



SUMMATIVE (FORMAL) ASSESSMENT: MODULE 2A

THE UNCITRAL MODEL LAWS RELATING TO INSOLVENCY

This is the **summative (formal) assessment** for **Module 2A** of this course and is compulsory for all candidates who **selected this module as one of their compulsory modules from Module 2**. Please read instruction 6.1 on the next page very carefully.

If you selected this module as **one of your elective modules**, please read instruction 6.2 on the next page very carefully.

The mark awarded for this assessment will determine your final mark for Module 2A. In order to pass this module, you need to obtain a mark of 50% or more for this assessment.

INSTRUCTIONS FOR COMPLETION AND SUBMISSION OF ASSESSMENT

Please read the following instructions very carefully before submitting / uploading your assessment on the Foundation Certificate web pages.

1. You must use this document for the answering of the assessment for this module. The answers to each question must be completed using this document with the answers populated under each question.
2. All assessments must be submitted electronically in MS Word format, using a standard A4 size page and a 11-point Arial font. This document has been set up with these parameters – **please do not change the document settings in any way. DO NOT** submit your assessment in PDF format as it will be returned to you unmarked.
3. No limit has been set for the length of your answers to the questions. However, please be guided by the mark allocation for each question. More often than not, one fact / statement will earn one mark (unless it is obvious from the question that this is not the case).
4. You must save this document using the following format: **[student ID.assessment2A]**. An example would be something along the following lines: 202122-336.assessment2A. **Please also include the filename as a footer to each page of the assessment** (this has been pre-populated for you, merely replace the words “studentID” with the student number allocated to you). Do not include your name or any other identifying words in your file name. **Assessments that do not comply with this instruction will be returned to candidates unmarked.**
5. Before you will be allowed to upload / submit your assessment via the portal on the Foundation Certificate web pages, you will be required to confirm / certify that you are the person who completed the assessment and that the work submitted is your own, original work. Please see the part of the Course Handbook that deals with plagiarism and dishonesty in the submission of assessments. **Please note that copying and pasting from the Guidance Text into your answer is prohibited and constitutes plagiarism. You must write the answers to the questions in your own words.**
- 6.1 If you selected Module 2A as one of your **compulsory modules** (see the e-mail that was sent to you when your place on the course was confirmed), the final time and date for the submission of this assessment is **23:00 (11 pm) GMT on 1 March 2022**. The assessment submission portal will close at 23:00 (11 pm) GMT on 1 March 2022. No submissions can be made after the portal has closed and no further uploading of documents will be allowed, no matter the circumstances.
- 6.2 If you selected Module 2A as one of your **elective modules** (see the e-mail that was sent to you when your place on the course was confirmed), you have a **choice** as to when you may submit this assessment. You may either submit the assessment by **23:00 (11 pm) GMT on 1 March 2022** or by **23:00 (11 pm) BST (GMT +1) on 31 July 2022**. If you elect to submit by 1 March 2022, you **may not** submit the assessment again by 31 July 2022 (for example, in order to achieve a higher mark).
7. Prior to being populated with your answers, this assessment consists of **12 pages**.

ANSWER ALL THE QUESTIONS

Total marks: 43 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] 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.

The correct answer is D

Question 1.3

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

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

Question 1.4

“Cross-border insolvencies are inherently chaotic and value evaporates quickly with the passage of time”. Which of the following rules or concepts set forth in the Model Law **best addresses** this feature of cross-border insolvencies?

- (a) The *locus standi* access rules.
- (b) The public policy exception.
- (c) The safe conduct rule.
- (d) The “hotchpot” rule.

Question 1.5

For a debtor with its COMI in South Africa and an establishment in Brazil, foreign main proceedings are opened in South Africa and foreign non-main proceedings are opened in Brazil. Both the South African foreign representative and the Brazilian foreign representative have applied for recognition before the relevant court in the UK. Please note that South Africa has implemented the Model Law subject to the so-called principle of reciprocity (based on country designation), Brazil has not implemented the Model Law and the UK has implemented the Model Law without any so-called principle of reciprocity. In this scenario, **which of the following statements is the most correct one?**

- (a) The foreign main proceedings in South Africa will not be recognised in the UK because the UK is not a designated country under South Africa’s principle of reciprocity, but the foreign non-main proceedings in Brazil will be recognised in the UK despite Brazil not having implemented the Model Law.
- (b) Both the foreign main proceedings in South Africa and the foreign non-main proceedings in Brazil will not be recognised in the UK because the UK has no principle of reciprocity and Brazil has not implemented the Model Law.

(c) Both the foreign main proceedings in South Africa and the foreign non-main proceedings in Brazil will be recognised in the UK.

(d) None of the statements in (a), (b) or (c) are correct.

Question 1.6

Which of the following statements regarding concurrent proceedings under the Model Law **is true**?

(a) No interim relief based on Article 19 of the Model Law is available if concurrent domestic insolvency proceedings and foreign proceedings exist at the time of the application of the foreign proceedings in the enacting State.

(b) In the case of a foreign main proceeding, automatic relief under Article 20 of the Model Law applies if concurrent domestic insolvency proceedings and foreign proceedings exist at the time of the application of the foreign proceedings in the enacting State.

(c) The commencement of domestic insolvency proceedings prevents or terminates the recognition of a foreign proceeding.

(d) If only after recognition of the foreign proceedings concurrent domestic insolvency proceedings are opened, then any post-recognition relief granted based on Article 21 of the Model Law will not be either adjusted or terminated if consistent with the domestic insolvency proceedings.

Question 1.7

When using its discretionary power to grant post-recognition relief pursuant to Article 21 of the Model Law, what should the court in the enacting State primarily consider?

(a) The court must be satisfied that the interests of the creditors and other interested parties, excluding the debtor, are adequately protected.

(b) The court should consider whether the relief requested is necessary for the protection of the assets of the debtor or the interests of the creditors and strike an appropriate balance between the relief that may be granted and the persons that may be affected.

(c) The court should consider both (a) and (b).

(d) Neither (a) nor (b) must be considered by the court.

Question 1.8

Which of the statements below regarding the Centre of Main Interest (or COMI) and the Model Law **is incorrect**?

(a) COMI is a defined term in the Model Law.

(b) For a corporate debtor, the Model Law does contain a rebuttable presumption that the debtor's registered office is its COMI.

- (c) While (for purposes of the Model Law) the COMI of a debtor can move, the closer such COMI shift is to the commencement of foreign proceedings, the harder it will be to establish that the move was “ascertainable by third parties”.
- (d) None of the above.

Question 1.9

Which of the following types of relief have, prior to the adoption of the Model Law on Recognition and Enforcement of Insolvency-Related Judgments, been declared beyond the limits of the Model Law?

- (a) Enforcement of insolvency-related judgments.
- (b) An indefinite moratorium continuation.
- (c) Both (a) and (b).
- (d) Neither (a) nor (b).

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 Guide to Enactment and Interpretation of the UNCITRAL MLCBI (the “GEI”) proposes that the most appropriate date in determining or identifying COMI of a debtor is the date on which the foreign proceeding (for which the recognition is sought) was commenced (paragraph 159 of the GEI). Furthermore, paragraph 160 of the GEI, as well as paragraph 143 of the Judicial Perspective of the UNCITRAL MLCBI (the “JP”), propose that the same considerations shall apply for the appropriate date for determining whether an establishment exists, and therefore the date on which the foreign proceeding was commenced shall also be the most appropriate in determining the existence of an establishment.

However, decisions by courts in states enacting the MLCBI have also made references to different alternative dates, other than the date on which the foreign proceeding was commenced, as the most appropriate in determining or identifying COMI. These alternative dates have included;

- (a) the date on which the application for recognition is made - whereby courts supporting the reference to this date have focused on the present tense “has” in article 17 paragraph 2 of the MLCBI, which indicates that the COMI shall be in existence when the application for recognition is made;
- (b) the date the court was called upon to decide the application - whereby courts supporting the use of this date have relied on the provisions in the MLCBI which require the foreign representative to notify the recognizing court of changes in status, or provisions in the MLCBI that require the modification or termination of recognition based on changes in circumstances, which suggest that these provisions in the MLCBI promote flexibility and suggest that the courts shall consider actual facts in arriving at COMI determination rather than setting an arbitrary determination point; and
- (c) the date that is based on operational history of the debtor – while this approach has been argued in several cases, it has been rejected for the likelihood of conflicting COMI determinations by different courts, resulting in conflicting main proceedings, which thus defeats the goal of uniformity and harmonization.

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:

Article 30(c) of the MLCBI provides that, in the case involving two foreign non-main proceedings, the MLCBI does not prescribe any order of preference, but the court shall try to facilitate coordination of the concurrent proceedings, and any relief granted may be terminated or modified such that there is consistency between the proceedings.

Statement 2:

Article 31 of the MLCBI sets forth the “hotchpot” rule which tries to ensure that no creditor shall obtain more favourable treatment or payment, than the other fellow creditors in the same class. The “hotchpot” rule is not intended to affect the ranking of claims as established by the law of the enacting State, and therefore would not affect the secured creditors with *in-rem* rights.

Statement 3:

Article 16(3) of the MLCBI sets forth the rebuttable presumption that the debtor’s COMI is presumed to be the debtor’s registered office, or habitual residence in case of individual / natural person. Case laws developed by numerous courts applying the MLCBI have argued that, the derivation of the concept of COMI in MLCBI, as well as the various guides followed in interpreting COMI, have suggested that COMI in MLCBI should bear similar interpretation given to it in the EIR.

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.**

Article 21 (1) of the MLCBI sets forth non-exhaustive reliefs that are available and can be granted by, and under the discretion of, the recognizing courts, and article 21 in general provides a broad discretion to courts in deciding any appropriate relief that is in line with the objective of the MLCBI, to protect assets of the debtor as well as interest of the creditors. Article 22 (2) further empowers the recognizing courts to subject the reliefs granted under Article 21, to any conditions that are appropriate. While the MLCBI provides the recognizing courts with a very broad discretions with regards to reliefs, they are not without limits. Recognizing courts have showcased self-restrain and apply certain limits to the discretions afforded by the MLCBI.

In the so-called *IBA* case, following a recognition of foreign main proceeding (that took place in Azerbaijan), the foreign representative applied for a relief under article 21 of the MLCBI, in the form of indefinite continuation of the automatic moratorium that resulted from the recognition order. This application for relief was contested by two creditors who had claims against the debtor under debt instruments that were governed by English laws, and had not submitted to the jurisdiction of foreign insolvency proceedings. Under English laws, the so-called Gibbs Rule stipulates that debt governed by English laws cannot be discharged or compromised by foreign insolvency proceedings, unless the relevant creditors have submitted to the foreign proceedings. In the *IBA* case, the two contesting creditors did not submit themselves to the Azeri foreign proceedings and as such the exception under the Gibbs Rule would not apply to their claims.

The court of first instance denied the application for the relief in the form on indefinite continuation of the moratorium, and the ruling judge opined that a permanent stay cannot be deployed to circumvent the Gibbs Rule, and that the court did not have jurisdiction to grant the relief requested because the provisions of the MLCBI do not empower the court to vary or to discharge substantive rights under the English laws such as rights accorded by the Gibbs Rule.

At the appellate level, the English Court of Appeal upheld the decision of the court of first instance, but the appellate court opined that the crux of the case was not an issue of jurisdiction in the strict sense, but that an indefinite continuation of moratorium requested would prevent the English creditors from their rights under the Gibbs Rule, and that the continuation would unnecessarily prolong the moratorium beyond the stay for reconstruction and restructuring imposed by the foreign proceeding itself.

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**.

Where there are concurrent proceedings taking place in the enacting State and the foreign state, and the foreign proceeding is recognised as a foreign main proceeding, articles 29(a) and 29(b) of the MLCBI requires that the court in the enacting State shall seek cooperation and coordination of the concurrent proceedings, by applying the following rules on reliefs;

- If the domestic proceeding in the enacting State was already taking place when application for recognition of the foreign proceeding was filed, article 29(a) of the MLCBI requires that;
 - (i) any relief to be granted under article 19 and 21 of the MLCBI must be consistent with the domestic proceeding in the enacting State; and
 - (ii) automatic relief under article 20 of the MLCBI would not apply;
- If the domestic proceeding in the enacting State was only commenced after the application for recognition of the foreign proceeding was filed (and the foreign main proceeding was granted recognition after the domestic proceeding was commenced), article 29(b) of the MLCBI requires that;
 - (i) any interim relief in effect under article 19 of the MLCBI shall be reviewed by the court, and modified or terminated to be consistent with the domestic proceeding;
 - (ii) any relief to be granted under article 21 of the MLCBI must be consistent with the domestic proceeding in the enacting State; and
 - (iii) any stay and suspension pursuant to article 20 of the MLCBI shall be modified or terminated, to be consistent with the domestic proceeding.

Article 18 of the MLCBI sets forth the duty that the foreign representative in the foreign main proceeding has, towards the court in the enacting State, from the time of the filing of application for recognition of the foreign proceeding, to promptly inform the court in the enacting State of;

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

QUESTION 3 (essay-type questions) [15 marks in total] 10,5 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?

Access and co-operation (co-ordination) are two of the four key elements that are the focus of the MLCBI.

Access rights in State A (the enacting State) provide standing before the courts in State A for the foreign representative. Article 9 of the MLCBI provides a foreign representative with direct access to courts in State A, without requiring any prior recognition of the foreign proceeding in State B. Similarly, article 11 of the MLCBI provides the foreign representative standing to request commencement of domestic insolvency proceeding in State A, without requiring any prior recognition of the proceeding in State B. The access provisions in the MLCBI aim to save time and expense, providing the foreign representatives with primary standing in courts without the need for consular requirements or formal licenses that are otherwise applicable, which

thus help avoid potential destruction (and in some cases even provide enhancement) of the values of the debtor's estate.

Similarly, the MLCBI promotes the principles of co-operation and co-ordination with emphasis on direct communication, to avoid time consuming procedures that are traditionally in use, such that potential destruction in values of the debtor's estate can be avoided. Co-operation promoted by the MLCBI is not dependent on recognition of a foreign proceeding and as such may occur at an early stage, even before application for recognition is made. Article 25 (1) of the MLCBI requires the courts in State A to co-operate to the maximum extent possible with foreign courts or foreign representatives, for cross-border insolvency issues referred to in article 1 of the MLCBI. Article 25 (2) of the MLCBI further empowers the courts in State A with specific authorization to communicate directly with, or request assistance from, foreign courts or foreign representatives.

Article 26 of the MLCBI stipulates similar requirement and authorisation for a domestic insolvency office-holder in State A, subject to supervision of the court in State A, to co-operate and communicate directly with foreign courts or foreign representatives. Article 27 of the MLCBI provides an indicative and non-exhaustive list of the types of co-operation and communication that are available. The forms as well as practical aspects of the co-ordination and co-operation principles promoted by the MLCBI provisions are further expanded in the Practice Guide through the use of cross-border insolvency agreements or protocols.

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.

As the provisions in MLCBI are intended to expedite and simplify process for recognition of foreign proceedings, the MLCBI prescribes straight-forward and easy-to-meet requirements for the recognition of foreign proceedings in the enacting State. The key judicial scrutiny for recognition under the MLCBI is in the qualifications set out by the definitions of 'foreign proceeding' (article 2 (a)) and 'foreign representative' (article 2 (d)). Given that both the foreign representative and the foreign proceeding in State B qualify to be 'foreign representative' and 'foreign proceeding' under the MLCBI respectively, the administrative or evidential requirements for recognition in our case, are relatively easy to be fulfilled.

The evidential requirements for the recognition of foreign proceedings are enumerated in article 15 (2) of the MLCBI, which comprise of:

- a certified copy of the decision commencing the foreign proceeding and appointing the foreign representative;
- a certificate from the foreign court affirming the existence of the foreign proceeding and the appointment of the foreign representative; or
- any other evidence acceptable to the recognising court (in State A) of the existence of the foreign proceeding and appointment of the foreign representative.

Article 15 (3) of the MLCBI requires the application to be accompanied by a statement identifying all foreign proceedings concerning the debtor that are known to the foreign representative, and article 15 (4) of the MLCBI stipulates that the documents submitted shall

be translated into the official language of State A, if so required by the court in which the recognition is sought.

Article 17 of the MLCBI stipulates that an application for recognition shall be decided at the earliest possible time, and in the absence of public policy grounds that will be manifestly contrary to granting recognition to such application in State A (article 6), the application for recognition that has been submitted to the competent court in State A (as per article 4 of the MLCBI) shall be granted if the requirements set forth in article 15 (2) are met. Article 17 (2) stipulates that a foreign proceeding shall be recognized as foreign main proceeding if the foreign proceeding is taking place at the debtor's COMI, and as foreign non-main proceeding otherwise. Article 17 (4) of the MLCBI however empowers the recognizing court to modify or terminate the recognition if the grounds for granting recognition become fully or partially lacking or have ceased to exist, while article 18 imposes requirement for the foreign representative to provide updates to the recognizing court on any substantial change in the status of the foreign proceeding or the foreign representative's appointment.

For full marks reference should also be made to art. 1(2) – exclusions, art. 3 on restrictions and a more elaborate answer regarding the judicial scrutiny in art. 16/17.

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.

Article 19 of the MLCBI empowers the adjudicating or recognizing court to grant interim relief at the request of the foreign representative, from the time of filing until the application is decided upon, where relief is urgently needed to protect the debtor's assets or the interests of creditors. The types of reliefs enumerated in article 19 (1) include;

- staying execution against debtor's assets;
- entrusting the administration or realization of all or part of debtor's assets located in the enacting State, to the foreign representative or another person designated by the court;
- any relief available in paragraphs (c), (d), and (g) of article 21, which are reliefs available upon recognition of the foreign proceeding.

The list of reliefs enumerated in article 19 (1) of the MLCBI is non-exhaustive, and the Guide to Enactment and Interpretation (GEI) further elaborates that the types of interim relief available under article 19 would include reliefs that are usually available only in collective insolvency proceedings. Article 22 of the MLCBI requires the court to also consider the interests of the creditors and other interested persons (including the debtor), such that they are adequately protected. Furthermore, the court may subject the interim relief granted to conditions it considers appropriate (article 22 (2)).

Post-recognition reliefs are prescribed in article 21 of the MLCBI. At the request of the foreign representative, the recognizing court may grant the following non-exhaustive types of reliefs;

- (a) staying the commencement or continuation of individual actions or proceedings concerning the debtor;
- (b) staying of execution against the debtor's assets (if not already automatically stayed upon recognition of foreign main proceeding);
- (c) suspending the right to transfer, encumber or otherwise dispose of any of the debtor's assets;
- (d) providing for examination of witnesses, taking of evidence, or delivery of information concerning the debtor;

- (e) extending any interim relief granted under article 19 (1);
- (f) any additional relief that may be available to domestic insolvency officer in the enacting State;
- (g) entrust the distribution or all or part of the debtor's assets located in the enacting State to the foreign representative or another person designated by the court.

While article 21 of the MLCBI has provided the court with a broad reservoir of power to consider and grant any appropriate relief to effectuate the objective of the MLCBI and to protect the debtor's assets and creditors' interests, there are certain considerations, conditions, and limitations;

- Article 21 (2) requires the court to be satisfied that the interests of domestic creditors in the enacting State are adequately protected before granting relief that will entrust the distribution of all or part of the debtor's assets located in the enacting State, to the foreign representative or another person designated by the court;
- Article 21 (3) requires the court, in granting reliefs to a representative of a foreign non-main proceeding, to be satisfied that the relief relates to assets that, pursuant to the law of the enacting State, should be administered in the foreign non-main proceeding or concerns information required in that proceeding;
- Article 22 of the MLCBI stipulates that, in granting relief under article 21, the court must be satisfied that the interests of the creditors and other interested persons (including the debtor) are adequately protected, and the court may subject the relief granted to conditions it considers appropriate (article 22 (2));

Furthermore, numerous case laws implementing and interpreting the MLCBI have shown that the type of reliefs that can be granted under the MLCBI are not unlimited, such as (i) that the types of reliefs available under the MLCBI do not extend to cover insolvency-related *in-personam* default judgment (*Rubin v Eurofinance SA*), (ii) the reliefs to be granted shall not go beyond the reliefs the court would grant in a domestic insolvency (the *Pan Ocean* case), and (iii) the reliefs shall not vary or discharge substantive rights conferred by the domestic laws of the enacting State (the *IBA* case).

Again reference should be made to art. 3 and art. 6

Question 3.4 [maximum 1 mark] 1 mark

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

Interim relief as per article 19 of the MLCBI is granted where there is urgency to protect the assets of the debtor or interests of the creditors. These article 19 reliefs can be extended post-recognition pursuant to article 21(1)(f). However, article 22 of the MLCBI requires the recognizing court, in considering or granting reliefs sought under article 19 or 21 of the MLCBI, to also consider and balance out all the interests of the parties that would be affected by such reliefs, which include not just creditors but also other interested persons, including the debtor. Furthermore, extension of a worldwide freezing order would be contrary to the objective and purpose of the MLCBI, which is to expedite and simplify the process of cross-border insolvency, as well as to promote co-operation and co-ordination among courts and insolvency representatives across jurisdictions or states. As such, a worldwide freezing order is unlikely to be extended post-recognition, and would be more likely to be either terminated or modified upon recognition.

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

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] 14 marks

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

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

- 4.1.1 whether the Bank's liquidation comprises a "foreign proceeding" within the meaning of article 2(a) of the MLCBI [maximum 10 marks]; 9 marks and
- 4.1.2 whether the Applicants fall within the description of "foreign representatives" as defined by article 2(d) of the MLCBI [maximum 5 marks].5 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

The Guide to the Enactment and Interpretation (GEI) of the MLCBI elaborates that to qualify as foreign proceeding under the MLCBI, as per the definition provided by article 2 (a) of the MLCBI, such foreign proceeding should satisfy all of the elements set out in article 2 (a) of the MLCBI;

- *It is a proceeding.*
The Bank's liquidation demonstrates the hallmark of a 'proceeding' given that there is a statutory framework (the LBBA and the DGF Law in Country A) that constrains the debtor's actions and regulates the final distribution of assets.
- *It is either judicial or administrative.*
As the liquidation of the Bank is administered by DGF with the powers to manage, recover, and dispose the Bank's assets, the bank liquidation in Country A exhibits administrative features. Therefore, the Bank's liquidation clearly meets the criteria of having either a judicial or administrative nature.
- *Collective.*
The GEI as well as the Judicial Perspective (JP) of the MLCBI explain that the required element of the proceeding to be 'collective' under the MLCBI shall be directed at the desire to achieve a coordinated and global solution of all stakeholders, such that the MLCBI is not used merely as collection device for a particular creditor or group of creditors. GEI further elaborates that a key consideration for collectiveness, is whether substantially all of the assets and liabilities of the debtor are dealt with in the proceeding. The Bank's liquidation qualifies to be a collective process given that DGF acquires the full powers of a liquidator under the law of Country A, which include the power to alienate, sell, and distribute the bank's assets. Furthermore, DGF having the public mandate and responsibility for the process of withdrawing insolvent banks from the market and winding down their operations via liquidation, would need to consider and attend the interest of the Bank's creditors at large, as demonstrated by the DGF approving to the list of creditors' claims.
- *In a foreign state.*
The Bank's liquidation was commenced in Country A and thus was commenced in a foreign state.
- *Pursuant to insolvency-related law.*
The GEI elaborates that the language used in article 2 (a) of the MLCBI is broad enough to acknowledge the fact that liquidation and reorganization might be conducted under law that is not labelled as insolvency law, and that insolvency rules might be contained in different types of statute or law. The Bank's liquidation was triggered by the LBBA and the DGF Law in Country A, which were not labelled as insolvency laws but nevertheless concerned with and directed at insolvency and liquidation of banks, and as such the Bank's liquidation shall satisfy the element of being pursuant to an insolvency-related law.
- *Control or supervision of the debtor's assets and affairs, by a foreign court.*
Both the assets and affairs of the Bank are under the control and supervision of DGF, which is an official body overseeing insolvent banks in Country A, as per the prevailing laws in Country A. The fact that DGF is not a judicial authority does not negate the potential supervision by the court in Country A, given that DGF's authority and mandate are derived from the LBBA and the DGF Law in Country A. The MLCBI does not specify the level or timing of control or supervision, such that it can be potential rather than actual, and indirect rather than direct. Furthermore, the GEI notes that the MLCBI does not make distinction in the definition of 'foreign court', between reorganization and liquidation proceeding controlled or supervised by a judicial or administrative body, such that in jurisdiction (such

as in Country A), where a certain type of liquidation is undertaken by non-judicial authority (such as the DGF), such proceeding still qualify as a 'foreign proceeding' under the MLCBI.

- *The proceeding shall have the debtor's reorganization or liquidation as the purpose.*
The purpose of the Bank's liquidation proceeding is clearly aimed at liquidating the Bank, as mandated and required under the LBBA and the DGF Law in Country A, and as such this element is also satisfied.

Consequently, given that the required elements pursuant to article 2 (a) of the MLCBI, as discussed above, are all cumulatively met, the Bank's liquidation qualifies to be a "foreign proceeding" within the meaning of article 2(a) of the MLCBI.

Great answer. To receive full points a few more references to the facts, i.e. the independence of the DGF as well as a bit more argumentation on how this qualifies as and administrative procedure should be made.

4.1.2

Article 2 (d) of the MLCBI defines a foreign representative under the MLCBI as either a 'person' or a 'body', authorized to administer the reorganization or the liquidation of the debtor's assets or affairs, or to act as a representative of the foreign proceeding. The applicants in the Bank's case consist of both the DGF and Ms G (in her capacity as authorised officer of the DGF in respect of the liquidation of the Bank), and whether each of the applicant qualify to be a foreign representative as per article 2 (d) of the MLCBI, is discussed below;

- *The DGF*
As the official agency or body in charge of liquidations of banks in Country A (as per the LBBA and the DGF Law), DGF shall meet the definition of foreign representative under the MLCBI, as it has the mandate and authority to administer the reorganization or the liquidation of the Bank. The MLCBI does not specify that the foreign representative must be appointed or authorized by a foreign court, but the focus is on the authorization being provided in the course of the foreign proceeding, rather the source or the authority providing such authorisation, so the definition in article 2 (d) of the MLCBI is broad enough to include appointments mandated by the prevailing laws, such is the case with DGF.

DGF has delegated to Ms. G, all of its liquidation powers set out in the DGF law with regards to the liquidation of the Bank, other than 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. The fact that DGF still retains some of the powers in dealing with the liquidation of the Bank, and that Ms. G is still under the supervision of (and her appointment can be revoked or replaced by) DGF, show that DGF still carries the authorities to administer the liquidation of the Bank, and as such qualifies as a foreign representative.

- *Ms. G*
Ms. G was appointed by DGF to represent DGF in the liquidation of the Bank, and DGF also delegated all of its liquidation powers set out in the DGF law with regards to the liquidation of the Bank other than those powers specifically reserved or excluded. As such, Ms. G meets the definition of 'foreign representative' as she was mandated to act as a representative of DGF, to administer the liquidation of the Bank. Furthermore, the MLCBI does not specify that the foreign representative must be appointed or authorized by a foreign court, but the definition in article 2 (d) of the MLCBI is broad enough to include

appointments made by special agency other than the court, which is the case in the appointment of Ms. G by DGF.

Consequently, both the DGF and Ms. G meet the criteria to qualify as "foreign representative" within the meaning stipulated by article 2(d) of the MLCBI.

*** End of Assessment ***