Caroline Bradley **SPRING SEMESTER 2009**

INTERNATIONAL FINANCE

THREE HOURS.

This is a closed-book exam.

ANSWER <u>2</u> OF THE FOLLOWING 6 QUESTIONS

Each question will count for 50% of the exam grade.

Note that there is some potential for overlap in answers to these questions. Avoid substantial overlap in your answers, because, as a general rule, you will only get credit once for each piece of information you give me. For example, note that if you write "see above", or "see answer to question x" in your second answer, your grade for the second answer will suffer.

DO read the questions carefully and think about your answers before beginning to write.

DO refer to cases and other materials where appropriate. If you make general statements, try to back them up with specific references.

DO NOT use abbreviations unless you explain what you are using them to stand for.

DO NOT make assumptions in answering a hypothetical.

DO explain what further information you might need in order to answer the question properly.

DO write legibly and clearly.

You will get credit for following these instructions, and <u>may be penalized</u> for failing to do so.

1. Discuss the following statement:

Regulation is first and foremost the responsibility of national regulators who constitute the first line of defense against market instability. However, our financial markets are global in scope, therefore, intensified international cooperation among regulators and strengthening of international standards, where necessary, and their consistent implementation is necessary to protect against adverse cross-border, regional and global developments affecting international financial stability. G 20, Declaration of the Summit on Financial Markets and the World Economy (Nov. 2008).

2. Write a critique of **two** of the following five cases:

(a) Morrison v. National Australia Bank Ltd. (2nd. Cir. 2008);
(b) Capital Ventures Int'l v. Republic of Argentina (2nd Cir. 2009);
(c) Libyan Arab Foreign Bank v Bankers Trust (English High Court, 1989);
(d) Enron v. Springfield Associates (SDNY 2007)
(e) Barbados Trust Co Ltd v Bank of Zambia (English Court of Appeal 2007).

3. “Loan market participants should adopt policies regarding disclosure of material information about borrowers that may not be available to counter parties, including information available only to particular lending syndicates. In no event should a loan market participant make intentional misstatements with respect to information in connection with any of its transactions in the loan market, or intentionally make only partial disclosures with respect to such information in such connection without disclosing in writing to its counter party the scope of such disclosure and the fact that it is not or may not be complete. Loan market participants should maintain customer, counter party and transaction confidentiality, absent express agreement to the contrary. Absent such an agreement or a legal or regulatory requirement, a loan market participant should not (except with immediately involved parties on a need to know basis) discuss or reveal, or pressure others to discuss or reveal, aspects of transactions, or the identities of counter parties or customers, when such loan market participant in the exercise of good judgment reasonably believes such information should be kept confidential.” (Loan Syndications and Trading Association Code of Conduct, Oct. 2008)

Discuss.

4. A draft loan agreement contains the following clauses (the numbering is included for your convenience, and does not suggest anything about the other contents of the draft agreement):

> i. During the term of this loan the Borrower will not create or permit to be created and continue any security over any of its assets for any purpose;
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> ii. If any Lender shall obtain any payment on account of the Advances made by it in excess of its ratable share of payments on account of the Advances obtained by all the Lenders, such Lender shall forthwith purchase from the other Lenders such participations in the Advances made by them as shall be necessary to cause such purchasing Lender to share the excess payment ratably with each of them.
>
> iii. If the Borrower fails to pay any amount payable in respect of any Eurodollar Rate Advance by it on its due date, interest shall accrue on the overdue amount from the due date up to the date of actual payment at a rate which is 2% higher than the rate which would have been paid had the overdue amount constituted a Eurodollar Rate Advance during the period of non-payment;
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> iv. If after the date hereof, due to either (i) the introduction of or any change in or in the interpretation of any law or regulation or (ii) the compliance with any hereafter promulgated guideline or request from any central bank or other governmental authority (whether or not having the force of law), there shall be any increase in the cost to any Lender of agreeing to make or making, funding or maintaining Eurodollar Rate Advances, then such Lender shall so notify the Borrower promptly and the Borrower shall from time to time, upon demand by such Lender, pay to the Agent for the account of such Lender additional amounts sufficient to compensate such Lender for such increased cost. A certificate of such Lender as to the amount of such increased cost shall be conclusive;
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> v. The Agent bank's duties under this agreement are solely mechanical and administrative in nature.
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> vi. Obligations of the Borrower under this loan rank, and will rank, pari passu in right of payment with all other present and future unsecured and unsubordinated Indebtedness of the Borrower;

Critically assess these clauses, describing the purpose of each clause and how it

fits into the structure of a syndicated loan agreement, and explaining what changes to these clauses you would recommend (if any). Would it make a difference whether you were representing the Borrower, the Agent Bank, or a Lender?

5. As a result of the recent financial crisis, Ruritania, a country in Asia, has announced that it is unable to continue to make payments on its external debt, which includes outstanding loans and a number of series of bonds. For example, there is one issue of bonds from 2004 and another issue of bonds from 2005. The terms applicable to the 2004 and 2005 bonds are different. Whereas the 2005 bonds contain collective action clauses, the 2004 bonds do not. The bond issues are governed by New York law and have jurisdiction clauses which permit litigation in courts in New York. Ruritania has substantial deposits with banks in New York.

The 2005 bonds contain the following provision relating to amendments:

> No amendment or waiver of any provision of the Bonds or the Fiscal Agency Agreement, nor consent to any departure by the Issuer therefrom, shall in any event be effective unless in writing and consented to (including by electronic mail) by Bondholders holding at least 75% in principal amount of the Bonds then outstanding, and then such waiver or consent shall be effective only in the specific instance and for the specific purpose for which given; provided that no amendment, waiver or consent shall, unless in writing and consented to by Bondholders holding at least 95% in principal amount of the Bonds then outstanding, do any of the following: (a) subject the Bondholders to any additional obligations, (b) reduce the principal of, or interest on any of the Bonds, (c) change the currency of payment of the principal or interest on any Bond; (d) change any date fixed for any payment in respect of principal of, or interest on, any of the Bonds, or (e) waive, modify or otherwise affect pari passu protection, the negative pledge covenant, cross-default and cross-acceleration restrictions on incurrence of additional indebtedness, waiver of immunities, choice of law, consent to jurisdiction and service of process; provided further that no amendment, waiver or consent shall, unless in writing and consented to by all of the Bondholders, change this Section; provided further that no amendment, waiver or consent shall, unless in writing and consented to by the Fiscal Agent in addition to the Bondholders required herein above to take such action, affect the rights or duties of the Fiscal Agent under the Fiscal Agency Agreement.

A large number of the financial institutions which own the 2005 bonds also own 2004 bonds and are concerned that because of the absence of collective action clauses in the 2004 bonds there is a risk that holdout creditors will interfere with an effective restructuring of the 2004 bonds. They are particularly concerned that Ruritania's New York deposits will be attractive to vulture fund investors.

Hawkeye Funds LLC bought some of the 2004 bonds when there was already some concern in the markets about whether Ruritania would be able to keep up payments on its debt. Hawkeye also has a small investment in the 2005 bonds. Hawkeye is aggressive about tracking down assets of issuers of bonds it buys and suing to recover payments. Hawkeye employs a large number of lawyers, and its President makes no secret of the fact that he loves to win law suits.

Discuss the issues raised by the facts described. In your answer, consider whether it is realistic to think that collective action clauses can achieve a fair distribution of assets between different creditors of a sovereign.

6. Discuss whether courts should give effect to the contractual terms which sophisticated parties negotiate with respect to financial transactions, even if these terms displace general rules of law which would otherwise apply. In your answer, consider whether courts should be more or less willing to do so where the contracts have transnational aspects.