



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: 43,5 marks out of 50

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

QUESTION 1 (multiple-choice questions) [10 marks in total] 9 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] 10 marks

Question 2.1 [maximum 3 marks] 3 marks

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

The MLCBI does not explicitly specify the date for determination of COMI of a debtor. However, according to the Guide to Enactment and Interpretation of the UNCITRAL Model Law on Cross-Border Insolvency (GE), the appropriate date for determining the COMI of a debtor or whether an establishment exists is the date of commencement of the foreign proceedings against the debtor (which are being sought to be recognised in the enacting State).

The GE mentions that given the importance accorded to foreign court order initiating the insolvency proceedings and appointing the foreign representative in recognition proceedings, the date of commencement of the foreign proceedings is the appropriate date for determining the COMI or establishment (as the case may be) of the debtor.

The GE also notes that identifying the date of commencement as the date for determining COMI of a debtor provides a test which can be applied with certainty in such situations. This provides a clear test to identify a COMI or establishment even in situations where the business activity of the debtor halts after the commencement of the foreign insolvency proceedings. However, the COMI of a debtor might move and if such move is near the time when the foreign proceedings commenced then it will be more difficult to prove the requirements needed for identifying COMI such as it being readily ascertainable by third parties like the debtor's creditors.

Importantly, a somewhat different approach has been followed in the US, where in the case *Morning Mist Holdings Ltd v Krys* the court held that while COMI is to be decided depending on activities at or around the time of filing of the recognition application in the US, the court may look at activities in the time between commencement of the foreign proceedings and filing of the recognition application to determine the COMI.

Question 2.2 [maximum 3 marks] 3 marks

The following **three (3) statements** relate to particular provisions / concepts to be found in the Model Law. Indicate the name of the provision / concept (as well as the relevant Model Law article), addressed in each statement.

Statement 1 *"This Article provides guidance in case of concurrence of two foreign non-main proceedings."*

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

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

Statement 1 "This Article provides guidance in case of concurrence of two foreign non-main proceedings."

Concept: This Statement addresses the concept of coordination of more than one foreign non-main proceeding. In case of two concurrent foreign non-main proceeding, no foreign proceeding is treated preferentially. However, reliefs granted may be modified or terminated to ensure coordination between the two proceedings.

Relevant Model Law article: The relevant Model Law article that addresses cases where there are two concurrent foreign non-main proceedings is Article 30(c).

Statement 2 "The rule in this Article does not affect secured claims."

Concept: This Statement addresses the rule of payment in concurrent proceedings or the 'hotchpot rule'. This rule is intended to prevent situations where a creditor obtains more recovery than other creditors in the same class by receiving payments against the same claim in insolvency proceedings in different States. However, this rule does not affect ability of secured creditor claims to be paid in full (an issue which depends on the law of the jurisdiction where the proceeding are taking place).

Relevant Model Law article: The relevant Model Law article that addresses the hotchpot rule is Article 32.

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

Concept: This Statement addresses the concept of a rebuttable presumption that the debtor's registered office or habitual residence is presumed to be its centre of main interest (an undefined concept under the MLCBI).

Relevant Model Law article: The relevant Model Law article that addresses Statement 3 is Article 16(3).

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.**

In the *IBA* case appeal, the English Court of Appeal upheld the decision of the court of the first instance which refused to grant an indefinite moratorium continuation in relation to a restructuring in Azerbaijan. The Azeri foreign representative had sought this indefinite moratorium which was contested by two creditors who had claims against IBA under English law governed contracts and who had not submitted to the Azerbaijan proceedings.

The court of first instance relied on the Gibbs rule (i.e., debt governed by English law cannot be discharged through a foreign insolvency proceeding) and held that granting such indefinite moratorium cannot be used as a way around Gibbs rule because granting such a permanent stay would in effect affect the ability of the creditors to enforce their English law claims.

In the appeal, the English Court of Appeal affirmed the judgment of the lower court and held that an English court could only grant such a permanent stay if such stay was necessary to protect IBA's creditors' interest and if the stay was the appropriate way to ensure such protection and in the court's opinion none of these requirements were met.

Moreover, the Court of Appeal also noted if the intention of reliefs under Article 21 of the Model Law was to override creditor rights under the chosen law of their debt instruments, then such intention would have been made expressly mentioned.

The court also relied on the duty of the foreign representative's continuous obligation to report to the court on any substantial change of her own appointment to hold that once the foreign proceeding (i.e., the Azeri reconstruction) has ended and foreign representative does not hold an office anymore, reliefs granted under the Model Law would terminate. If it contemplated that continuation of relief even after the conclusion of the foreign proceeding then this would have been mentioned expressly.

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**.

According to **Article 29(a)** of the MLCBI, in case of recognition of a foreign main proceeding in an enacting State where a domestic proceeding has already been opened in respect of the debtor, then:

- Any interim reliefs granted under Article 19 of the MLCBI (such as the stay on execution against debtor's assets) and any post-recognition reliefs granted under Article 21 of the MLCBI (such as providing foreign representative reliefs such as

examination of witnesses, taking of evidence etc.) will need to be consistent with the domestic proceedings;

- No automatic reliefs can be granted upon recognition of the foreign main proceeding under Article 20 (such as suspension of right to transfer or dispose the debtor's assets etc.)

According to **Article 18** of the MLCBI, the foreign representative has an ongoing duty from the time of filing the application for recognition of the foreign proceedings to inform the court of the enacting State of:

- Any substantial change in the status of the recognized foreign proceeding or appointment of the foreign representative; and
- Any other foreign proceeding regarding the debtor that the foreign representative becomes aware of. This is in addition to the requirement to disclose all known foreign proceedings relating to the debtor in the application seeking recognition of the foreign proceeding by the foreign representative under Article 15(3) of MLCBI.

QUESTION 3 (essay-type questions) [15 marks in total] 12,5 marks

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

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

Question 3.1 [maximum 4 marks] 4 marks

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

The following access and coordination rights under the Model Law of State A can benefit the foreign representative:

Access rights in State A (under Chapter II of the Model Law):

- Direct access to courts of State A under Article 9 of the Model Law: The foreign representative is granted direct access and standing in the courts of the enacting State without formal and time-consuming requirements such as licenses or consular action.
- Standing to commence domestic insolvency proceeding under Article 11 of the Model Law: Under this article, a foreign representative is given the standing to commence domestic insolvency proceeding in State A as long as conditions for commencement of such proceedings are met. This standing is independent of and does not require foreign proceedings to be recognized first.
- Ability to file a recognition application under Article 15 of the Model Law: The foreign representative has the right to file an application for recognition of the foreign proceeding in courts of State A. Such application needs to meet the other requirements set out under the Model Law.

Therefore, prior to recognition of the foreign proceedings, the foreign representative may rely on these access rights to directly access the courts of State A. Other access rights such as standing to participate or intervene in local proceedings relating to the debtor or initiate actions to avoid acts detrimental to the debtors' creditors under Article 12, 23 and Article 24 are only granted post recognition of the foreign proceedings.

Co-operation and co-ordination rights in State A (under Chapter IV and V of the Model Law):

Co-operation rights under Chapter IV of the Model Law

- Mandatory co-operation and direct communication by courts in State A with foreign representatives under Article 25 of the Model Law: Article 25 mandates that courts of the enacting State co-operate with the foreign representative to the maximum extent possible. It also provides that the court can directly communicate with, request assistance or information from the foreign representative. This right to have direct communication with the court helps in avoiding the requirement to use time-consuming processes such as letters rogatory.
- Mandatory co-operation and direct communication by insolvency office-holder in State A with foreign representatives under Article 26 of the Model Law: This article mandates requirements similar to the ones imposed on domestic courts on domestic insolvency office-holders of the enacting State (i.e., State A) as well, and requires them to co-operate with the foreign representative to the maximum extent possible. It also provides them the right to directly communicate with the foreign representative. Therefore, in case an insolvency office-holder has been appointed for the debtor in State A, the foreign representative can rely on rights under Article 26 to cooperate and communicate with them to achieve optimal results.
- Manner in which cooperation under Article 25 and 26 can be implemented under Article 27: Article 27 lays down an illustrative list of ways in which cooperation can be achieved under Article 25 and 26. For instance, agreements can be entered into in relation to coordination of proceedings, information may be communicated using appropriate means etc. Therefore, the foreign representative may rely on these means to coordinate and cooperate with courts in State A.

These co-operation rights are not dependent on prior recognition of the foreign proceedings and provide a legal basis for courts and foreign representatives of different jurisdictions to cooperate to achieve efficient results. These rights can even extend to foreign proceedings in jurisdictions which does not have a COMI or establishment of the debtor but merely presence of its assets. Therefore, the foreign representative can rely on these rights to seek cooperation with State A even before a recognition application is made.

Co-ordination of concurrent proceedings under Chapter V

The Model Law also lays down rules for co-ordination of concurrent proceedings in Chapter V (Article 28 – 32) which will only become applicable upon recognition of the foreign proceeding, in case there are concurrent domestic proceedings in State A, or if any other foreign main proceeding or foreign non-main proceedings have been recognized in State A.

The core principle followed in such situations is that reliefs granted in case of recognition of foreign proceedings should be consistent with the domestic insolvency proceedings. For instance, in case there is an ongoing domestic proceeding which is then followed by recognition of foreign main proceedings, then the automatic reliefs under Article 20 do not apply. In case of concurrent foreign main and foreign non-main proceedings, the reliefs granted in relation to the foreign non-main proceedings will need to be consistent with the foreign main proceedings.

Therefore, in case there are any concurrent proceedings, the foreign representative may need to look at Chapter V provisions (such as Article 29 and 30 of the Model Law) to understand

the hierarchy amongst the concurrent proceedings and the reliefs that can be expected to be granted upon recognition.

Question 3.2 [maximum 5 marks] 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.

Evidence, restrictions, exclusions and limitations that may need to be considered as well as the judicial scrutiny that will need to be overcome for a recognition application in State A to be successful are:

Evidence required for a recognition application: The following evidence needs to be submitted with a recognition application:

- Article 15(2) of the Model Law requires a recognition application to be accompanied with:
 - a) A certified copy of the foreign court order initiating the foreign proceeding and appointing the foreign representative; or
 - b) A foreign court certificate affirming the existence of the foreign proceeding and appointment of the foreign representative; or
 - c) If the above two records are not available, then the foreign representative needs to submit some evidence which is acceptable to the court showing the existence of the foreign proceeding and appointment of the foreign representative.
- Article 15(3) requires the application to be accompanied with a statement identifying all foreign proceedings regarding the debtor which the foreign representative is aware of.
- Article 15(4) provides that the court of State A may need translations of the documents submitted with the recognition application in an official language of State A.

Judicial scrutiny: According to Article 17(1) of the Model Law, the court of State A may recognize the foreign proceeding (assuming that the foreign proceeding and the foreign representative qualify as such under Article 2(a) and Article 2(d) of the MLCBI) if:

- The evidence required under Article 15 (mentioned in the paragraph above) is provided;
- The recognition application is submitted to the court identified for this purpose under Article 4 of Model Law (which requires the enacting State to identify a court for the purpose of deciding recognition applications under the Model Law).

According to Article 17(2):

- The foreign proceeding may be recognized as a foreign main proceeding if it is taking place in a State where the centre of main interest of the debtor lies; and
- The foreign proceeding may be recognized as a foreign non-main proceeding if it is taking place in a State where an establishment of the debtor lies.

Presumptions that may be made by the court of State A while deciding recognition application:

- Under Article 16(2), the court of State A can presume that documents submitted along with the recognition application are authentic even if they have not been legalized.

- According to Article 16(3), the place of debtor's registered office or habitual residence can be presumed to be the debtors centre of main interest (in the absence of proof to the contrary).

Restrictions, exclusions and limitations to be considered: The following restrictions, exclusions or limitations may be relevant to a recognition application:

- Model Law does not apply to debtor under Article 1(2) of the Model Law: If the debtor is an entity that has been identified under Article 1(2) to which the Model Law does not apply, then recognition of its foreign proceeding may be denied on that ground.
- Recognition is manifestly contrary to the public policy of State A: According to Article 6 of the Model Law, recognition may be denied in case such recognition is manifestly contrary to the public policy of State A.
- Recognition conflicts with State A's other obligations: According to Article 3 of the Model Law, in case recognition of the application is in conflict with State A's obligation under any other treaty or agreement of State A, then its obligation under such treaty or agreement will prevail and recognition may be denied on that basis.
- Debtor does not have centre of main interest or establishment in the foreign State: The foreign proceeding may not be recognized if the debtor does not have a centre of main interest or an 'establishment' (as defined under Article 2(f) of the Model Law). Mere presence of assets in the foreign jurisdiction is not sufficient grounds for recognition of a foreign proceeding under the Model Law;
- Recognition may be terminated or modified: Under Article 17(4), the court of State A may modify or terminate the recognition if it is shown that the grounds for granting recognition application are lacking or have stopped existing.
- Reliefs granted in case of concurrent proceedings: In case there is a pre-existing domestic proceeding relating to the debtor or if any other foreign proceeding has been recognized in State A, then the reliefs granted upon recognition of the foreign proceedings in State B will need to be consistent with the domestic proceedings or the foreign proceedings in accordance with Article 29 and 30 of the Model Law. If the foreign proceeding is recognized as a foreign main proceeding, then the automatic reliefs under Article 20 will not be applicable in case a domestic proceeding is pre-existing. As mentioned in another answer above, the core principle followed in such situations is that reliefs granted in case of recognition of foreign proceedings should be consistent with the domestic insolvency proceedings or any other foreign proceedings which has already been recognized. For instance, in case of concurrent foreign main and foreign non-main proceedings, the reliefs granted in relation to the foreign non-main proceedings will need to be consistent with the foreign main proceedings.

Question 3.3 [maximum 5 marks] 3 marks

As far as relief is concerned, briefly explain (with reference to the relevant MLCBI articles) what pre- and post-recognition relief can be considered in the context of the MLCBI, as well as any restrictions, limitations or conditions that should be considered in this context. For purposes of this question, it can be assumed that there is no concurrence of proceedings.

Pre-recognition reliefs

The pre-recognition interim reliefs (i.e., from the time of filing of application for recognition till such application is decided) that may be considered in the context of the MLCBI are specified under Article 19 of the Model Law.

If interim reliefs are urgently required to protect the debtor's assets or its creditors' interests, then the court of the enacting State may, at the request of the foreign representative grant

provisional reliefs under Article 19(1). Appropriate notice of the interim relief granted may be provided as per Article 19(2). These reliefs include:

- Stay execution against the debtor's assets;
- Entrust the foreign representative (or another person designated by the court for this purpose) with the administration or realisation of all or part of the debtor's assets located in the enacting State to protect and preserve the asset's value, which by their nature or other circumstances are perishable, or susceptible to devaluation or in jeopardy;
- Suspension of right to transfer, encumber or otherwise dispose of the debtor's assets.
- Provide for examination of witnesses, taking evidence, or information delivery relating to the debtor's affairs, rights, obligations or liabilities;
- Grant of additional reliefs that are made available to domestic liquidator or insolvency office holder under the laws of the enacting State.

Restrictions, limitations or conditions that may apply in relation to these automatic reliefs under Article 19 are:

- Relief is urgently required: Relief under Article 19(1) must be urgently required to protect the debtor's assets or its creditors' interests;
- Entrusting of asset only in cases where the value of the asset is by its very nature perishable: Relief to entrust debtor's asset to the foreign representative (or another person designated by the court for this purpose) would only be done to protect and preserve the value of the asset which by its very nature is susceptible to devaluation;
- Termination of interim reliefs upon decision on recognition application: Reliefs under Article 19 terminate once the recognition application has been decided, as per Article 19(3) of the Model Law;
- Refusal to grant interim relief in case it interferes with a foreign main proceeding: Court of the enacting may refuse to grant interim reliefs under Article 19 if granting such relief would interfere with a foreign main proceeding, as per Article 19(4) of the Model Law.
- Requirement to protect creditor interest and interest of other interested parties: Article 22 provides that the court of the enacting State while exercising its powers under Article 19 should be satisfied that the interests of the creditors and other interested persons (including the debtor) are adequately protected. It may subject such relief to certain conditions or modify or terminate such relief at the request of the foreign representative, or person affected by it or on its own, according to Article 22(2) and (3).

Post-recognition relief (for foreign main proceeding)

Upon recognition of foreign main proceeding (i.e., foreign proceeding is in the State where the debtor's centre of main interest lies), the following automatic reliefs are granted under Article 20(1) of the Model Law:

- Stay on commencement or continuation of individual actions or proceedings relating to the debtor's assets, rights, obligations or liabilities. While this provision affects arbitrations as well, such a stay may be difficult to enforce if the arbitration is not taking place in the enacting State or the jurisdiction of the foreign main proceeding.
- Stay on execution against the debtor's assets; and
- Suspension of right to transfer, encumber or otherwise dispose of the debtor's assets;

Restrictions, limitations or conditions that may apply in relation to these automatic reliefs under Article 20 are:

- Reliefs subject to protections/exceptions against such stay under law of the enacting State: According to Article 20(2) of the Model Law, the court in the enacting State may modify or terminate the reliefs granted under Article 20(1) to make these reliefs consistent with the protections included in insolvency laws of the enacting State that lay down any exceptions or limitations to the automatic stay and suspension under Article 20(1). This can include protections or exceptions relating to enforcement of secured claims, actions relating to post-insolvency claims.
- Preservation of claims against debtor: According to Article 20(3), relief granted under Article 20(1)(a) (i.e., stay on individual actions) does not affect right to commence individual actions or claims to preserve a claim against the debtor.
- Right to commence domestic insolvency proceeding and file claims in it: According to Article 20(4), the automatic reliefs granted under Article 20 do not affect the right to commence insolvency proceedings in the enacting State or the ability to file claims in such a proceeding.

Post-recognition relief (for foreign main and foreign non-main proceeding)

Post recognition of a foreign proceeding (main or non-main), Article 21(1) provides the court in the enacting State, the discretion to grant appropriate reliefs where necessary to protect the debtor's assets or in its creditors' interest, on the request of the foreign representative which include:

- Stay on commencement or continuation of individual actions or proceedings relating to the debtor's assets, rights, obligations or liabilities (to the extent not already stayed under Article 20(1)(a) in case of a foreign main proceeding);
- Stay on execution against the debtor's assets (to the extent not already stayed under Article 20(1)(b) in case of a foreign main proceeding);
- Suspension of right to transfer, encumber or otherwise dispose of the debtor's assets (to the extent not already stayed under Article 20(1)(c) in case of a foreign main proceeding);
- Provide for examination of witnesses, taking evidence, or information delivery relating to the debtor's affairs, rights, obligations or liabilities;
- Entrusting the foreign representative or another person designated by the court to administer or realise all or part of the debtor's assets in the enacting State;
- Extension of interim reliefs granted under Article 19(1) of the Model Law;
- Grant of additional reliefs that are made available to domestic liquidator or insolvency office holder under the laws of the enacting State.

Article 21(2) provides that at the request of the foreign representative, the court of the enacting State may at its discretion entrust the distribution of the debtor's assets (all or part) in the enacting State to the foreign representative or another person designated by the court for this purpose, provided that it is satisfied that the interests of all domestic creditors are adequately protected.

Restrictions, limitations or conditions that may apply in relation to these automatic reliefs under Article 21 are:

- Limits to reliefs that may be granted under Article 21: Case laws have laid down certain limitations to reliefs that fall under the scope of Article 21. For example, an English court in the case *Rubin v Eurofinance SA* held that enforcement of insolvency related default judgment is not covered under the ambit of the Model Law. In another case, an English court in the *Antony Gibbs* case held that foreign insolvency law cannot be applied to discharge or compromise a debt governed by English law and this is not a relief which can be granted under the Model Law. In the IBA case, an English court

noted that the Model Law does not provide it jurisdiction to grant an indefinite moratorium against a debtor.

- Relief should be necessary to protect the debtor's assets or its creditor's interest: Reliefs under Article 21(1) are up to the discretion of the court and can be provided where necessary to protect the debtor's assets or its creditors' interest.
- Interest of the domestic creditors should be adequately protected: Reliefs under Article 21(2) are up to the discretion of the court and can be provided only if the court is satisfied that the interest of the domestic creditors are adequately protected.
- Article 21(3) requirements in case of reliefs granted in relation to foreign non-main proceeding: In case of granting reliefs under Article 21 to a foreign representative of a foreign non-main proceeding, Article 21(3) provides that the court also needs to be satisfied that the relief relates to assets that under the laws of the enacting State should be administered in such foreign non-main proceeding and relates to information required under that proceeding.
- Requirement to protect creditor interest and interest of other interested parties: Article 22 provides that the court of the enacting State while exercising its powers under Article 21, should be satisfied that the interests of the creditors and other interested persons (including the debtor) are adequately protected. It may subject such relief to certain conditions or modify or terminate such relief at the request of the foreign representative, or person affected by it or on its own, according to Article 22(2) and (3).

In addition to the post recognition relief under Article 20 and 21, according to Article 23(1), upon recognition, the foreign representative also gets a standing to initiate actions to avoid acts which are prejudicial to the debtor's creditors that are available in the enacting State to liquidators/administrators etc. In case of a foreign non-main proceeding, the action should relate to assets which as per the law of the enacting State should be administered in the foreign non-main proceeding.

Under Article 24 of the Model Law, the foreign representative also gets a standing to intervene in any proceedings in the enacting State to which the debtor is a party, provided requirements under the laws of the enacting State are met.

Again, reference should also be made to art. 3 and art. 6 here for full marks on the 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?

According to Article 19(3), the relief granted under Article 19 of the MLCBI terminates post recognition of the proceeding, unless it is expressly extended under Article 21(1)(f).

Given the IBA judgment, where the English court refused to grant an indefinite freezing order on the grounds that it does not make sense to have such an order in place once the foreign proceeding has terminated as well as the fact that such a permanent stay could in effect violate the protections under Gibbs rule (in case English court is the enacting State and there English law governed debt is present), it is unlikely that a worldwide freezing order will continue indefinitely post-recognition through relief under Article 21.

It should be mentioned here 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] 12 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.

4.1.1 According to Article 2(a) of the MLCBI, the key elements mentioned below need to be met in order for a proceeding to qualify as a “foreign proceeding” under it. Each of these elements are discussed below in the context of the Bank’s liquidation in Country A to assess whether they are met or not. Key features of a “foreign proceeding” under Article 2(a) of the MLCBI are:

- **Collective judicial or administrative proceeding:** The foreign proceeding needs to be collective in nature. It may be a judicial or administrative proceeding, and even includes an interim proceeding.
Application to given facts: A key factor to be considered in determining whether a process is collective or not is to assess whether most of the debtors and assets and liabilities are dealt with in the proceedings. In the given facts, DGF, as a liquidator had extensive powers to take over management of and also to identify and recover the property and assets of Commercial Bank for Business Corporation (the Bank). It also has the power to compile a list of creditor claims and seek to satisfy those claims. Therefore, the liquidation proceedings are likely to satisfy the test of being a collective proceeding.
While the proceeding may satisfy the requirement to be an administrative proceeding, it may not satisfy the requirement of being a judicial one (please see discussion of requirement for the assets and affairs of the debtor to be subject to the control and supervision of a foreign court below).
- **Proceeding should take place in a foreign State:** This requirement stands satisfied as the liquidation of the Bank is taking place in Country A.
- **Proceeding should be conducted under a law related to insolvency:** According to the Guide to Enactment of the MLCBI, this requirement does not require the law under which the foreign proceeding is taking place to be labelled as an “insolvency law” but a law that deals with addressing insolvency and severe financial stress.
Application to given facts: Both the LBBA and the DGF Law while not expressly labelled as insolvency law, are laws that deal with addressing insolvency of banks. While Article 76 of the LBBA lays down the requirements for classifying a bank as insolvent. The DGF Law provides for the procedure to be followed in case a bank is declared insolvent (i.e., the provisional administration followed by liquidation of their operations and withdrawing the bank from the market). Therefore, since these laws address insolvency and severe financial stress of banks, they meet the requirement of being a law related to insolvency. Reliance may also be placed on the judgment of an English court in the Agrokor case, which held that law relating to insolvency requirement may be satisfied if insolvency is one of the reasons on the basis of which proceedings can be commenced. Under Article 34 of the DGF Law, once a bank has been classified as insolvent (determined according to Article 76 of the LBBA), DGF can begin the process of removing it from the market by initially undertaking provisional administration followed by liquidation. Therefore, it meets the requirement of being a law related to insolvency.
- **Debtor’s assets and affairs should be subject to the control and supervision of a foreign court under such proceeding:** The MLCBI does not lay down the standard of control or supervision which is required to meet this test and such control need not be actual or direct but even potential is sufficient. However, the Guide to Enactment does mention that supervision of an insolvency representative by a licensing authority is not sufficient to satisfy this requirement.

Application to given facts: This requirement is the one which the Applicants might struggle with satisfying. Article 77 of the LBBA provides that a bank can be liquidated by the National Bank (NB) directly which can revoke its license. This process does not appear to require supervision by courts of country A. The other entity involved in the liquidation process is DGF, which is a governmental body tasked with the power to act as or appoint authorised persons to act as an administrator in the Bank's provisional administration followed by liquidation. According to Article 77 of the LBBA, the DGF automatically becomes the liquidator of a bank on the date that it receives confirmation of NB's decision to revoke the bank's license. Following this the DGF acquires all powers of a liquidator under Country A's laws. Here again, there does not appear to be any supervision over the assets and affairs of the Bank during the liquidation proceeding by any court of Country A. Therefore, even though the threshold for meeting this requirement of court supervision under the MLCBI is low, the Applicants may still fail to meet this requirement as there appears to be no court supervision over the assets and affairs of the debtor in the liquidation proceedings.

- **Purpose of the proceeding should be reorganisation or liquidation:** According to the given facts, the DGF is tasked with the responsibility of withdrawing insolvent banks from the market to be completed through liquidation. Therefore, this requirement for the purpose of the proceeding to be liquidation is met by the liquidation proceedings being undertaken for the Bank.

Conclusion: As discussed above, the Bank's liquidation satisfies most of the key requirements to qualify as a foreign proceeding under Article 2(a) of the MLCBI. However, the Applicants may find it challenging to show that the requirement that the debtor's assets and affairs are subject to the control and supervision of a court of Country A under the liquidation proceeding is being met. Therefore, whether they will succeed in their application will depend on whether they can show if there was any court supervision to satisfy this test.

For full marks on this question it should be addressed if the proceeding is judicial or administrative and also a more detailed explanation of the concepts of collective and "foreign court"

4.1.2 According to Article 2(d) of the MLCBI, the key elements mentioned below need to be met in order for a proceeding to qualify as a "foreign representative" under it. Each of these elements are discussed below in the context of the Applicants to assess whether they are met or not. Key features of a "foreign representative" under Article 2(d) of the MLCBI are:

- **Representative should be a person or a body, even if appointed on an interim basis:** The Applicants (i.e., DGF and Ms G (as DGF's authorised person)) satisfy the test of being a person or body. While DGF has been formally appointed as the liquidator, it is possible for it to replace Ms G as its authorised person. However, since the definition also includes someone appointed on an interim basis, this should not pose a challenge to recognition of DGF and Ms G together as the foreign representative of the Bank's liquidation proceedings in country A.
- **Representative should be authorised in a foreign proceeding:** This requirement does not require the representative to be authorised by a court. Therefore, appointment of Ms G by DGF through its resolution 1513 according to Article 48(3) of the DGF Law is sufficient to meet this test. DGF could argue that it was authorised to act as the liquidator by virtue of the provisions in LBBA and DGF Law. However, the English court could raise challenges to their authorisation if it challenges that the Bank's liquidation classifies a foreign proceeding in the first place (on the grounds that there is no court supervision over the affairs and assets of the debtor).
- **Representative should be appointed with the purpose of administering the reorganisation or liquidation of the assets and affairs of the debtor or to act as the representative of the foreign proceeding:** DGF and its authorised person (Ms

G) have been given extensive powers (to take control of bank's assets, compile creditor claims etc.) with the purpose of liquidation of the assets and affairs of the Bank. Even though certain functions such as the power to claim damages from a related party of the Bank is not within the authority of Ms G, these fall within the ambit of DGF's authority and overall, the Applicants have sufficient authority and have been appointed with the purpose of administering the liquidation of the Bank's assets.

Conclusion: The Applicants (DGF and Ms G) satisfy most requirements of being classified as a "foreign representative" as defined under Article 2(d) of the MLCBI. However, as mentioned above, the English court could raise a challenge on the ground that the Applicants have not been authorised in a "foreign proceeding" as the Bank's liquidation fails the test of being a foreign proceeding (as it may not satisfy the test of being a proceeding where there is court supervision over the assets and affairs of the debtor).

*** End of Assessment ***