



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: 31 out of 50 marks

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] 7 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.

Question 1.2

Which of the following statements is **unlikely** to be a reason for the development of the Model Law?

- (a) The existence of a statutory basis in national (insolvency) laws for co-operation and co-ordination of domestic courts with foreign courts or foreign representatives.
- (b) The difficulty of agreeing multilateral treaties dealing with insolvency law.
- (c) The practical problems caused by the disharmony among national laws governing cross-border insolvencies, despite the success of protocols in practice.
- (d) None of the above.

Question 1.3

Which of the following challenges to a recognition application under the Model Law **is most likely to be successful?**

- (a) The registered office of the debtor is not in the jurisdiction where the foreign proceedings were opened, but the debtor has an establishment in the jurisdiction of the enacting State.
- (b) The registered office of the debtor is in the jurisdiction of the enacting State, but the debtor has an establishment in the jurisdiction where the foreign proceedings were opened.
- (c) The debtor has neither its COMI nor an establishment in the jurisdiction where the foreign proceedings were opened.**
- (d) The debtor has neither its COMI nor an establishment in the jurisdiction of the enacting State.

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).

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.

QUESTION 2 (direct questions) [10 marks in total] 7 marks

Question 2.1 [maximum 3 marks] 2 marks

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

[Type your answer here]

Paragraph 157 of Part 2 of the Guide to Enactment and Interpretation of the UNCITRAL Model Law on Cross-Border Insolvency (“GEI”) states that *“The Model Law does not expressly indicate the relevant date for the determining the centre of main interests of the debtor.”*

Paragraph 159 of Part 2 of the GEI states that *“With respect to the date at which the COMI of the debtor should to be determined, having regard to the evidence required to accompany an application for recognition under article 15 and the relevance accorded the decision*

commencing the foreign proceeding and appointing the foreign representative, the date of commencement of that proceeding is the appropriate date.”

Accordingly, the appropriate date for determining the COMI of a debtor, or whether an establishment exists is the date of commencement of foreign proceedings.

For full mark it should be noted that there are slightly different approaches in different jurisdictions.

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.”*

[Type your answer here]

Statement 1

Statement 1 refers to the concept of concurrent foreign non-main proceedings. The concept of concurrent non-main proceedings is outlined in Chapter V Article 30(c) of the MLCBI.

Statement 2

Statement 2 refers to the rule of payment in concurrent proceedings, the ‘hotchpot rule’. The hotchpot rule avoids situations in which a creditor might obtain more favourable treatment than the other creditors in the same class, by obtaining payment of the same claim in insolvency proceedings in a different jurisdiction. To the extent that secured creditors claims are paid in full, those claims are not affected by the hotchpot rule. The hotchpot rule is outlined in Chapter V Article 32 of the MLCBI.

Statement 3

Statement 3 refers to presumptions concerning recognition, specifically a rebuttable presumption in relation to the COMI. The rebuttable presumption is contained in Chapter III Article 16(3) of the MLCBI.

Question 2.3 [2 marks] 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.**

[Type your answer here]

The jurisdictional question raised in the *IBA* case appeal was in what sense it may be said that the English Court lacked jurisdiction to grant the indefinite Moratorium Continuation requested by the foreign representative. The major questions faced by the Court was whether the Court should not exercise its power to grant the indefinite Moratorium Continuation where to do so

would: (i) in substance prevent the English creditors from enforcing English law rights in accordance with the Gibbs Rule (i.e. pursuing their claims pursuant to English law); and / or (ii) prolong the stay after the foreign reconstruction has come to an end.

In relation to point (i), the Court of Appeal held that an English court could only properly grant the indefinite Moratorium Continuation if it were satisfied that: firstly, the stay was necessary to protect the interest of the IBA's creditors; and secondly, the stay would have to be an appropriate way of achieving that same protection. Based on the evidence, the Court of Appeal concluded that the IBA creditors needed no further protection in order for the foreign proceeding to achieve its purpose as the matter was far too indirect to satisfy the test of necessity in article 21(1) of the MLCBI. Additionally, the Court of Appeal found it material that the IBA could have promoted a parallel scheme in the UK and chose not to.

Therefore, under certain circumstances a restructuring plan could still be approved in the UK over the objections of one or more classes that have rejected the restructuring plan. The Court of Appeal had expected this point to be explicit or at the very least discussed in the application.

In relation to point (ii), the Court of Appeal considered the information obligation on the foreign representative contained in Article 18 of the MLCBI, in that the status of the foreign proceedings and the status of the foreign representative's own appointment, requires the foreign proceedings to still be in existence and the foreign representative to still be in office. According to the Court of Appeal, once the foreign proceeding has come to an end and the foreign representative is no longer in office. Accordingly, there is no scope for further orders in support of the foreign proceedings to be made and any relief granted under the MLCBI should terminate.

Question 2.4 [2 marks] 0

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**.

[Type your answer here]

Proceeding the recognition of the foreign main proceeding in the enacting state, the court in the enacting state should provide relief pursuant to Chapter III Article 20 of the MLCBI. The court of the enacting state must consider: (i) staying the commencement of continuation of individual actions or individual proceedings concerning the debtor's assets, rights, obligations or liabilities; (ii) staying the execution against the debtor's assets; and (iii) suspending the right to transfer, encumber or otherwise dispose of any of the debtor's assets.

Pursuant to Chapter III Article 26, the foreign representative in the foreign main proceedings shall cooperate to the maximum extent possible with foreign courts or foreign representatives (subject to the supervision of the Court of the foreign main proceedings).

The correct answers are art. 29 (a) and art. 18

QUESTION 3 (essay-type questions) [15 marks in total] 6 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 MLCBI 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] 1 mark

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

[Type your answer here]

Chapter 4 of the MLCBI titled “*Cooperation with foreign courts and foreign representatives*” affords multiple benefits to foreign representatives to facilitate access and co-ordination. State A have implemented the MLCBI and therefore the following benefits would be available to the Foreign Representative in State B.

Article 25 of the MLCBI allows the courts of State A and State B, with the appropriate involvement of the parties, to communicate directly and to request information and assistance directly.

Article 27 of the MLCBI suggest multiple forms of cooperation available for use by State A. In this scenario these may include: (i) communication of information by any means considered appropriate by the Court of State A; (ii) Coordination of the administration and supervision of the State B Debtor’s assets and affairs; (iii) Approval or implementation by the Courts of both State A and State B of agreements concerning coordination of proceedings; and (iv) if applicable, coordination of concurrent proceedings regarding State B’s Debtor.

Subparagraph (f) of Article 27 allows State A the opportunity to list any additional forms of possible cooperation which are considered appropriate.

The following should also be included in your answer:

- **Legal standing (Article 9 MLCBI):** The key access for the foreign representative is set forth in Article 9 MLCBI. In the capacity of foreign representative, the foreign representative has automatically standing before the courts in State A without having to meet any formal requirements such as a license or any consular action. In other words, the “status” in State B of the foreign representative is automatically recognised in State A for the purpose of granting the foreign representative standing before the courts in State A. This allows the foreign representative to safeguard and pursue assets of the debtor estate in State A before its courts.
- **Opening domestic insolvency proceedings (Article 11 MLCBI):** The foreign representative is further specifically entitled to apply for the opening of domestic insolvency proceedings in State A, as reflected in Article 11 of the MLCBI. Whether or not the foreign representative would wish to do this will depend on what the requirements are for opening such domestic proceedings. Can these requirements be met? On the other hand, it will depend on what the foreign representative believes he/she can get in terms of (interim) relief for the foreign proceedings in State B. In other words, are domestic insolvency proceedings really needed, or just additional time and costs that should be avoided?
- **Save Time & Costs:** The key benefits of both the access provisions and the cooperation provisions are that they save time and therefore also costs, as a result of which value destruction can be avoided and value enhancement is being promoted.

Question 3.2 [maximum 5 marks] 2 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.

[Type your answer here]

Pursuant to Article 15 of the MLCBI, the Foreign Representative of the Debtor of State B's recognition application shall be accompanied by: (i) a copy of the decision commencing the proceedings in State B and appointing State B's Foreign Representative; or (ii) a certificate from the Court of State B confirming the existence of the Debtor's proceedings in State B; or (iii) in the absence of (i) or (ii), any other evidence acceptable to the Court in State A of the existence of the foreign proceeding in State B and the appointment of the Foreign Representative of State B's Debtor. Examples of any other evidence include verified copies of minutes, court orders and reports to creditors for point (i); and relevant correspondence with the State B Registrar of Companies and company searches for the Debtor in State B which evidence the change in the state B's Debtor's status for point (ii). State B's application for foreign recognition in State A should also be accompanied by a statement identifying all foreign proceedings (if any) of the State B Debtor that are known to State B's foreign representative. Finally, the Court in State A may require translation of documents supplied in support of the application to recognition into the local language.

Article 16 of the MLCBI establishes presumptions to allow the Court in State A to expedite the evidentiary process. As the Proceeding in State B qualifies under Article 2(a) of the MLCBI and the foreign representative of State B qualifies under Article 2(d) of the MLCBI, pursuant to Article 16 of the MLCBI, the Court of State A is entitled to (i) presume that documents in support of the recognition application are authentic (whether or not they have been legalised); and (ii) in the absence of evidence to the contrary, the Debtor in State B's centre of main interest (“COMI”) is presumed to be its registered office.

Article 17 of the MLCBI focuses on the decision to recognise a foreign proceeding. In the case of the appointment of the Foreign Representative to the Debtor of State B the conditions of subparagraphs 1 (a) and (b) of Article 17 have been met as Article 2 (a) and (d) have been satisfied. Subparagraph 1(c) of Article 17 requires that the Foreign Representative of the Debtor of State B provides the Court of State A the documentation outlined in Article 15 and subparagraph 1(d) of Article 17 requires the application to be made to the correct court. In this instance the correct court is the court in State A, being the court of the enacting state.

Paragraph 2 of Article 17 considers whether the proceeding will be considered a foreign main proceeding or foreign non-main proceeding. Whether the Proceedings of the Debtor of State B are considered the foreign main proceedings or the foreign non-main proceedings will be dependant on Debtor B's COMI. The proceedings in State B will be considered the foreign main proceedings if Debtor B's COMI is in State B; or the foreign non-main proceedings if Debtor B has assets but no establishments, as defined in Article 2 subparagraph (f), in State B.

For full marks, the following should also be included:

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

Question 3.3 [maximum 5 marks] 2 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.

[Type your answer here]

Article 19 of the MLCBI sets out the relief that may be granted upon the application of recognition of a foreign proceeding, which is considered pre-recognition relief. From the time the Foreign Representative in State B files the recognition application in State A, until the application is decided upon, the Court in State A, at the request of the Foreign Representative in State B may grant relief of a provisional nature where relief is urgently needed to protect the assets of the State B Debtor or the interests of the State B Debtor's creditors. Examples of relief which may granted are:

(i) Staying execution against State B's Debtor's assets;

(ii) Entrusting the administration or realisation of all or part of State B's Debtor's assets located in State A to State B's Foreign Representative (or another person designate by State A's Court) in order to protect and preserve the value of the assets; and

(iii) any relief mentioned in paragraph 1 (c), (d) and (g) of Article 21 which is discussed below. Unless extended under Article 21(f), relief granted under Article 19 terminates when the application for recognition is decided upon. If the proceedings in State B are foreign non-main proceedings, the Court in State A may refuse to grant relief under Article 19 if the relief would interfere with the administration of a foreign main proceeding; as there are no concurrence of proceedings this will not be relevant in this scenario.

Article 21 of the MLCBI outlines the relief that may be granted upon recognition of a foreign proceeding, which is considered post-recognition relief. In the situation that State B's proceedings are recognised in State A, whether as a main or non-main proceeding, the Court in State A at the request of the Foreign Representative in State B may grant any appropriate relief, including:

(i) Article 21 Paragraph 1(a) the Court in State A may stay the commencement or continuation of individual actions or individual proceedings concerning the State B Debtor's assets, rights, obligations or liabilities, to the extent they have not been stayed under Article 20 paragraph 1(a). Article 20 paragraph 1(a) provides that upon the recognition of a foreign main-proceeding, commencement or continuation of individual actions or individual proceedings concerning a debtor's assets, rights obligations or liabilities are stayed upon recognition of a foreign main proceeding. As there is no concurrence of proceedings this relief would be

granted under Article 20 1(a), if the proceedings in State B are recognised as a foreign main proceeding, or under Article 21 1(a) if the proceedings in State B are recognised as a foreign non-main proceeding;

(ii) Article 21 paragraph 1(b) the Court in State A may stay the execution against the State B Debtor's assets to the extent it has not been stayed under Article 20 Paragraph 1(b). Article 20 Paragraph 1(b) stays the execution against a debtor's assets upon recognition of a foreign main proceeding. Similar to point (i), if the proceedings in State B are recognised as a foreign main proceedings this relief would be granted under Article 20 paragraph 1(b), or under Article 21 paragraph 1(b) if the proceedings in State B are recognised as a foreign non-main proceeding;

(iii) Article 21 paragraph 1(c) the Court in State A may suspend the right to transfer, encumber or otherwise dispose of any assets of the State B Debtor to the extent this right has not been suspended under Article 20 paragraph 1(c). Article 20 paragraph 1(c) suspends the right to transfer, encumber or otherwise dispose of any assets of the State B Debtor where a foreign main proceeding is recognised. Similar to points (i) and (ii), if the proceedings in State B are recognised as a foreign main proceeding this relief would be granted under Article 20 paragraph 1(c), or under Article 21 paragraph 1(c) if the proceedings in State B are recognised as a foreign non-main proceeding. This relief may be extended from the same relief granted in Article 19;

(iv) Article 21 paragraph 1(d) would allow the foreign representative of the State B Debtor to conduct the examination of witnesses, the taking of evidence or the delivery of information to the foreign representative of the State B Debtor of information concerning the State B Debtor's assets, affairs, rights obligations or liabilities in State A. This relief may be extended from the same relief granted in Article 19;

(v) Article 21 paragraph 1(e) allows the court of State A to entrust the administration or realisation of all or part of the State B Debtor's assets located in State A to the foreign representative of State B or another person designated by the Court of State A;

(vi) Article 21 paragraph 1(f) allows the Court of State A to extend any relief granted subject to Article 19. This is primarily granted to the provisions of Article 21 1(c), (d) and (g);

(vii) Article 21 paragraph (g) allows the Court of State A to grant any additional relief that may be available to the Foreign Representative of State B under the laws of State A.

(viii) Article 21 (2) outlines that upon recognition of the State B Foreign Representative's appointment, whether main or non-main, the Court of State A may at the request of the Foreign Representative of State B, entrust distribution of all or part of the State B Debtor's assets located in State A to the State B Foreign Representative or another person designated by the State A Court, provided that the State A Court is satisfied that the interests of creditors in State A are adequately protected.

Reference should also be made to art. 3, art. 6 and art. 22 on adequate protection to receive full mark

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?

[Type your answer here]

A pre-recognition worldwide freezing order granted under Article 19 of the MLCBI is unlikely to continue post recognition under Article 21 because once the State B Foreign Representative's appointment has been recognised in State A, the Foreign Representative would have the sanction of the Court of State A to administer the assets of the State B Debtor in the best interest of creditors.

QUESTION 4 (fact-based application-type question) [15 marks in total] 11 marks

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**]; 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**].

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.

[Type your answer here]

Whether the Bank's liquidation comprises a "foreign proceeding" within the meaning of article 2(a) of the MLCBI:

Article 2(i) of the English Cross-Border Insolvency Regulations 2006 ("CBIR") defines a Foreign Proceeding as:

"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 reorganisation or liquidation"

The Guide to Enactment and Interpretation of the UNCITRAL Model Law on Cross-Border Insolvency ("GEI") provide four criteria for determining whether a proceeding meets the definition of Article 2(a), or in this case Article 2(i) of the CBIR. These four criteria are:

1. Collective proceeding;
2. Pursuant to a law relating to insolvency;
3. Control or supervision by a foreign court; and
4. For the purpose of reorganisation or liquidation.

Collective proceeding

Paragraph 70 of the GEI provides guidance on evaluating whether a given proceeding is collective for the purpose of the MLCBI:

"... a key consideration is whether substantially all of the assets and liabilities of the debtor are dealt with in the proceeding, subject to local priorities and statutory exceptions, and to local exclusions relating to the rights of secured creditors."

The application is being brought by both Ms G, in her capacity as authorised officer of the Deposit Guarantee Fund ("DFG") of Country A in respect of the Bank, together with DFG ("the applicants").

As at the date of appointment DFG as the Liquidator of the bank (18 December 2015), DFG received the full powers of a Liquidator pursuant to the Laws of Country A, specifically Article 37 of the DFG Law. These powers include:

- (i) exercising management powers and take over of management and property of the Bank;
- (ii) the power to make a register of creditors and satisfy those claims;

- (iii) the power to take steps to find, identify and recover property belonging to the bank;
- (iv) the power to dismiss the employees of the Bank and withdraw from/ terminate their 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 the Bank".

The comprehensive powers afforded to DFG in their capacity as Liquidator of the Bank clearly pass the collective proceeding criteria. Although Ms G has been provided limited powers in her capacity as an authorised representative, the applicants include both Ms G and DFG (who has vested powers) so this point is not relevant.

Pursuant to law relating to Insolvency

Paragraph 73 of the GEI acknowledges the fact that liquidation and reorganisation might be conducted under law that is not labelled as insolvency law.

DFG was appointed Liquidator of the Bank pursuant to Article 77 of the Law of Country A on Banks and Banking Activity ("LBBA"), one day after the NB's decision to revoke the Bank's licence. Whether the LBBA is an "insolvency law" or "company law" is not the defining factor of whether the criteria is passed. The criteria refers to whether the law leading to the appointment of the liquidator is one relating to insolvency or severe financial distress.

Prior to the appointment of DFG the Bank was classified as insolvent pursuant to Article 76 of the LBBA and therefore clearly passes this criteria.

Control or supervision by a foreign court

Paragraph 74 of the GEI sets out that the required control or supervision should be formal in nature and may be potential rather than actual. Both assets and affairs of the debtor should be subject to control or supervision; it is not sufficient if only one or the other are covered by the DFG's appointment as Liquidator of the Bank.

The liquidation process of Country A specifies that 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. The notion of commencing proceedings indicates that proceedings would be initiated in the Court of Country A and that there would be an ongoing obligation for the Liquidator of the Bank to report to the Court of Country A. Additionally the powers afforded to the Liquidator of the Bank pursuant to the LBBA are extensive and cover both the assets and liabilities of the Bank.

For the purpose of reorganisation or liquidation

Paragraph 77 of the GEI states that the proceedings must be for the purpose of liquidation or reorganisation. DFG has been appointed to complete the liquidation process as Liquidator of the Bank and therefore their appointment is for the purpose of liquidation.

The answer should also include a discussion on if th DGF qualifies as a foreign court, if its an administrative proceeding or a judicial.

Whether the Applicants fall within the description of "foreign representatives" as defined by article 2(d) of the MLCBI:

Article 2(j) of the CBIR defines a Foreign Representative as:

“a person or body, including one appointed on an interim basis, authorised in a foreign proceeding to administer the reorganisation or the liquidation of the debtor’s assets or affairs or to act as a representative of the foreign proceeding”

Paragraph 86 of the GEI states that the definition of foreign representative is sufficiently broad to include appointments that might be made by a special agency other than the court.

The Applicants are Ms G in her capacity as authorised officer of DGF together and DGF.

DFG meets the definition of foreign representative as they are the party whom commenced the proceedings and were appointed pursuant to the LBBA.

Ms G was appointed as an authorised representative of DFG pursuant to a decision of the Executive Board of Directors of EFG. Ms G’s appointment was subject to certain exclusions. Ms G can still be recognised as a foreign representative owing to the broad definition allowing appointment by special agency, but should be subject to the same exclusions in England as she is in Country A.

For full marks on this question, the powers and the delegation hereof should be discussed as well as more facts on the appointment, authorisation and powers should be included.

*** End of Assessment ***