



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.**
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- 6.1 If you selected Module 2A as one of your **compulsory modules** (see the e-mail that was sent to you when your place on the course was confirmed), the final time and date for the submission of this assessment is **23:00 (11 pm) GMT on 1 March 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] 5 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

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]

APPROPRIATE DATE TO DETERMINE CENTRE OF MAIN INTEREST AND ESTABLISHMENT

The relevant date for defining the debtor's centre of main interests is not specified in the Model Law. As per **Article 17(a)** of the Model Law, the foreign proceeding must be ongoing or pending when the recognition decision is made. There is no proceeding eligible for recognition under the Model Law if the proceeding is no longer in the originating State.

The date of the commencement of the foreign proceeding and the appointment of the foreign representative is the appropriate date for determining the centre of main interests. If the debtor's business activity halted after the foreign proceeding begun, and all that exists at the time of the application for recognition to show the debtor's main interests is that foreign proceeding and the foreign representative in administering the insolvency estate. Determination by reference to the date of those procedures would yield a clear result in such situation.

The same argument may apply in the case of reorganization, where the reconstructing company, rather than the debtor, retains a centre of main interests under statutory provisions. In this case, the criterion for a foreign proceeding conducted in accordance with **Article 17(2)(a)** of the Model Law, is obviously met, and the foreign proceeding should be recognized. The same principles apply to the date at which any determination regarding the existence of a debtor's establishment is to be made. As a result, the date of the foreign proceeding's initiation is the relevant date to consider in making that conclusion.

It should also be mentioned that there are different approaches in different jurisdictions.

Question 2.2 [maximum 3 marks] 2 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]

ANSWER:

STATEMENT1:

ARTICLE 30: COORDINATION OF MORE THAN ONE FOREIGN PROCEEDING

As per **Article 30(c)** of the Model Law, in case of more than one foreign non-main proceeding, no foreign proceeding is a priori treated preferentially

STATEMENT2 :

ARTICLE 32: RULE OF PAYMENT IN CONCURRENT PROCEEDING

As per the **hotchpot rule**, as stated in **Article 32** of the Model Law, a creditor who has received part payment in respect of its claim in a proceeding pursuant to a foreign insolvency law may not receive payment for the same claim in a [domestic proceeding in the enacting State) regarding the same debtor, without prejudice to secured claims or rights in rem, so long as the payment to other creditors of the same class is proportionally less than the payment the creditor has already received.

STATEMENT3:

ARTICLE 31: PRESUMPTION OF INSOLVENCY BASED ON RECOGNITION OF FOREIGN MAIN PROCEEDING

As per **Article 31** of the Model Law provides for a rebuttable presumption that the recognition of a foreign primary procedure constitutes proof that the debtor is insolvent for the purposes of starting a domestic insolvency process for the debtor in the implementing State.

The correct answer is art. 16(3)

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.**

[Type your answer here]

ANSWER:

The Court held that an English Court could only lawfully continue the indefinite moratorium if it had been satisfied with following **two components**:

- **firstly**, the stay would have to be essential to preserve the interests of IBA's creditors; and
- **secondly**, there has to be an adequate method of protecting such interests.

In the instance case, the Court of Appeal found that neither of these elements had been met also the Azeri reconstruction's was attained before the termination in January 2018, and IBA was operating its business regularly.

The Court of Appeal further noted that **Article 21** of the Model Law was not meant to trump creditors' substantive rights under the law applicable on their debts. If **Article 21** had intended for relief to continue beyond the relevant foreign process, it would have undoubtedly included the necessary mechanism to this effect.

It should also be mentioned that based on Article 18 of the MLCBI, the English Court of Appeal in the *IBA* case appeal held that had the MLCBI ever contemplated the continuance of relief after the end of the relevant foreign proceeding, it would have addressed the question explicitly and provided appropriate machinery for that purpose.

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**.

[Type your answer here]

DOMESTICE PROCEEDING AFTER RECOGNITION OF MAIN PROCEEDING

According to **Article 29(b)** of the Model Law, if a domestic proceeding has already been commenced in respect of the debtor after recognition of a foreign main proceeding, the court of an enacting State should grant the following relief:

- To ensure consistency with the local proceeding, any relief granted under **Article 19** or **21** to the foreign proceeding must be reviewed and modified or terminated;
- A foreign proceeding that is a main proceeding must be modified and terminated under **Article 20** of the Model Law, if it conflicts with the local proceeding. However, it is possible that the court may wish to maintain those automatic effects since they are potentially beneficial.

Article 29 of the Model Law avoids creating a fixed hierarchy between the processes as it would unduly impede the court's capacity to collaborate and apply its discretion under **Articles 19** and **21**. When **Article 29** is adopted, it would be preferable not to limit the court's discretion.

ONGOING DUTY OF INFORMATION

The foreign representative is required under the **Article 18(a)** of the Model Law to notify the court of **any material change in the status of the recognized international procedure**. The objective is to allow the court to alter or reject the recognition application's implications. When the court's judgement on recognition is based on a **foreign interim proceeding** or a **foreign representative** has been **appointed on an interim basis**, it is critical that the court be notified of any changes.

Article 18(b) of the Model Law, extends this obligation to the period following the filing of the application for recognition. This information will enable the court to examine whether previously awarded relief should be coordinated with insolvency procedures initiated following the decision on recognition according to **Article 30** of the Model Law and to encourage cooperation under **Chapter IV** of the Model Law.

QUESTION 3 (essay-type questions) [15 marks in total] 9 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] 3 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?

[Type your answer here]

ANSWER:

OBJECTIVE OF COORDINATION:

The goal of cooperation and coordination is to make it possible for courts and insolvency representatives from two or more countries to work together efficiently and obtain the best possible outcomes. The Model Law's access privileges, which allow foreign representatives to appear before judges in the adopting State without having to go through separate processes, plainly enhance cooperation. Recognition of foreign proceedings facilitates this cooperation by allowing the court to grant the foreign representation with appropriate and more-tailored remedy as and when needed.

Providing access to the courts of the enacting State to the person administering a foreign insolvency proceeding ("foreign representative"), allowing the foreign representative to seek a temporary "breathing space" and the courts of the enacting State to determine what coordination among the jurisdictions or other relief is warranted for optimal insolvency disposition.

IMPORTANCE OF ACCESS:

One of the Model Law's main goals is to give foreign representatives quick and direct access to the courts of the adopting State. **Article 9** of the Model Law expresses the idea of direct access by a foreign representative to the courts of the adopting State, relieving the representative from formal procedures such as licences or consular action. **Article 4** of the Model Law concerns the implementing State's court's ability to provide remedy to the foreign representation.

ACCESS RIGHT UNDER MODEL LAW:

Article 9 of the Model Law grants a foreign representative standing in the enacting State's courts without the necessity for the foreign proceeding to be recognised in the foreign State. **Article 11** of the Model Law gives foreign representatives standing the authority to initiate domestic insolvency proceedings if all other prerequisites are satisfied. Foreign creditors have the same rights as creditors domiciled in the adopting State under **Article 13** of the Model Law, without altering the ranking of claims in the enacting State.

BENEFIT TO THE FOREIGN REPRESENTATIVE:

Article 14 of the Model Law, which grants foreign creditors access rights to foreign courts, as well as **Article 10** of the Model Law which provides safe conduct norm, will provide comfort to foreign creditors in cross-border insolvencies. These rights guarantee that the foreign representative has access to local instruments without having to go through additional procedures in the enacting State to establish such standing. As a result, international creditors may feel secure in the knowledge that their recovery would be maximised without the need for additional local processes or the risk of undesirable jurisdictional repercussions.

For full mark attention should be given to art. 25-27 also.

Question 3.2 [maximum 5 marks] 2,5 marks

For a recognition application in State A to be successful, the foreign proceeding opened in State B must qualify as a "foreign proceeding" within the meaning of article 2(a) of the MLCBI and the "foreign representative" must qualify as a foreign representative within the meaning of article 2(d) of the MLCBI. Assuming both qualify as such, list and briefly explain (with reference to the relevant MLCBI articles) any other evidence, restrictions, exclusions and limitations that must be considered, as well as the judicial scrutiny that must be overcome for a recognition application to be successful.

[Type your answer here]

ANSWER:

RECOGNITION:

One of the Model Law's main goals is to develop simpler procedures for the recognition of qualified foreign proceedings, which would eliminate the need for time-consuming legalisation or other steps and give certainty in the recognition decision.

Article 17 states that, subject to **Article 6**, if the conditions of **Article 2** concerning the nature of a foreign process are satisfied and the evidence as required under **Article 15** is proved, the Court shall recognise the foreign proceeding without additional restrictions. The presumptions contained in **Article 16** of the Model Law help the application and recognition procedure by allowing the court in the enacting State to presume the authenticity and validity of certificates and documents originating in the foreign State.

Recognition can be withheld under **Article 6** of the Model Law if it would be "manifestly opposed to the public policy" of the state seeking recognition. This might be a preliminary question to consider before submitting a recognition application.

Recognizing that the grounds for granting recognition may later be determined to be inadequate, have changed, or have ceased to exist, the Model Law provides for revision or termination of the order for recognition under **Article 17** of the Model Law.

EVIDENCE REQUIREMENT FOR RECOGNITION:

As per **Article 15** of the Model Law, an application for recognition by a foreign court in respect of a debtor should be accompanied by a certified copy of the decision commencing the foreign proceeding and appointing the foreign representative; or. A certificate from the foreign court affirming the existence of the foreign proceedings and of the appointment of the foreign representative.

SUBSEQUENT INFORMATION

Article 18 of the Model Law obligates the foreign representative to inform the court of "any substantial change in the status of the recognized foreign proceeding". The purpose of the obligation is to allow the court to modify or terminate the consequences of recognition. It is of particular importance that the court be informed of such modifications when its decision on recognition concerns a foreign "interim proceeding" or a foreign representative has been "appointed on an interim basis".

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. **Judicial scrutiny:** While the court in State A is able to rely on the rebuttable presumptions set forth in Article 16 of the Model Law, in the context of Article 17 of the Model Law the court will have to assess whether either the COMI or at least an establishment of the debtor is located in State B where the foreign proceedings were opened. If the COMI of the debtor is in State B the foreign proceedings should be recognised as foreign main proceedings and if only an establishment of the debtor is in State B the foreign proceedings should be recognised as foreign non-main proceedings. Without a COMI or at least an establishment of the debtor in State B, recognition cannot be granted by the court in State A.

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.

[Type your answer here]

ANSWER:

PRE-RECOGNITION RELIEF (ARTICLE 19 OF THE MODEL LAW)

Under **Article 19** of the Model Law, the following remedies is available as pre-recognition relief:

- a. Execution on the debtor's asset is stayed.
- b. Entrusting the administration or realisation 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 are perishable, susceptible to devaluation, or otherwise in jeopardy, by their nature or due to other circumstances;
- c. Suspending the debtor's right to transfer, encumber, or otherwise dispose of any of the debtor's assets, to the extent that this right has not already been suspended under **Article 20 (1)(c)** of the Model Law;
- d. Allowing for the examination of witnesses, the taking of evidence, or the delivery of information relating to the debtor's assets, affairs, rights, obligations, or liabilities;

RESTRICTION or LIMITATION or CONDITION:

As per Article 19(3) of the Model Law the relief provided under Article 19 of the Model Law is provisional in nature and the same will terminate once the recognition application is decided. However, Courts has been given power under Article 21(1)(f) of the Model Law to extend such remedy.

When a foreign main process is underway, **Article 19(4)** of the Model Law pursues the same objective as **Article 30(a)** of the Model Law; any relief given in favour of a foreign non-main proceeding must be compatible (or should not interfere) with the foreign main proceedings. Accordingly, **Article 15(3)** of the Model Law requires the foreign representative requesting for recognition to submit to the application for recognition a declaration specifying all foreign procedures with regard to the debtor in order to facilitate such coordination.

POST-RECOGNITION RELIEF (ARTICLE 21 OF THE MODEL LAW)

Under **Article 21** of the Model Law, the following remedies is available as pre-recognition relief:

- 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 Article 20(1)(a);
- b. Staying execution against the debtor's assets to the extent it has not been stayed under Article 20(1)(b);
- 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 Article 20(1)(c);
- 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 Article 19(1)

RESTRICTION or LIMITATION or CONDITION

It's worth noting that the Model Law includes many protections to guarantee that local interests are protected before assets are given over to the foreign representative. **Article 21(2)** of the Model Law, which states that the court should not sanction the transfer of assets unless it is satisfied that the interests of local creditors are protected; and **Article 22(2)** of the Model Law, which states that the court may restrict the relief it gives to conditions it deems suitable.

Relief provided to a foreign non-main process shall be confined to assets to be managed in another bankruptcy proceeding, according to **Article 21(3)** of the Model Law. If the debtor's assets or affairs are the subject of the foreign representative's request, the relief must be limited to the information necessary in that non-Main procedure. The goal is to persuade the court that relief in favour of a foreign action should not grant the foreign repatriation counsel overly wide powers.

Again, attention should also be given to art. 3 and art. 6 for full marks on this question.

Question 3.4 [maximum 1 mark] ½ 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]

ANSWER:

The mandatory moratorium caused by the recognition of the foreign main case provides a quick "freeze" that is necessary to avoid fraud and preserve the legitimate interests of the parties involved until the court may notify all parties involved and analyse the situation. Thus, such worldwide freezing orders obtained as pre-recognition temporary relief under Article 19 of the Model Law are unlikely to remain post-recognition under Article 21 of the Model Law in the interest of the Creditor and for value maximisation and quick realisation of the asset.

It should be included in the answer that art. 21 provide for another form for protection leaving the freezing order un-warranted.

QUESTION 4 (fact-based application-type question) [15 marks in total] 10 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]; 7 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]. 3 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]

ANSWER 4.1.1:

LAW:

The Model Law contains definitions of the terms "foreign proceeding" (subparagraph (a) and "foreign representative" but not of the person or body entrusted with the administration of the assets of the debtor in an insolvency proceeding in the enacting State. To the extent that it would be useful to define in the national statute the term used for such a person, this may be added to the definitions in the law enacting the Model Law.

The definitions of "**foreign proceeding**" and "**foreign representative**" limited the scope of application of the Model Law. For a proceeding to be susceptible to recognition or cooperation under the Model law, such as access to local courts, the foreign proceeding must have the attributes specified in **Article 2(a)** of the Model Law, and the foreign representative must meet the same criteria.

The definitions of proceedings or persons emanating from foreign jurisdictions avoid the use of expressions that may have different technical meaning in different legal systems and instead describe their purpose or function. This technique is used to avoid inadvertently narrowing the range of possible foreign proceedings that might obtain recognition and to avoid unnecessary conflict with terminology used in the enacting State.

A foreign proceeding is an insolvency proceeding that falls within the scope of the Model Law. The attributes required for a foreign proceeding to be recognized include the basis in law of the originating state and involvement of creditors collectively. It also includes control or supervision of the assets and affairs of the debtor by a court or another official body.

ANALYSIS:

For a recognition application in State A to be successful, the foreign proceeding opened in English Court must qualify as a "**foreign proceeding**" within the meaning of **Article 2(a)** of the Model Law and the "**foreign representative**" must qualify as a foreign representative within the meaning of Article 2(d) of the Model Law.

Article 2 of the Model Law specifies a number of qualities that must be included in a "**Foreign Proceeding**":

a. Collective Proceeding

The Model Law is designed to serve as a tool for all parties involved in a bankruptcy case to achieve a coordinated, worldwide solution. It's not meant to be utilized just as a collection tool for a single creditor or a group of creditors who may have started a collection action in another state. It's also not meant to be used to collect assets in a winding up or conservation procedure that doesn't include provisions for dealing with creditors' claims.

In the instant case the proceeding is intended to provide a tool for achieving a coordinated, global solution for all stakeholders of an insolvency proceeding as the investigations into the Bank have shown that it seems to have been potentially involved in a multi-million dollar fraud resulting in monies being sent to several overseas companies, including entities incorporated and registered in England.

A key consideration in determining whether a proceeding is collective for the purposes of the Model Law is whether the proceeding deals with substantially all of the debtor's assets and liabilities, subject to local priorities and statutory exceptions, as well as local exclusions relating to secured creditors' rights. The failure of a procedure to pass the collectivity test should not be based solely on the fact that a class of creditors' rights is unaffected. Since in the instant case as per

DGF amended list of creditors' claims totaling approximately USD 1.113 billion. The Affidavit states that the Bank's current, estimated deficiency exceeds USD 823 million. Consequently, the present suit has been filed by the DGF and Ms. G as the Applicant.

b. Pursuant to a Law relating to insolvency

Liquidation and restructuring can be carried out under non-insolvency legislation that deals with or remedies financial crisis. A simple action for a solvent legal entity that does not attempt to reorganize the entity's financial issues but rather seeks to terminate its legal existence is unlikely to be governed by an insolvency statute. The goal of the Model Law was to come up with a definition that was comprehensive enough to include a wide variety of insolvency regulations, regardless of the kind of legislation or law.

The Law of Country A and Banking Activity ("LBBA") triggered the proceedings in this matter since the Bank meets the conditions set out in Articles 75 and 76. Furthermore, under Article 77 of the LBBA, in such a circumstance, the banks are liquidated and DGF is appointed as their liquidator. Although the same is not an insolvency law, however, the same is covered under Model Law. Consequently qualifying the above condition.

c. Control or Supervision by a Foreign Court

Control or supervision can be exerted not only by the court, but also by an insolvency representative if the insolvency representative is, for example, under the court's control or supervision. A licensing authority's mere oversight of an insolvency representative would be insufficient.

In this scenario, DGF is not only supervising but actually participating in the process. In addition, as a liquidator, the DGF will have the authority to investigate the bank's history and file claims against anyone who are thought to be responsible for its demise.

d. For the purpose of reorganization or liquidation

Several forms of foreign proceeding may be ineligible for recognition because they are not for the declared goal of restructuring or liquidation. They can take a variety of forms, including processes aimed at preventing waste and dissipation rather than liquidating or reorganizing the insolvent estate. The foreign representative's rights and responsibilities may be more limited than those involved with liquidation or restructuring. Purely contractual negotiations between a debtor and its creditors may not be qualified for recognition under bankruptcy legislation. Other procedures that do not need judicial oversight or control may also be disqualified. Those measures would be difficult to handle in a general rule on recognition since they may take a variety of forms.

This is evident in the instant case as the Application is applied for recognition of liquidation of the Bank before the English Court.

CONCLUSION

Thus, it can be concluded that since all the above conditions are fulfilled by the Application, the same falls within the definition of “foreign proceeding” as defined in Article 2(a) of the Model Law

For full marks on this question a more detailed and elaborate explanation on the concepts of “foreign court”, “insolvency law”, administrative process should be examined and explained.

ANSWER 4.1.2:

LAW:

The “**foreign representative**” may be a person authorised in the foreign proceedings to administer those proceedings, which would include seeking recognition, relief, and cooperation in another jurisdiction, or they may simply be a person authorised specifically for the purposes of representing those proceedings, according to **Article 2(d)** of the Model Law. The Model Law makes no requirement that the foreign representative be authorised by the court (as specified in **Article 2(e)** of the Model Law), and so the concept is broad enough to cover appointments made by a special agency other than the court. Appointments made on a temporary basis are also included.

The fact of appointment of the foreign representative in the foreign proceeding to act in either or both of those capacities is sufficient for the purposes of the Model Law. A certified copy of the decision appointing the representative, a certificate verifying the appointment, or other documentation of the appointment acceptable to the receiving court are all required by **Article 15** of the Model Law. The Model Law’s definition in **Article 2(d)** of the Model Law is wide enough to encompass debtors who remain in possession after the start of insolvency procedures.

ANNALYSIS:

In the instant case the Applicant i.e. Ms G who was appointed pursuant to a decision of the Executive Board of the Directors of the DGF, vide **Resolution No. 1513** does not fall under the definition of “Foreign Representative” as defined in Article 2(d) of the Model Law as it fails to qualify the following conditions:

a. **Authorised Personnel:**

Ms. G is a DGF authorised personnel as per Resolution No. 1513.

b. **Appear in Foreign Proceeding:**

Articles 37, 38, 47-52, 521, and 53 of the DGF Law grants to Ms. G the authority to sign all agreements related to the sale of the bank’s assets in the manner prescribed by 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.

c. **Seeking Relief and Co-operation:**

The power to seek damages from a Bank related party, the power to seek damages from a non-banking financial institution that raised money from individuals as loans or deposits, and the power to arrange for the sale of the Bank's assets are all expressly excluded from Ms G's authority under Resolution 1513.

CONCLUSION:

Ms. G's ability to act and obtain appropriate relief in the English Proceeding would be hampered by the exclusion of power to claim damages from a related party of the Bank, power to make a claim against a non-banking financial institution that raised money as loans or deposits from individuals, and power to arrange for the sale of the Bank's assets.

However, the Bank's formerly designated liquidator has such ability. Thus, if both enter jointly as an applicant they will qualify as a "Foreign Representative" in toto.

A more detailed explanation of "appointment", authorisation and "administer" should be given along with the application of facts for full points. Attention should also be given as to DGF's status as a foreign representative.

*** End of Assessment ***