



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: 39 marks out of 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] 6/10 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.

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] 9/10 marks

Question 2.1 [maximum 3 marks] 3 marks

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

In the guidance text for this module, it is stated that the appropriate date to determine the COMI of a debtor, or whether an establishment exists, is the date of commencement of the foreign proceeding. As mentioned in the footnote no. 88 of the guidance text, the Second Circuit of Appeals took a different approach and concluded that a debtor’s COMI is determined as of the time of the filing of the Chapter 15 petition (recognition application). Furthermore, the Second Circuit of Appeal considered that in order to offset a debtor’s ability to manipulate its COMI, a court may also look at the time period

between the initiation of the foreign liquidation proceeding and the filing of the Chapter 15 petition (*Morning Mist Holdings Ltd v Krys*, 2nd Cir. Appeals Apr. 16, 2013).

If insolvency proceedings were initiated at the debtor's COMI and, therefore, the debtor's business activity stopped or was reduced to a bare minimum it will hardly be possible that the debtor's COMI will change between the commencement of the insolvency proceedings and a recognition application. If insolvency proceedings were not commenced at the debtor's COMI it is possible that the debtor's main business activities continued and that the debtor's COMI changed. Given that a COMI must be readily ascertainable as such by creditors of the debtor, such a change of COMI after the commencement of a non-main insolvency proceeding is, however, unlikely.

In general, the appropriate date to determine the COMI is, therefore, the date of the commencement of the foreign proceeding. Important developments between the commencement of the foreign proceedings and the recognition application should, however, also be taken into account for the determination of the COMI of a debtor.

Question 2.2 [maximum 3 marks] 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 1: This statement refers to the coordination of more than one foreign proceeding regulated under art. 30(c) of the Model Law.

Statement 2: This statement refers to the hotchpot rule stipulated under art. 32 of the Model Law.

Statement 3: This statement refers to the rebuttable presumption that the debtor's COMI is at the place of its registered office according to art. 16(3) of the Model Law.

Question 2.3 [2 marks] 1

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.**

According to the Gibbs Rule, a debt governed by English law cannot be discharged or compromised by a foreign insolvency proceeding to which the creditor of the claim governed by English law did not submit. The indefinite Moratorium Continuation sought by IBA aimed to circumvent the Gibbs Rule and prevent creditors from enforcing their English law claims which were discharged under the Azeri restructuring plan of IBA.

The Court of Appeal held that an English court could only properly grant an indefinite Moratorium Continuation if it was satisfied that: (i) the stay would have to be necessary to protect the interests of the debtor's creditors and (ii) the stay would have to be an

appropriate way of achieving such protection. Both these conditions were not satisfied in the case of IBA pursuant to the Court of Appeal.

The possibility that IBA's restructuring plan could be jeopardised by the successful enforcement by the English law creditors was regarded by the Court of Appeal as being "far too indirect and imponderable a consideration to satisfy the test of necessity in article 21(1) of the Model Law." Furthermore, the court of Appeal considered that IBA could have promoted a parallel scheme of arrangement in the UK, but chose not to do so. Hence, IBA could have protected the interests of the debtor's creditors with a parallel scheme of arrangement and an indefinite Moratorium Continuation was not necessary to obtain such protection.

For full marks on this question it should also be mentioned that the court dealt with the fact that granting the indefinite Moratorium would mean that the stay after the Azeri reconstruction would be prolonged, which the court mentioned was not in compliance with art. 18 (see guidance text page 38)

Question 2.4 [2 marks] 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**.

In general, the recognition of a foreign main proceeding have the automatic effects (relief) pursuant to art. 20 of the Model Law. However, when at the time of the application for recognition of a foreign main proceeding there is already a domestic insolvency proceeding taking place in the enacting State art. 20 of the Model Law does not apply according to art. 29(a)(ii) of the Model Law. In such a situation, the court of the enacting State may grant, at the request of the foreign representative, any relief stipulated under art. 21 of the Model Law which is consistent with the domestic proceeding (see art. 29(b)(ii) of the Model Law). Under the same condition, the court of the enacting State may also grant any interim relief stipulated under art. 19 of the Model Law after the filing of the recognition application but before recognition of the foreign main proceeding.

Pursuant to art. 18 of the Model Law, from the time of filing the application for recognition of the foreign proceeding, the foreign representative shall inform the court promptly of:

- (a) Any substantial change in the status of the recognized foreign proceeding or the status of the foreign representative's appointment; and
- (b) Any other foreign proceeding regarding the same debtor that becomes known to the foreign representative.

QUESTION 3 (essay-type questions) [15 marks in total] 11 marks

A foreign representative of a foreign proceeding opened in State B in respect of a corporate debtor (the Debtor) is considering whether or not to make a recognition application under the implemented Model Law of State A (which does not contain any reciprocity provision). In addition, the foreign representative is also considering what (if any) relief may be appropriate to request from the court in State A.

Write a brief essay in which you address the three questions below.

Question 3.1 [maximum 4 marks] 4 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?

Access rights of the foreign representative are governed by chapter II of the Model Law. According to art. 9 of the Model Law, the foreign representative is entitled to apply directly to a court in the enacting State. This access granted to the foreign representative, without the need to meet formal requirements such as licenses or consular action, save the foreign representative costs and time.

Pursuant to art. 11 of the Model Law, the foreign representative is also entitled to apply to commence a domestic proceeding in State A if the conditions for commencing such a proceeding are otherwise met. By providing standing to the foreign representative in this regard without requiring prior recognition of the foreign proceeding, the foreign representative can again profit by saving time and costs when requesting the commencement of a domestic proceeding.

Upon recognition of the foreign proceeding, the foreign representative is, furthermore, entitled to participate domestic proceedings regarding the debtor according to art. 12 of the Model Law. Even if prior recognition is necessary in this case, the foreign representative profits from this rule by having guaranteed access to domestic proceedings which enables him to take influence on the domestic proceedings.

Coordination of concurrent proceedings is governed by chapter V of the Model Law.

The foreign representative may profit from the rules regarding concurrent proceedings by getting transparency and predictability about the effects of concurrent domestic or recognised foreign proceedings in the enacting State (State A). This will support the foreign representative in deciding if to submit a recognition application in the enacting State (State A).

Question 3.2 [maximum 5 marks] 3 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.

Pursuant to art. 17(1) of Model Law, a foreign proceeding shall be recognized, subject to art. 6, if:

- (a) The foreign proceeding is a proceeding within the meaning of subparagraph (a) of article 2;
- (b) The foreign representative applying for recognition is a person or body within the meaning of subparagraph (d) of article 2;
- (c) The application meets the requirements of paragraph 2 of article 15; and
- (d) The application has been submitted to the court referred to in article 4.

According to art. 6 of the Model Law, a recognition application may be refused if recognition would be manifestly contrary to the public policy of the enacting State.

This rule enables State A to refuse recognition in exceptional cases when recognition of the proceeding opened in State B would be manifestly contrary to the public policy of State A

Pursuant to art. 15(2) of the Model Law, a recognition application shall be accompanied by:

- (a) A certified copy of the decision commencing the foreign proceeding and appointing the foreign representative; or
- (b) A certificate from the foreign court affirming the existence of the foreign proceeding and of the appointment of the foreign representative; or
- (c) In the absence of evidence referred to in subparagraphs (a) and (b), any other evidence acceptable to the court of the existence of the foreign proceeding and of the appointment of the foreign representative.

According to art. 15(3) of the Model Law, a recognition application shall also be accompanied by a statement identifying all foreign proceedings in respect of the debtor that are known to the foreign representative.

Pursuant to art. 15(4) of the Model Law, the court may require a translation of documents supplied in support of the recognition application into an official language of this State.

If the decision or certificate referred to in art. 15(2) of the Model Law indicates that the foreign proceeding is a proceeding within the meaning of art. 2(a) of the Model Law and that the foreign representative is a person or body within the meaning of art. 2(d) of the Model Law, the court is entitled to so presume according to art. 16(1) of the Model Law.

Pursuant to art. 16(2) of the Model Law, the court is also entitled to presume that documents submitted in support of the application for recognition are authentic, whether or not they have been legalized.

These presumptions lower the judicial scrutiny of the documents submitted in support of the recognition application required by the court of State A. This facilitates recognition and speeds up the recognition process.

In order for the recognition application to be successful, the application must also be submitted to the competent court or authority of the State A according to art. 4 of the Model Law.

Additionally, the foreign proceeding of State B must qualify as a “foreign main proceeding” in the meaning of art. 2(b) of the Model Law or a “foreign non-main proceeding” in the meaning of art. 2(c) of the Model Law (see art. 17(2) of the Model Law). Therefore, either the debtor’s COMI or an establishment in the meaning of art. 2(f) of the Model Law needs to be located in State B.

In the absence of proof to the contrary, the debtor’s registered office is presumed to be the debtor’s COMI pursuant to art. 16(3) of the Model Law.

This also facilitates recognition and avoids a situation where it would not be possible to establish a COMI.

Even if not stipulated in the Model Law, the foreign representative must not commit an abuse of process in connection with the recognition application. Any abuse of process, as breaching the obligation to full and frank disclosure, may lead to a refusal of recognition.

The presences of concurrent proceedings does not have any influence on the recognition of foreign proceedings.

For full marks on this question, reference should also be made to the following:

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.

Question 3.3 [maximum 5 marks] 3 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.

Pre-recognition relief is governed by art. 19 of the Model Law.

According to art. 19(1) of the Model Law, the court may, at the request of the foreign representative, where relief is urgently needed to protect the assets of the debtor or the interests of the creditors, grant relief of a provisional nature, including:

- (a) Staying execution against the debtor's assets;
- (b) Entrusting the administration or realization of all or part of the debtor's assets located in this State to the foreign representative or another person designated by the court, in order to protect and preserve the value of assets that, by their nature or because of other circumstances, are perishable, susceptible to devaluation or otherwise in jeopardy;
- (c) Any relief mentioned in paragraph 1 (c), (d) and (g) of article 21.

This list of possible relief under art. 19(1) of the Model Law is non-exhaustive and the court may grant any other relief it deems urgently needed to protect the assets of the debtor or the interest of the creditors.

Pursuant to art. 19(3) of the Model Law, interim pre-recognition relief terminates when the application for recognition is decided upon unless it is extended under art. 21(1)(f) of the Model Law.

According to art. 19(4) of the Model Law, the court may refuse to grant pre-recognition relief if such relief would interfere with the administration of a foreign main proceeding. Hence, foreign main proceedings have priority over foreign non-main proceedings.

Any relief granted under art. 19 of the Model Law must be consistent with any ongoing domestic proceeding in the enacting State pursuant to art. 29(a)(i) and 29(b)(i) of the Model Law.

Post-recognition relief is governed by art. 20 and 21 of the Model Law.

Art. 20 of the Model Law governs the relief automatically granted to a foreign main proceeding. Art. 21 of the Model Law stipulates what post-recognition relief may be granted at the request of the foreign representative to a foreign main or non-main proceeding.

Pursuant to art. 20(1) of the Model Law, recognition of a foreign main proceeding has the following effects:

- (a) Commencement or continuation of individual actions or individual proceedings concerning the debtor's assets, rights, obligations or liabilities is stayed;
- (b) Execution against the debtor's assets is stayed; and
- (c) The right to transfer, encumber or otherwise dispose of any assets of the debtor is suspended.

Art. 20 of the Model Law does not apply when a domestic proceeding in the enacting State is taking place at the time the application for recognition of the foreign main proceeding is filed pursuant to art. 29(a)(ii) of the Model Law. If a domestic proceeding in the enacting State is commenced after recognition of a foreign main proceeding the relief of stay and suspension shall be modified or terminated if inconsistent with the domestic proceeding pursuant to art. 29(b)(ii) of the Model Law.

According to art. 21(1) of the Model Law, the court may, at the request of the foreign representative and upon recognition of a foreign proceeding, whether main or non-main, where necessary to protect the assets of the debtor or the interests of the creditors, grant any appropriate relief, including:

- (a) Staying the commencement or continuation of individual actions or individual proceedings concerning the debtor's assets, rights, obligations or liabilities, to the extent they have not been stayed under paragraph 1 (a) of article 20;
- (b) Staying execution against the debtor's assets to the extent it has not been stayed under paragraph 1 (b) of article 20;
- (c) Suspending the right to transfer, encumber or otherwise dispose of any assets of the debtor to the extent this right has not been suspended under paragraph 1 (c) of article 20;
- (d) Providing for the examination of witnesses, the taking of evidence or the delivery of information concerning the debtor's assets, affairs, rights, obligations or liabilities;
- (e) Entrusting the administration or realization of all or part of the debtor's assets located in this State to the foreign representative or another person designated by the court;
- (f) Extending relief granted under paragraph 1 of article 19.
- (g) Granting any additional relief that may be available to under the laws of the enacting State.

This list of possible relief under art. 21(1) of the Model Law is non-exhaustive and the court may grant any other relief it deems appropriate.

Pursuant to art. 21(2) of the Model Law, the court may, at the request of the foreign representative and upon recognition of a foreign proceeding, whether main or non-main, entrust the distribution of all or part of the debtor's assets located in the enacting State to the foreign representative or another person designated by the court, provided that the court is satisfied that the interests of creditors in this State are adequately protected.

In granting relief under art. 21 of the Model Law 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 according to art. 21(3) of the Model Law.

Any relief granted under art. 21 of the Model Law must be consistent with any ongoing domestic proceeding in the enacting State pursuant to art. 29(a)(i) and 29(b)(i) of the Model Law.

Additionally, in granting or denying relief under art. 19 or 21 of the Model Law, or in modifying or termination any such relief, the court must be satisfied that the interests of the creditors and other interested persons, including the debtor, are adequately protected pursuant to art. 22(1) of the Model Law. Therefore, the court has the power to subject relief granted under art. 19 or 21 of the Model Law to conditions it considers appropriate according to art. 22(2) of the Model Law. Furthermore, the court may, at the request of the foreign representative or a person affected by relief granted under art. 19 or 21 of the Model Law, or at its own motion, modify or terminate such relief.

Finally, a consequence of recognition is that the foreign representative obtains standing to initiate actions in the enacting state according to art. 23 of the Model Law and to intervene in any domestic proceedings in which the debtor is a party pursuant to art. 24 of the Model Law.

Very good description, however for full mark on this question the following should also be addressed:

1. Existing international obligations of State A: Based on Article 3 of the Model Law, the court in State A should again verify that there are no existing international obligations of State A (under a treaty or otherwise) that may conflict with granting the requested relief under the implemented Model Law in State A.
2. Public policy exception: The court in State A should, based on Article 6 of the Model Law, also again verify that the relief application is not manifestly contrary to public policy of State A.

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?

A worldwide freezing order granted as interim relief based on art. 19 of the Model Law is unlikely to continue post-recognition because it would have to be extended post-recognition by the court according to art. 19(3) and 21(f) of the Model Law. Such an extension could only be granted if it was necessary to protect the assets of the debtor or the interests of the creditors pursuant to art. 21(1) of the Model Law. While a worldwide freezing order may be necessary for the protection of the assets of the debtor or the interests of the creditors until recognition of a foreign proceeding is obtained it is not necessary anymore after recognition has been obtained.

If the foreign proceeding is a foreign main proceeding the right to transfer, encumber or otherwise dispose of any assets is suspended automatically upon recognition according to art. 21(1)(c) of the Model Law and an extension of a worldwide freezing order would, therefore, not be necessary.

If the foreign proceeding is a foreign non-main proceeding the court must be satisfied that the relief granted relates to assets that, under the law of the enacting State, should be administered in the foreign non-main proceeding pursuant to art. 21(3) of the Model Law. It is unlikely that the court of the enacting State would come to the conclusion that that all assets anywhere in the world should be administered in the foreign non-main proceeding (including the assets of the foreign main proceeding) and that a worldwide freezing order should, therefore, be extended.

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

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]

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]; 9 marks received** 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]. 4 marks**

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.

4.1.1

Pursuant to art. 2(a) of the Model Law, "foreign proceedings" means a collective judicial or administrative proceeding in a foreign State, including an interim proceeding, pursuant to a law relating to insolvency in which proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganization or liquidation.

Hence, the following attributes for a "foreign proceeding" are required for it to fall within the scope of the Model Law:

- a) Collective judicial or administrative proceeding in a foreign State;
- b) Pursuant to a law relating to insolvency;
- c) Control or supervision by a foreign court;
- d) For the purpose of reorganization or liquidation.

Hereafter, each of these attributes will be individually examined for the case at hand.

a) Collective judicial or administrative proceeding in a foreign State

A proceeding is “collective” in the meaning of art. 2(a) of the Model Law if it deals with substantially all of the assets and liabilities of the debtor, subject to local priorities and statutory exceptions, and to local exclusions relating to the rights of secured creditors (para. 70 of the UNCITRAL Guide to Enactment and Interpretation).

“Judicial” or “administrative” is a proceeding that is governed or supervised by a judicial or administrative body.

In the case at hand, the DGF, a governmental body of Country A, became automatically liquidator of the Bank after the NB revoked the Bank’s licence. The powers of the DGF as the Bank’s liquidator are governed by law and include *inter alia*:

- The power to take over management of the property (including the money) of the Bank;
- The power to compile a register of creditor claims and to seek to satisfy those claims;
- The powers of sale, distribution and the power to bring claims for compensation against persons for harm inflicted on the insolvent Bank.

The fact that the DGF delegated its powers to an “authorised officer” is irrelevant for the qualification of the proceeding.

Hence, the liquidation proceeding governed by the DGF entails all assets and liabilities of the Bank. Furthermore, the DGF is an administrative body of Country A. Therefore the requirement of a collective judicial or administrative proceeding in a foreign State is fulfilled.

b) Pursuant to a law relating to insolvency

A law is “relating to insolvency” if it deals with or addresses insolvency or severe financial distress. This condition is met irrespectively of whether the law that contains the rules relate exclusively to insolvency (para. 73 of the UNCITRAL Guide to Enactment and Interpretation).

In the case at hand, liquidation proceedings have been commenced by the DGF after the NB classified the Bank as insolvent pursuant to art. 76 of the LBBA on 17th September 2015 and, thereafter, revoked the Bank’s licence on 17th December 2015. The Bank was classified as insolvent based on art. 76 of the LBBA because it was in a situation of severe financial distress.

Therefore, the liquidation proceeding regarding the Bank is a proceeding pursuant to a law relating to insolvency.

It is irrelevant that a liquidation proceeding over a bank could theoretically also be introduced due to non-compliance, irrespectively of financial difficulties, according to art. 76 and 77 of the LBBA. It is sufficient that the liquidation proceeding has been commenced due to financial distress in the case at hand.

c) Control or supervision by a foreign court

Pursuant to art. 2(e) of the Model Law, “foreign court” means a judicial or other authority competent to control or supervise a foreign proceeding.

Both the assets and affairs of the debtor have to subject to control or supervision (para. 76 of the UNCITRAL Guide to Enactment and Interpretation). It is sufficient for control or supervision to be rather potential than actual (para. 74 of the UNCITRAL Guide to Enactment and Interpretation).

In the case at hand, the DGF, a governmental body of Country A, has control over the assets and affairs of the Bank as its liquidator. The DGF itself is an economically independent institution and neither public authorities nor the NB have any right to interfere in the exercise of its functions and powers pursuant to art. 3(3) and 3(7) of the DGF Law.

Given the DGF's control over the assets and affairs of the Bank and that the DGF as a governmental body of Country A is a "foreign court" in the meaning of art. 2(e) of the Model Law, the condition of "control or supervision by a foreign court" is fulfilled.

d) For the purpose of reorganisation or liquidation

In the case at hand, the Bank was classified by the NB as insolvent in September 2015 after the Bank's financial position had deteriorated further and suffered increased losses. Thereafter, the DGF commenced to liquidate the Bank's assets and draw up a list of creditor's claims. The purpose of the liquidation proceedings lead by the DGF was, therefore, clearly to liquidate the Bank and distribute its assets to the Bank's creditors. The requirement that the proceeding must be "for the purpose of reorganisation or liquidation" was, therefore, also met.

e) Conclusion

Given that all conditions of the definition of a foreign proceeding according to art. 2(a) of the Model Law are fulfilled, the liquidation proceeding governed by the DGF is to be qualified as a foreign proceeding in the meaning of art. 2(a) of the Model Law.

A very good assessment, for full marks one should discussed the characterisation of the DGF as an *administrative body* more fully.

4.1.2

Pursuant to art. 2(d) of the Model Law, "foreign representative" means a person or body, including one appointed on an interim basis, authorized in a foreign proceeding to administer the reorganization or the liquidation of the debtor's assets or affairs or to act as a representative of the foreign proceeding.

In the case at hand, Ms G, in her capacity as authorised officer of the DGF, together with the DGF, applied for recognition of the liquidation of the Bank. Ms G was appointed by decision of the DGF. She was being authorised to sign all agreements related to the sale of the Bank's assets in the manner prescribed by the DGF Law but not to claim damages from a related party of the Bank, to make a claim against a non-banking financial institution that raised money as loans or deposits from individuals or to arrange for the sale of the Bank's assets. These excluded powers remained vested in the DGF as the Bank's formally appointed liquidator.

The DGF, as formally appointed liquidator of the Bank, was authorized in the foreign proceeding of State A to liquidate the Bank's assets and to represent the foreign proceedings. Therefore, the DGF qualifies as "foreign representative" of the foreign proceeding in the meaning of art. 2(d) of the Model Law.

Ms G was appointed by the DGF to represent the DGF in certain aspects of the liquidation proceeding of the Bank. It may be questionable if Ms G would be authorized to file a request for recognition for the liquidation proceeding regarding the Bank without special permission of the DGF. Given that she applied together with the DGF for recognition, this question can be left unanswered because the DGF obviously approved her application.

Great assessment. For full marks on the questions, more reference to the law of DGF should be made.

*** End of Assessment ***