



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 ID.assessment2A]**. An example would be something along the following lines: 202122-336.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 “studentID” 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.**
5. Before you will be allowed to upload / submit your assessment via the portal on the Foundation Certificate web pages, you will be required to confirm / certify that you are the person who completed the assessment and that the work submitted is your own, original work. Please see the part of the Course Handbook that deals with plagiarism and dishonesty in the submission of assessments. **Please note that copying and pasting from the Guidance Text into your answer is prohibited and constitutes plagiarism. You must write the answers to the questions in your own words.**
- 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 2022**. The assessment submission portal will close at 23:00 (11 pm) GMT on 1 March 2022. 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 2022** or by **23:00 (11 pm) BST (GMT +1) on 31 July 2022**. If you elect to submit by 1 March 2022, you **may not** submit the assessment again by 31 July 2022 (for example, in order to achieve a higher mark).
7. Prior to being populated with your answers, this assessment consists of **12 pages**.

ANSWER ALL THE QUESTIONS

Total marks received 36,5/50

Please note that all references to the “MLCBI” or “Model Law” in this assessment are references to the Model Law on Cross-Border Insolvency.

QUESTION 1 (multiple-choice questions) [10 marks in total] 5/10 marks

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).

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.

The correct answer is D

QUESTION 2 (direct questions) [10 marks in total] 8/10 marks

Question 2.1 [maximum 3 marks]

Under the MLCBI, explain what the appropriate date is for determining the COMI of a debtor, or whether an establishment exists.

The appropriate date to determine the COMI, or whether there is an establishment, is the date of commencement of the foreign proceeding.

Determining the debtor's COMI or whether an establishment exists is of great importance for the application of the Model Law. This is because if the foreign proceeding was commenced in a state where the debtor has its COMI, the foreign proceedings will be recognized as foreign main proceedings by the enacting state.

In turn, if the debtor only has an establishment in the foreign state where the foreign proceeding was initiated, the foreign proceeding will be recognized as a foreign non-main proceeding. In turn, this classification will determine the relief to be granted by the Enacting State Court:

- The main proceedings will have an automatic mandatory relief-
- The non-main proceedings will have only discretionary post-recognition relief.

For full marks on this question it should be noted that the MLCBI does not explicitly indicate the relevant time and that there are some jurisdictions who take a slightly different approach, hence the US.

Question 2.2 [maximum 3 marks]

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 guidance in case of concurrence of two foreign non-main proceedings.”*

Statement 2 *“The rule in this Article does not affect secured claims.”*

Statement 3 *“This Article contains a rebuttable presumption in respect of an undefined key concept in the MLCBI.”*

Statement	Concept	Article
Statement 1 <i>“This Article provides guidance in case of concurrence of two foreign non-main proceedings.”</i>	In the case of more than one foreign non-main proceeding, no foreign proceeding is a priori treated preferentially.	Article 30(c)
Statement 2 <i>“The rule in this Article does not affect secured claims.”</i>	Article 32 provides that: <i>“Without prejudice to secured claims or rights in rem, a creditor who has received part payment in respect of its claim in a proceeding pursuant to a law relating to insolvency in a foreign State, may not receive a payment for the same claim in a [domestic proceeding in the enacting State] regarding the same debtor, so long as the payment to the other creditors of the same class is proportionally less than the payment the creditor has already received.”</i> This article establishes the "hotchpot" rule, which is intended to avoid situations where a creditor may obtain more favourable treatment than other creditors of the same class by obtaining payment of the same	Article 32

	claim in insolvency proceedings in different jurisdictions.	
Statement 3	<p><i>“This Article contains a rebuttable presumption in respect of an undefined key concept in the MLCBI.”</i></p> <p>Unless proven otherwise, the debtor's registered office, or habitual residence in the case of an individual, shall be presumed to be the center of the debtor's main interests.</p> <p>In this regard, it is important to remember that COMI is not a defined term in the Model Law.</p>	Article 16 “Recognition presumptions”

Question 2.3 [2 marks]

In the *IBA* case appeal, the English Court of Appeal upheld the decision that the court should not exercise its power to grant the indefinite Moratorium Continuation. **Please explain.**

On appeal in the *IBA* case, the English Court of Appeal confirmed the decision that the court should not exercise its power to grant indefinite continuation of the moratorium in view of the fact that in its criteria with such decision i) the Challenging Creditors would not be able to enforce their English law rights under the Gibbs Rule; and ii) the stay would be extended after the Azeri reconstruction has come to an end.

In relation to the first point, the Court of Appeal held that for this case it was not possible to grant indefinite continuation considering that i) the stay was not necessary to protect the rights of *IBA's* creditors and ii) the stay was not the way to achieve the protection of *IBA's* interests. This was because *IBA's* creditors did not need further protection in order for the foreign proceeding to achieve its objective.

With respect to the second point, the Court of Appeal considered that once the foreign proceeding has come to an end and the foreign representative will no longer occupy such position, it was not possible for new orders to be issued in support of the foreign proceeding. Therefore, any relief previously granted under the Model Law must be terminated along with the termination of the foreign proceeding.

Finally, it should be noted that in this decision the English Court of Appeal considered that the court had no jurisdiction to hear and decide on jurisdiction. Therefore, it focused mainly on determining whether the English court lacked jurisdiction to grant the indefinite continuation of the moratorium requested by the foreign representative, in the terms explained above.

Question 2.4 [2 marks]

In terms of relief, what should the court in an enacting State, where a domestic proceeding has already been opened in respect of the debtor, do after recognition of a foreign main proceeding? In your answer you should **mention the most relevant article of the MLCBI**. What (ongoing) duty of information does the foreign representative in the foreign main proceeding have towards the court in the enacting State? Here too you are required to **mention the most relevant article of the MLCBI**.

The court of an enacting State must follow the following process, when it already opens a domestic proceeding with respect to the debtor, following the recognition of a foreign main proceeding.

1. Any measure granted under Article 19 or Article 21 shall be reviewed by the court and shall be modified or revoked if it is incompatible with the domestic insolvency proceedings. In the case of a foreign main proceeding, the same applies to any automatic relief granted.
2. For a foreign non-main proceeding, the court must be satisfied that (Article 29(c)):
 - The relief relates to assets that, under the law of the enacting State, should be administered in the foreign non-main proceeding; or
 - The relief concerns information required in the foreign non-main proceeding.

It should be noted in this context that the opening of a domestic insolvency proceeding does not prevent or terminate the recognition of a foreign proceeding.

In turn, from the time of filing the application for recognition of the foreign proceeding, the foreign representative shall inform the court promptly of (Article 18):

1. Any substantial change in the status of the recognized foreign proceeding or the status of the foreign representative's appointment; and
2. Any other foreign proceeding regarding the same debtor that becomes known to the foreign representative.

To ensure that the court is fully informed of material changes affecting the foreign proceeding, article 18 imposes an obligation on the foreign representative to report such changes, including the status of the proceedings or the appointment of the foreign representative, and any other proceedings concerning the debtor of which the foreign representative may become aware.

QUESTION 3 (essay-type questions) [15 marks in total] 10/15

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] 3/4 marks

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

Taking into account that State A has adopted the Model Law in its national legislation, State A may provide the foreign representative with access and coordination rights with respect to the foreign proceeding, as explained below:

The Model Law has tools to ensure cross-border cooperation and communication between the courts of the state in which the foreign proceeding was initiated and the courts of the enacting state.

By virtue of the above, foreign courts or foreign representatives will be able to communicate directly with the courts of the enacting state, and in a much faster and more efficient manner.

This implies that it will not be necessary to resort to the procedures that have traditionally been established for courts of different states to communicate (as letters rogatory or requests for consular assistance).

In connection with the above, it is worth noting the relevant clause on cooperation that were incorporate in the Model Law:

- Article 25 provides that courts should cooperate to the fullest extent with foreign courts or foreign representatives. Under this article, cooperation may also be available with respect to proceedings that are neither principal nor non-principal on the basis of the presence of assets.
- This article provides that the office-holder must cooperate with foreign courts and foreign representatives, and allow direct communication with them.
- Article 27 establishes an indicative list of authorized cooperation measures.

However, it is important to note that the Model Law does not specify how such cooperation and communication should necessarily be advanced, but leaves it to each jurisdiction to determine this through the application of its own domestic laws and practices. To this end, the Model Law provides a non-exhaustive list of appropriate means of cooperation as guidance for state (article 27). Therefore, in order to know exactly how such cooperation operates in State A, it will be necessary to study its domestic rules.

The right of access gives foreign representatives standing before the courts of the enacting state, without the need for the foreign representative to initiate separate insolvency proceedings in the enacting state.

Finally, it should be noted that cooperation does not depend on the recognition of the foreign proceeding by the enacting country and may thus occur at an early stage and before an application for recognition. However, such recognition will enable it to offer the foreign representative adequate and more personalized assistance, depending on the needs of the process.

For full marks it should also be addressed that the MLCBI directly in art. 11 grant access for the foreign representative to apply for the opening of insolvency proceedings.

Question 3.2 [maximum 5 marks] 3/5 marks

For a recognition application in State A to be successful, the foreign proceeding opened in State B must qualify as a “foreign proceeding” within the meaning of article 2(a) of the MLCBI and the “foreign representative” must qualify as a foreign representative within the meaning of article 2(d) of the MLCBI. Assuming both qualify as such, list and briefly explain (with reference to the 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.

Based on the assumption that the proceeding initiated in State B qualifies as a foreign proceeding and that the foreign representative qualifies as a foreign representative, under the Model Law, the following are further considerations, restrictions and exclusions to be taken into account during the consideration of a request for recognition:

1. Exclusions (Article 1(2) of the Model Law): The Model Law allows the enacting State to exclude certain procedures from the application of the Model Law. Among the exclusions that may be adopted by the enacting country are banks and insurance companies. This is because, according to the Model Law, a special regulatory regime

may be required for these subjects. Likewise, public utilities or consumers/non-traders may be excluded.

As an example of the above, it is worth bearing in mind that in the United Kingdom the Cross Border Insolvency Regulation, which adopted the Model Law, excludes certain water and sewerage companies or qualified licensed water suppliers, companies licensed to provide air traffic services, public-private partnership companies, protected energy companies, building societies, English credit institutions, among others.

Therefore, it should be considered whether the foreign process whose recognition is being sought falls under any of these exclusions.

2. Evidentiary requirements (Article 15 of the Model Law): Recognition of a foreign proceeding will require compliance with the evidentiary requirements set forth in article 15 of the Model Law. If these requirements are met, recognition will be granted in accordance with Article 17 of the Model Law.

These requirements include: i) the foreign representative may apply to the court for recognition of the foreign proceeding in which the foreign representative has been appointed; ii) the application for recognition must be accompanied by certain documents and information; iii) the application for recognition must also be accompanied by a statement identifying all foreign proceedings relating to the debtor of which the foreign representative has knowledge. The court may also require the translation of the documents submitted in support of the application for recognition into an official language of the enacting State.

3. Presumptions (Article 16 of the Model Law): For the recognition of a foreign proceeding, the enacting State may rely on the presumptions set forth in the Model Law. Such presumptions include, for example, that the debtor's registered office, or habitual residence in the case of an individual, is presumed to be the debtor's center of main interests.
4. Foreign proceedings that are not commenced in the jurisdiction of the debtor's center of interests and that do not have at least one establishment in the enacting State cannot be recognized as foreign proceedings for the purposes of the Model Law.
5. Finally, it is important to note that the court of the enacting State should not consider whether the foreign proceeding for which recognition is sought was properly commenced under the applicable law of the foreign State (Article 15 of the Model Law).

For full marks the following should also be included in the answer:

1. 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.
2. 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] 3/5 marks

As far as relief is concerned, briefly explain (with reference to the 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 question, it can be assumed that there is no concurrence of proceedings.

The following explains the pre- and post-recognition relief that may be granted under the Model Law, as well as any restrictions, limitations or conditions to be considered:

1. Pre-recognition (Article 19 of the Model Law):
 - a. Even before a decision on the application for recognition, the court of the enacting State is authorized to grant urgent interim relief. This is the case if such reliefs protect the assets of the debtor or the interests of the creditors.
 - b. For this purpose, it is necessary for the foreign representative to apply to the court for such urgent reliefs. The foreign representative may request them regardless of whether the proceeding is a main or non-main proceeding.
 - c. These reliefs shall apply from the moment the application for recognition is filed until the decision as to whether or not recognition is granted.
 - d. This type of reliefs includes: i) a stay of execution against the debtor's assets; ii) any of the following post-recognition relief provided for in Article 21 of the Model Law, iii) among others.
2. Post-recognition (Article 21 of the Model Law):
 - a. After recognition of a foreign main or non-main proceeding, the court of the enacting State may grant different reliefs that are in the interest of the debtor's estate or the interest of the creditors. Such reliefs include, but are not limited to, the following: i) Stay the commencement or continuation of individual actions or individual proceedings that may affect the debtor's assets, rights or liabilities; ii) Stay enforcement against the debtor's assets.
 - b. The court of the enacting State may grant these reliefs under its discretionary power and taking into account whether these reliefs are necessary to protect the debtor's assets or the interest of creditors.
 - c. It is necessary for the foreign representative to request to the enacting state for these reliefs.
 - d. In one proceeding such relief must not interfere with the administration of another insolvency proceeding, in particular the main proceeding.
3. Other reliefs: Article 20 of the Model Law provides for an automatic mandatory exemption in case the recognized foreign proceeding qualifies as a foreign main proceeding.
4. Limitations on relief (Article 21(1)): Article 21 states that the relief that may be granted by the court of the enacting country is limited. As a reference to the above, three cases are presented in which the limits to the power to grant relief are discussed.
 - a. Case No. 1: The English Supreme Court concludes that the enforcement of an insolvency-related default judgment is not covered by the Model Law.
 - b. Case No. 2: In this case it was requested to prevent the counterparty of the company on which the foreign insolvency proceedings were initiated from

exercising the ipso facto clause, which according to the Korean insolvency law (where the foreign insolvency proceedings were initiated) is considered null and void. In this regard, the English court considered that the notice of termination of the agreement does not constitute the commencement or continuation of an individual action or proceeding. Therefore, the court has no power under Article 21(1)(a) of the Model Law to prevent the Brazilian party from giving notice of termination.

- c. Case No. 3: The Gibbs rule stands for the general proposition that a debt governed by English law cannot be discharged by foreign insolvency proceedings. A discharge of a debt under the insolvency law of a foreign country is only considered a discharge in England if it is a discharge under the law applicable to the contract. However, the Gibbs rule does not apply if the creditor in question is subject to foreign insolvency proceedings.

This rule has given the English courts food for thought as to whether the Gibbs Rule is compatible with "the principles of (modified) universalism", which are part of English (common) English law.

Likewise, the case explained in point 2.3 of this assessment was used as an example.

5. Other limitations: Article 22 states that the court of the enacting country must consider that the relief is balanced with the interests of persons who may be affected by such relief.

For full marks – again reference to the existing international obligation of State A (art. 3) should be made as well as to the public policy exception (art. 6)

Question 3.4 [maximum 1 mark] 1 mark

Briefly explain why a worldwide freezing order granted as pre-recognition interim relief ex article 19 MLCBI, is unlikely to continue post-recognition ex article 21 MLCBI?

That a worldwide freezing order granted as a precautionary measure prior to recognition under article 19 of the Model Law cannot continue after recognition of the foreign proceeding, for the following reasons:

- According to Article 19 of the Model Law urgent interim measures shall be applicable from the date on which recognition was requested until the application for recognition is decided. To this extent, once the recognition of the foreign proceeding is decided, the measures ordered under article 19 of the Model Law will no longer be in force.

- According to Article 21, the relief that may be granted by the court of the enacting country is not unlimited. Thus, a limit that such court may find in ordering a worldwide freezing measure is whether such measure is necessary to protect the interests of both creditors and other parties that may be affected by the measure.

QUESTION 4 (fact-based application-type question) [15 marks in total] 13,5

Read the following facts very carefully before answering the questions that follow.

(1) Background

The Commercial Bank for Business Corporation (the Bank) has operated since 1991. The Bank's registered office is situated in Country A, which **has not** adopted the MLCBI. As of 13 August 2015, the Bank's majority ultimate beneficial owner was Mr Z, who held approximately 95% of the Bank's shares through various corporate entities (including some registered in England).

The Bank entered provisional administration on 17 September 2015 and liquidation on 17 December 2015. Investigations into the Bank have revealed that it appears to have been potentially involved in a multi-million dollar fraud resulting in monies being sent to many overseas companies, including entities incorporated and registered in England.

Proceedings were issued in the High Court of England and Wales (Chancery Division) against various defendants on 11 February 2021 (the English Proceedings).

An affidavit (the Affidavit) sets out a detailed summary of the legislation of Country A's specific insolvency procedure for Banks. The procedure involves initial input from the National Bank (the NB) and at the time that the Bank entered liquidation, followed a number of stages:

Classification of the bank as troubled

The NB may classify a bank as "troubled" if it meets at least one of the criteria set down by article 75 of the Law of Country A on Banks and Banking Activity (LBBA) or for any of the reasons specified in its regulations.

Once declared "troubled", the relevant bank has 180 days within which to bring its activities in line with the NB's requirements. At the end of that period, the NB must either recognise the Bank as compliant, or must classify it as insolvent.

Classification of the bank as insolvent

The NB is obliged to classify a bank as insolvent if it meets the criteria set out in article 76 of the LBBA, which includes:

- (i) the bank's regulatory capital amount or standard capital ratios have reduced to one third of the minimum level specified by law;
- (ii) within five consecutive working days, the bank has failed to meet 2% or more of its obligations to depositors or creditors; and
- (iii) the bank, having been declared as troubled, then fails to comply with an order or decision of the NB and / or a request by the NB to remedy violations of the banking law.

The NB has the ability to classify a bank as insolvent without necessarily needing to first go through the troubled stage. Article 77 of the LBBA accordingly provides that a bank can be liquidated by the NB directly, revoking its licence.

Provisional administration

The Deposit Guarantee Fund (DGF) is a governmental body of Country A tasked principally with providing deposit insurance to bank depositors in Country A. However, the Affidavit explained that the DGF is also responsible for the process of withdrawing insolvent banks from

the market and winding down their operations via liquidation. Its powers include those related to early detection and intervention, and the power to act in a bank's interim or provisional administration and its ultimate liquidation.

Pursuant to article 34 of the DGF Law, once a bank has been classified as insolvent, the DGF will begin the process of removing it from the market. This is often achieved with an initial period of provisional administration. During this period:

- (i) the DGF (acting via an authorised officer) begins the process of directly administering the bank's affairs. Articles 35(5) and 36(1) of the DGF Law provide that during provisional administration, the DGF shall have full and exclusive rights to manage the bank and all powers of the bank's management.
- (ii) Article 36(5) establishes a moratorium which prevents, *inter alia*: the claims of depositors or creditors being satisfied; execution or enforcement against the bank's assets; encumbrances and restrictions being created over the bank's property; and interest being charged.

Liquidation

Liquidation follows provisional administration. The DGF is obliged to commence liquidation proceedings against a bank on or before the next working day after the NB's decision to revoke the bank's licence.

Article 77 of the LBBA provides that the DGF automatically becomes liquidator of a bank on the date it receives confirmation of the NB's decision to revoke the bank's licence. At that point, the DGF acquires the full powers of a liquidator under the law of Country A.

When the bank enters liquidation, all powers of the bank's management and control bodies are terminated (as are the provisional administrators' powers if the bank is first in provisional administration); all banking activities are terminated; all money liabilities due to the bank are deemed to become due; and, among other things, the DGF alienates the bank's property and funds. Public encumbrances and restrictions on disposal of bank property are terminated and offsetting of counter-claims is prohibited.

As liquidator, the DGF has extensive powers, including the power to investigate the bank's history and bring claims against parties believed to have caused its downfall. Those powers include:

- (i) the power to exercise management powers and take over management of the property (including the money) of the bank;
- (ii) the power to compile a register of creditor claims and to seek to satisfy those claims;
- (iii) the power to take steps to find, identify and recover property belonging to the bank;
- (iv) the power to dismiss employees and withdraw from/terminate contracts;
- (v) the power to dispose of the bank's assets; and
- (vi) the power to exercise "such other powers as are necessary to complete the liquidation of a bank".

The DGF also has powers of sale, distribution and the power to bring claims for compensation against persons for harm inflicted on the insolvent bank.

However, article 48(3) of the DGF Law empowers the DGF to delegate its powers to an “authorised officer” or “authorised person”. The “Fund’s authorised person” is defined by article 2(1)(17) of the DGF Law as: *“an employee of the Fund, who on behalf of the Fund and within the powers provided for by this Law and / or delegated by the Fund, performs actions to ensure the bank’s withdrawal from the market during provisional administration of the insolvent bank and/or bank liquidation”*.

Article 35(1) of the DGF Law specifies that an authorised person, must have: *“...high professional and moral qualities, impeccable business reputation, complete higher education in the field of economics, finance or law...and professional experience necessary.”* An authorised person may not be a creditor of the relevant bank, have a criminal record, have any obligations to the relevant bank, or have any conflict of interest with the bank. Once appointed, the authorised officer is accountable to the DGF for their actions and may exercise the powers delegated to them by the DGF in pursuance of the bank’s liquidation.

The DGF’s independence is addressed at articles 3(3) and 3(7) of the DGF Law which confirm that it is an economically independent institution with separate balance sheet and accounts from the NB and that neither public authorities nor the NB have any right to interfere in the exercise of its functions and powers.

Article 37 establishes that the DGF (or its authorised person, insofar as such powers are delegated) has extensive powers, including powers to exercise managerial and supervisory powers, to enter into contracts, to restrict or terminate the bank’s transactions, and to file property and non-property claims with a court.

(2) The Bank’s liquidation

The Bank was formally classified by the NB as “troubled” on 19 January 2015. The translated NB resolution records:

“The statistical reports-based analysis of the Bank’s compliance with the banking law requirements has found that the Bank has been engaged in risky operations.”

Those operations included:

- (i) a breach, for eight consecutive reporting periods, of the NB’s minimum capital requirements;
- (ii) 10 months of loss-making activities;
- (iii) a reduction in its holding of highly liquid assets;
- (iv) a critically low balance of funds held with the NB; and
- (v) 48% of the Bank’s liabilities being dependent on individuals and a significant increase in “adversely classified assets” which are understood to be loans, whose full repayment has become questionable.

Despite initially appearing to improve, by September 2015 the Bank’s financial position had deteriorated further with increased losses, a further reduction in regulatory capital and

numerous complaints to the NB. On 17 September 2015, the NB classified the Bank as insolvent pursuant to article 76 of the LBBA. On the same day, the DGF passed a resolution commencing the process of withdrawing the Bank from the market and appointing Ms C as interim administrator.

Three months later, on 17 December 2015, the NB formally revoked the Bank's banking licence and resolved that it be liquidated. The following day, the DGF initiated the liquidation procedure and appointed Ms C as the first of the DGF's authorised persons to whom powers of the liquidator were delegated. Ms C was replaced as authorised officer with effect from 17 August 2020 by Ms G.

Ms G's appointment was pursuant to a Decision of the Executive Board of the Directors of the DGF, No 1513 (Resolution 1513). Resolution 1513 notes that Ms G is a "leading bank liquidation professional". It delegates to her all liquidation powers in respect of the Bank set out in the DGF Law and in particular articles 37, 38, 47-52, 521 and 53 of the DGF Law, including the authority to sign all agreements related to the sale of the bank's assets in the manner prescribed by the DGF Law. Resolution 1513 expressly excludes from Ms G's authority the power to claim damages from a related party of the Bank, the power to make a claim against a non-banking financial institution that raised money as loans or deposits from individuals, and the power to arrange for the sale of the Bank's assets. Each of the excluded powers remains vested in the DGF as the Bank's formally appointed liquidator.

On 14 December 2020, the Bank's liquidation was extended to an indefinite date, described as arising when circumstances rendered the sale of the Bank's assets and satisfaction of creditor's claims, no longer possible.

On 7 September 2020, the DGF resolved to approve an amended list of creditors' claims totalling approximately USD 1.113 billion. The Affidavit states that the Bank's current, estimated deficiency exceeds USD 823 million.

QUESTION 4.1 [maximum 15 marks] 13,5 marks

Prior to any determination made in the English Proceedings, Ms G, in her capacity as authorised officer of the Deposit Guarantee Fund (or DGF) of Country A in respect of the liquidation of the Commercial Bank for Business Corporation (the Bank), together with the DGF (the Applicants), applied for recognition of the liquidation of the Bank before the English court based on the Cross-Border Insolvency Regulations 2006 (CBIR), the English adopted version of the MLCBI.

Assuming you are the judge in the English court considering this recognition application, you are required to discuss:

- 4.1.1 whether the Bank's liquidation comprises a "foreign proceeding" within the meaning of article 2(a) of the MLCBI [maximum 10 marks]; 8,5/10 marks and
- 4.1.2 whether the Applicants fall within the description of "foreign representatives" as defined by article 2(d) of the MLCBI [maximum 5 marks]. 5/5 marks received

While not all facts provided in the fact pattern for this question (Question 4) are immediately relevant for your answer, please do use, where appropriate, those relevant facts that directly support your answer.

For the purpose of this question, you may further assume that the Bank is **not excluded** from the scope of the MLCBI by article 1(2) of the MLCBI.

Foreign proceeding

In order to establish whether the foreign proceeding conducted in country A can be considered as a foreign proceeding under the Model Law, it is necessary to identify whether such proceeding complies with each of the following requirements established for such purpose in article 2 of the Model Law:

1. Judicial or administrative proceeding

According to the Digest of Case Law this requirement requires that the proceeding be either judicial or administrative. In turn, a proceeding is understood as a legal framework that limits actions of a company and regulates the final distribution of its assets.

In view of the above, country A's insolvency proceeding for banks meets this characteristic. This is because it is an administrative procedure that is carried out first by the National Bank and then by the Deposit Guarantee Fund.

The National Bank is in charge of classifying the bank subject to the process as a troubled bank and of granting it a term of 180 days to comply with certain requirements. After this period, the National Bank will decide whether the bank complies with such requirements or whether to declare it insolvent.

Once National Bank declares the bank insolvent, the Deposit Guarantee Fund is in charge of carrying out both the provisional administration and liquidation procedures.

On the other hand, the purpose of the provisional administration procedure is to regulate the withdrawal of the bank from the market. At the same time, the liquidation procedure allows the DFG to administer, among other things, the debtor's assets and funds.

Therefore, it is clear that this procedure is a legal framework that limits the bank's actions and regulates the distribution of its assets.

2. Collective proceeding

The collective insolvency proceeding must achieve a global solution for all parties in interest in an insolvency proceeding. Therefore, such proceedings cannot be intended to satisfy the recovery of a particular creditor or group of creditors who have initiated recovery proceedings in another State, or as a tool for gathering assets in a liquidation or conservation proceeding that does not also include a provision for meeting creditors' claims.

To determine whether that characteristic is met, it must be analyzed whether the entirety of the debtor's assets and liabilities are addressed in the proceeding (subject to local priorities and statutory exceptions, as well as local exclusions relating to the rights of secured creditors).

According to the Digest of Case Law, courts have noted that the above point can be met if the following requirements are present:

(a) Imposition of an orderly regime affecting the rights and obligations of all creditors and all assets of the debtor. The rights and obligations of all creditors, not only those of the applicant creditor, must be taken into account.

- On the facts of the case, it is stated that the DFG has the power to dispose of the bank's assets and funds; and "power to draw up a register of creditors' claims and to seek to satisfy them". No restrictions or limitations of any kind are established with respect to these powers. Thus, it may be concluded that the insolvency process of Country A affects all creditors and assets of the debtor.

b) It is not necessary that all creditors receive a share of the distribution.

- According to the facts of the case, on December 14, 2020 the liquidation of the Bank was extended to an indefinite date taking into account that it was not possible to achieve the satisfaction of the creditors' claims. However, it is not necessary for all creditors to receive part of the distribution for the process to be considered a collective process.

c) The interested parties must not be able to individually improve their position by taking advantage of some fortuitous circumstance that may result in an unfair advantage.

- The facts of the case do not present any circumstance that would allow the conclusion that the interested parties will be able to improve their position by an unjustified advantage.

(d) Creditor participation must be a reality; this requirement could be satisfied where, despite the fact that the applicable law does not provide for creditor participation, it can be demonstrated that, in practice, unsecured creditors have a voice and can oppose any plan that is submitted to the administrative authority for confirmation or sanction.

- From the facts of the case, there is no assumption that the bank's creditors, secured or unsecured, can participate in the liquidation process, or that they can oppose any plan to achieve such liquidation.

(e) Creditors should also have the opportunity to seek appellate review of the proceedings;

- From the facts of the case, there is no assumption to conclude that the bank's creditors could seek any type of appellate review.

(f) Creditors, including general unsecured creditors, should be given adequate notice under applicable foreign law.

- From the facts of the case, there is no assumption that Country A's insolvency process provides for creditor notification mechanisms.

Taking into account that three of the six points mentioned above are not met, it can be concluded that this requirement is not fulfilled.

3. It is in a foreign State

According to the facts of the case, a provisional administration and liquidation process was initiated in Country A, which is a foreign State with respect to England (the State in which the recognition of the foreign process was requested).

Therefore, this requirement is fulfilled.

4. Law relating to insolvency

While the Model Law does not describe what is meant by "insolvency law", it has been noted that this requirement is satisfied if the law addresses or deals with the insolvency or serious financial difficulties of a debtor. Thus, this requirement is met if insolvency is one of the grounds on which the proceeding could be initiated, even if insolvency cannot actually be demonstrated and there is another basis for initiating the proceeding.

In this regard, the Bank was classified by the National Bank as a troubled bank, taking into account, among other things, that the Bank had shown a reduction in its holdings of highly liquid assets, presented a critical balance under the National Bank's funds, and the Bank's liabilities are loans whose repayment was in question. Likewise, the Bank presented several periods in which it did not comply with the minimum capital requirements.

In September 2015 the bank's financial situation deteriorated much more.

Therefore, it is clear that the insolvency of the Bank was caused by its financial crisis and therefore, this requirement is met.

5. In which the assets and affairs of the debtor are subject to control or supervision by a foreign court

According to the Digest of Case Law, courts have noted that both the debtor's assets and business must be subject to control by the court to meet this requirement. In any event, the level of control or supervision may be potential rather than actual.

Courts have also indicated that control or supervision may be exercised not only directly by the court, but also indirectly by an insolvency representative where, for example, the insolvency representative itself is subject to control or supervision by the court or other regulatory authority.

Based on the facts of the case, it is not identified that DGF's actions are subject to supervision by any court or other regulatory entity. On the contrary, it is indicated that DFG is a financially independent institution with balance sheet and accounts separate from the National Bank and that neither the public authorities nor the National Bank have the right to interfere in the exercise of its functions and powers.

Similarly, the only reference made to the courts of Country A is related to the DGF's power to file patrimonial or non-patrimonial claims before those courts. However, this does not mean that its actions in general are subject to the control of such court, or that the debtor's assets or business are under the control of a court.

Likewise, there is no evidence that the debtor's assets or business are directly controlled by any court.

Therefore, this requirement is not met.

6. Purpose of reorganisation or liquidation

According to the facts of the case, the Law of Country A on Banks and Banking Activity (LBBA), has different stages whose ultimate goal is the liquidation of the bank. For this purpose, within the liquidation stage, all powers of the bank's management and control bodies are extinguished; all banking activities are extinguished; all monetary obligations contracted with the bank are considered due; and, among other things, the liquidation of the company is allowed. Likewise, in this liquidation stage the DGF disposes of the bank's assets and funds in favor of its creditors.

Therefore, this requirement is met.

Taking into account that with the facts of the case, it could be concluded that the insolvency process in Country A does not comply with requirements 2 and 5 above mentioned, this process cannot be considered as a *foreign proceeding* within the meaning of article 2(a) of the MLCBI.

The answer is very comprehensive and marks is giving for this assessment although the conclusion might not be right. For full marks on this question it should be addressed that an administrative body (DGF) can fulfill the requirement of "supervision by a foreign court" -hence Guide to enactment, note 87 and 74. The assessment should include a broader discussion on DGF is an administrative body.

Foreign representatives

It should be recalled that the application for recognition was initiated (i) by Ms. G, in her capacity as an authorized officer of the Deposit Guarantee Fund (DGF) of country A, (ii) together with the DGF.

In order to determine whether such foreign representatives can be considered as such under the Model Law, the following elements must be met. Therefore, these requirements are indicated below and it is explained whether or not they are met in the present case:

1. A person or body, even one appointed on an interim basis: It has to be a designated person or body (even appointed on an interim basis) authorized in the foreign proceeding.

According to Article 77 of the LBBA, the DGF automatically becomes the liquidator of a bank on the date on which it receives confirmation of the National Bank's decision to revoke the bank's license. At that time, the DGF acquires the full powers of a liquidator under the law of country A.

Section 48(3) of the DGF Act, empowers the DGF to delegate its powers to an "authorized officer" or "authorized person". "Authorized person of the Fund" is defined in Article 2(1)(17) of the DGF Law as "an employee of the Fund, who on behalf of the Fund and within the powers provided by this Law and/or delegated by the Fund, performs actions to ensure the withdrawal of the bank from the market during the interim administration of the failed bank and/or the liquidation of the bank."

In this regard, the DGF initiated the liquidation procedure and appointed Ms. C as "authorized person". Ms. C was replaced as proxy with effect from August 17, 2020 by Ms. G. Thus, as of August 17, 2020, Ms. G, was empowered to act as "authorized person".

By virtue of such delegation, Mrs. G can exercise all the powers of liquidation of the Bank set forth in the DFG Law and, in particular, Articles 37, 38, 47-52, 521 and 53 of the DGF Law. However, Resolution 1513 expressly excludes from Mrs. G.'s powers the power to claim damages from a related party of the Bank, the power to claim from a non-bank financial institution that has obtained money in the form of loans or deposits from individuals, and the power to arrange the sale of the Bank's assets.

Thus, Mrs. G i) is a person appointed by the DGF to act as liquidator within the foreign process, and ii) has the powers to request the recognition of the foreign process. The above, since within the powers that were not transferred to her and that remained with the DGF, the power to act before other international tribunals is not included.

Finally, it should be noted that the Model Law does not specify that the foreign representative must be authorized by the foreign court. It is therefore broad enough to include appointments that may be made by a special agency other than the court. Therefore, it is acceptable for the DGF to appoint an authorized person to act in the liquidation of the bank.

2. To administer the reorganization or liquidation of the debtor's assets or business or to act as a representative of the foreign proceeding: The authorization of the representative is to administer the reorganization or liquidation of the debtor's assets or business or affairs of the debtor or to act as a representative of the foreign proceeding.

As indicated above, the DGF has broad powers (i) to manage and take over the management of the assets (including money) of the bank; (ii) to prepare a register of creditors' claims and to seek to satisfy them; (iii) to take steps to find, identify and recover assets belonging to the bank; (iv) the power to dispose of the bank's assets; and (v) to exercise "such other powers as are necessary to complete the liquidation of a bank".

In turn, the "authorized officer" is an employee of the Fund, who on behalf of the Fund performs actions to ensure the liquidation of the bank.

Therefore, the DGF (or its authorized person, to the extent such powers are delegated) is empowered to administer the liquidation of the bank's assets.

Finally, under the model law, as long as the foreign representative is appointed and authorized, the representative is not required to satisfy a test of disinterestedness or to be free of conflicts of interest. Notwithstanding the above, Article 35(1) of the DGF Law specifies that an authorized person, must have "...high professional and moral qualities, unimpeachable business reputation, complete higher education in the field of economics, finance or law... and necessary professional experience. " The authorized person may not be a creditor of the bank in question, have a criminal record, have any obligations to the bank in question or have any conflict of interest with the bank. From the above, taking into account that Mrs. G was appointed by DGF, it can be concluded that she met these requirements.

Therefore, the representative could be considered as a foreign representative. However, considering that the definition of "foreign proceeding" is not met, the process could not be recognized.

*** End of Assessment ***