



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.

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).

The correct answer is C

Question 1.10

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

- (a) The UNCITRAL Guide of Enactment and the Practice Guide.
- (b) The UNCITRAL Guide of Enactment and the Legislative Guide – Parts One, Two, Three and Four.
- (c) The UNCITRAL Guide of Enactment and the Judicial Perspective.
- (d) All of the above.

Marks awarded: 8 out of 10

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

Question 2.1 [maximum 3 marks] 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 construed that this “authorised or conducted under a law relating to insolvency” element means that insolvency is one of the grounds to commence the proceeding. Also, in the matter of *Sturgeon Central Asia Balanced Fund Ltd* [2020] EWHC 123 (Ch) at 5 held that “it would be contrary to the stated purpose and object of the MLCBI to interpret “foreign proceedings” to include solvent debtors and more particularly include actions that are subject to a law relating to insolvency which have the purpose of producing a return to members not creditors.”

Therefore, “foreign solvent winding-up proceeding of a debtor on just and equitable grounds” is unlikely to meet the element, “authorised or conducted under a law relating to insolvency”.

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”*

Statement 1 addresses “public policy exception” (Article 6 of the MLCBI), which allows the court to refuse to take an action governed by the MLCBI if the action would be manifestly contrary to the public policy of the enacting State.

Statement 2 addresses the concept of “COMI (center of main interests)”. The concept of COMI is essential to the MLCBI as the requirements of a foreign main proceeding include the fact that the debtor has the COMI in the enacting State in Article 17.2(a). However, there is no definition of COMI in the MLCBI although it provides a rebuttable presumption to be the COMI in Article 16.3.

Statement 3 addresses “presumption of insolvency based on recognition of a foreign main proceeding” (Article 31 of the MLCBI), under which, for the purpose of commencing a domestic insolvency proceeding in the enacting State, the recognition of a foreign main proceeding is proof that the debtor is insolvent in the absence of evidence to the contrary.

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 determination of COMI under the European Insolvency Regulation is relevant to the jurisdiction where main proceedings should be opened. On the other hand, the determination of COMI under the MLCBI is relevant to the effects of recognition, particularly, the relief available to assist the foreign proceeding.

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.

If two concurrent foreign non-main proceedings are concurrently recognized, the court in the enacting State must grant, modify or terminate relief for the purpose of facilitating coordination of the proceedings under Article 30(c) of the MLCBI. The relevant foreign representative must cooperate to the maximum extent possible with foreign courts or foreign representatives as set out in Article 26.1 of the MLCBI.

You should also mention the duty to inform in art. 18

Marks awarded: 9 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?

Article 9 of the MLCBI provides a foreign representative with a right to direct access to the court in the enacting State, which means that the foreign representative's access to the court does not require any formal requirements such as licenses or consular action nor recognition of the foreign proceeding in the enacting State. This provision enables the foreign representative to save time and cost.

Article 25(1) and 26(1) of the MLCBI provides that the court and the insolvency office-holder must cooperate to the maximum extent possible with foreign representatives even before the foreign representative makes a recognition application in the enacting State. These provisions facilitate more efficient communications between courts and insolvency representatives from two or more countries as well as help the proceedings to be more cost-efficient and less time-consuming.

You should also mention art. 11 regarding the access to open domestic proceedings.

Question 3.2 [maximum 6 marks] 1,5

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 defined in the MLCBI Article 2(a), the elements of a "foreign proceeding" are as follows:

- (a) a proceeding (including an interim one);
- (b) that is either judicial or administrative;
- (c) that is collective in nature;
- (d) that is in a foreign State;
- (e) that is based on a law relating to insolvency;
- (f) in which the assets and affairs of the debtor are subject to control or supervision by a foreign court; and
- (g) which proceeding is for the purpose of reorganization or liquidation.

As defined in the MLCBI Article 2(d), the elements of a "foreign representative" are as follows:

- (a) a person or body (including one appointed on an interim basis);

- (b) authorised in a foreign proceeding;
- (c) to administer the reorganization or the liquidation of the debtor's assets or affairs or to act as a representative of the foreign proceeding.

According to Article 16.1 of the MLCBI, if the decision or certificate referred to in Article 15.2 (by which an application for recognition shall be accompanied) indicates that the foreign proceeding is a proceeding within the meaning of Article 2(a) of the MLCBI and that the foreign representative is a person or body within the meaning of Article 2(d), the court is entitled to so presume.

For full marks on this question, the following points should also be addressed:

1. Exclusions: If the debtor is an entity that is subject to a special insolvency regime in State B, the foreign representative should first of all check if the foreign proceedings regarding that type of a debtor are excluded in State A based on Article 1(2) of the implemented Model Law in State A.
2. Restrictions;- Existing international obligations of State A: Based on Article 3 of the Model Law, the court in State A should also check if there are no existing international obligations of State A (under a treaty or otherwise) that may conflict with granting the recognition application under the implemented Model Law in State A.
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.
5. Public policy exception: Finally, the court in State A should also ensure based on Article 6 of the Model Law that the recognition application is not manifestly contrary to public policy of 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.

(1) Pre-recognition Relief

According to Article 19 of the MLCBI, the court may grant temporary relief (a) after the filing of a recognition application until the application is decided upon, (b) at the request of the foreign representative, and (c) where relief is urgently needed to protect the assets of the debtor or the interests of the creditors. If the interim relief would hinder the administration of a foreign main proceedings, the court may refuse to grant such relief (Article 19.4 of the MLCBI).

(2) Post-recognition Relief

Article 20.1 of the MLCBI provides the following automatic reliefs upon recognition of a foreign main proceeding:

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

There are some limitations on this automatic relief as follows:

- (a) Article 20.2 allows any provisions of law of enacting State that give exceptions, limitations, modifications or termination of such automatic relief.
- (b) The automatic relief of Article 20.1(a) of the MLCBI does not affect (i) the right to commence individual actions or proceedings to the extent necessary to preserve a claim against the debtor, (ii) the right to request the commencement of a domestic insolvency proceeding of the enacting State or (iii) the right to file claims in such a proceeding.

In addition, according to Article 21.1 of the MLCBI, the court may grant any appropriate relief (a) upon recognition of a foreign proceeding, (b) at the request of the foreign representative, and (c) where necessary to protect the assets of the debtor or the interests of the creditors. The examples of such reliefs are stipulated in (a) - (g) of the Article 21.1.

Article 21.2 of the MLCBI sets forth that the court may entrust the distribution of the debtors assets located in the enacting State to the foreign representative, provided that the court is satisfied that the interests of creditors in the enacting State are adequately protected. Pursuant to Article 21.3, granting appropriate relief to a representative of a foreign non-main proceeding, the court must be satisfied that the relief relates to assets that, under the law of the enacting State, should be administered in the foreign non-main proceeding or concerns information required in that proceeding.

For full remarks, the following should also be addressed:

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.

Marks awarded: 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

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.

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] 1

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?

According to Article 2(b), a foreign main proceeding means a foreign proceeding taking place in the State where the debtor has the centre of its main interests. According to Article 16.3 of the MLCBI, the debtor’s registered office is presumed to be the COMI of the debtor.

In the case at issue, as GSC is incorporated in Cayman Islands, in other words, GSC’s registered office is in Cayman Islands, it is presumed that the COMI existed in the Cayman Islands at the time of the commencement of the Cayman liquidation proceedings of GSC. Therefore, as the US judge, I would decide that the local insolvency proceedings in the Cayman Islands constitute the foreign main proceeding of GSC unless any party proves that GSC’s COMI exists in another jurisdiction.

To receive full marks on this question, the following should be addressed:

1. Main v Non-Main Foreign Proceedings: Article 17(2) of the MLCBI requires the court to determine whether the foreign proceedings are recognised as either main or non-main. If the COMI of the debtor is in the jurisdiction where the foreign proceedings were opened, the foreign proceedings should be recognised as main (article 17(2)(a) of the MLCBI). If the debtor only has an establishment (as defined in article 2(f) of the MLCBI) in the jurisdiction where the foreign proceedings were opened, the foreign proceedings should be recognised as non-main.
2. 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.

3. Establishment: The same fact based holistic approach must be used for the determination of the existence of an establishment. Based on the facts can it be said that the Cayman Islands was a place of operation where the debtor carried out a non-transitory economic activity?
4. 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

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.

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.

5. 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?
6. Conclusion: The fact that the GSC liquidators have worked on the liquidation for one year primarily out of Cayman Islands should in any case be sufficient for the US court to determine that at the very least there is an establishment of GSC in the Cayman Island. Therefore, the US court should have no hesitation to recognise the Cayman Island liquidation proceedings of GSC as foreign non-main proceedings and possibly even as foreign main proceedings.

Additional facts for question 4.2:

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

Question 4.2 [maximum 3 marks] 3

The GSC liquidators manage to 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?

If a proceeding takes place in a State where the debtor has an “establishment”, the proceeding can be recognized as a foreign non-main proceeding (unless it is recognized as a foreign main proceeding) (Article 2(c) of the MLCBI). “Establishment” means any place of operations where the debtor carries out a non-transitory economic activity with human means and goods or services as defined in Article 2(f) of the MLCBI.

⁴ Brazil and Nigeria have not implemented the Model Law.

In the case at hand, it appears that the only asset GSC has in Nigeria is a bank account with a local bank in Nigeria. Also, even though GSC has a so-called representative office in Nigeria, it only has a letter box (mailing address) and does not have physical office. GSC conducts its business in other countries and the bank loans and notes of GSC are not related to Nigeria in any way.

Considering the facts mentioned above, it is difficult to find that there is any GSC's non-transitory economic activity in Nigeria, and thus, I would decide that the local Nigerian insolvency proceedings are not recognized as foreign non-main proceedings.

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]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?

In order to avoid that the assets of GSC in the UK are enforced by the Swiss PPN holders, the Cayman Islands liquidators should consider applying to the English court for a recognition of (i) the Cayman Islands liquidation proceeding and/or (ii) the US Chapter 11 proceedings of GSC to extend the effect of the moratorium of the proceedings (i) and (ii) to the jurisdiction of the UK. Also, it is possible that the liquidators file a petition for a scheme of arrangement or other proceedings to secure moratorium in the UK.

Regarding the second question, according to IBA case appeal, there are two requirements below for an English court to grant indefinite Moratorium Continuation, which prevents the English creditors from enforcing their English law claims despite of the existence of the Gibbs Rule:

- (a) the stay has to be necessary to protect the other creditors' rights; and
- (b) the stay have to be an appropriate way of achieving such protection.

For full remarks, the following should also be addressed:

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.

1. 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.
2. 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.
3. 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.
4. 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.

Marks awarded: 7 out of 15

*** End of Assessment ***

Total marks awarded: 31 out of 50