



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: 35,5 out of 50 marks

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

QUESTION 1 (multiple-choice questions) [10 marks in total] 7 marks

Questions 1.1. – 1.10. are multiple-choice questions designed to assess your ability to think critically about the subject. Please read each question carefully before reading the answer options. Be aware that some questions may seem to have more than one right answer, but you are to look for the one that makes the most sense and is the most correct. When you have a clear idea of the question, find your answer and **mark your selection on the answer sheet by highlighting the relevant paragraph in yellow**. Select only **ONE** answer. Candidates who select more than one answer will receive no mark for that specific question.

Question 1.1

Which of the following statements **incorrectly** reflects the main purpose of the Model Law?

- (a) The Model Law provides effective mechanisms for dealing with cases of cross-border insolvency so as to promote a number of objectives, including the protection and maximisation of trade and investment.**
- (b) The Model Law provides effective mechanisms for dealing with cases of cross-border insolvency so as to promote a number of objectives, including the fair and efficient administration of cross-border insolvencies that protects the interests of all creditors and other interested persons, not including the debtor.
- (c) The Model Law is a substantive unification of insolvency law so as to promote co-operation between courts of the enacting State and foreign States and facilitation of the rescue of financially troubled businesses.
- (d) All of the above.**

Question 1.2

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

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

Question 1.3

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

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

Question 1.4

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

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

Question 1.5

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

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

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

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

Question 1.6

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

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

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

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

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

Question 1.7

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

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

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

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

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

Question 1.8

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

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

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

(c) While (for purposes of the Model Law) the COMI of a debtor can move, the closer such COMI shift is to the commencement of foreign proceedings, the harder it will be to establish that the move was "ascertainable by third parties".

(d) None of the above.

Question 1.9

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

(a) Enforcement of insolvency-related judgments.

(b) An indefinite moratorium continuation.

(c) Both (a) and (b).

(d) Neither (a) nor (b).

Question 1.10

When for the interpretation of the Model Law “its original origin” is to be considered in accordance with article 8 of the Model Law, which of the following texts is likely to be of relevance?

(a) The UNCITRAL Guide of Enactment and the Practice Guide.

(b) The UNCITRAL Guide of Enactment and the Legislative Guide – Parts One, Two, Three and Four.

(c) The UNCITRAL Guide of Enactment and the Judicial Perspective.

(d) All of the above.

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

Question 2.1 [maximum 3 marks] 2 marks

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

Under the MLCBI, the appropriate date to determine the COMI of a debtor is the date of the commencement of a foreign proceeding – which is also suggested by the GEI. The GEI notes that the date of commencement of a proceeding is the appropriate date for determining COMI, whilst having regard to the evidence required to accompany an application for recognition under Article 15 and the relevance accorded to the decision appointing the foreign representative and commencing the foreign proceeding.

The COMI is defined as the location of the debtor’s principal place of business which can be shifted by the debtor which can be readily ascertained by the creditors of a debtor. The COMI of a debtor can be shifted, based on if the debtor has shifted his/her principal place of business, which can lead to confusion on the part of the creditors, if the COMI is shifted near the commencement of any foreign proceedings.

Establishment is determined to exist in any place where the debtor has operations and carries out non-transitory economic activity, with goods or services, and with human means. Some indicating factors of establishment are where the debtor's primary bank is located and the location of the debtor's books and records.

For full mark on this question, it should be mentioned that different jurisdictions have taken slightly different approaches to this.

Question 2.2 [maximum 3 marks] 2 marks

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

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

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

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

Statement 1 refers to Article 30 of the Model Law which notes that in respect of more than one foreign proceeding relating to the debtor, the court shall seek cooperation and coordination under articles 25-27, and that if, two foreign non-main proceedings are recognized, the court shall grant, modify, or terminate relief for the purpose of facilitating coordination of the proceedings.

Statement 2 refers to Article 32 of the Model Law which discusses the rule of payment in concurrent proceedings, sometimes referred to as the hotchpot rule, and which does not have prejudice to secured claims or rights.

Statement 3 refers to Article 31 which states that the rebuttable presumption of insolvency is based on the recognition of a foreign main proceeding. The presumption will not apply to foreign non main proceedings and the court of the enacting State where the insolvency has commenced will not be bound by the decision of the foreign court in this instance. **The correct art is 16(3)**

Question 2.3 [2 marks] 1 mark

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 that the court should not exercise its power to grant the indefinite Moratorium Continuation because the English court lacked jurisdiction to grant the continuation requested by the foreign representative. The Challenging Creditors in the case had unpaid claims against *IBA* under debt governed by English law and had not submitted to the foreign insolvency proceedings to which *IBA* was subject. This action led to the ruling that the Gibbs Rule, which stands for the general proposition that a debt governed by English law cannot be discharged or compromised by a foreign insolvency proceeding but does not apply if the relevant creditor submits to the foreign insolvency proceeding, did not apply to the Challenging Creditors.

The Court of Appeal held that an English court could only properly grant the indefinite Moratorium Continuation if it was satisfied that the stay would be necessary to protect the interests of IBA's creditors and would have to be an appropriate way of achieving such protection. The Court of Appeal upheld that neither of these conditions had been satisfied.

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

Question 2.4 [2 marks] 2 marks

In terms of relief, what should the court in an enacting State, where a domestic proceeding has already been opened in respect of the debtor, do after recognition of a foreign main proceeding? In your answer you should **mention the most relevant article of the MLCBI**. What (ongoing) duty of information does the foreign representative in the foreign main proceeding have towards the court in the enacting State? Here too you are required to **mention the most relevant article of the MLCBI**.

As stated in Article 29b of the MLCBI, the court in an enacting State, where a domestic proceeding has already been opened in respect of the debtor, should review any relief granted under Articles 19 or 21 and modify or terminate the relief granted previously if it is not consistent with the proceeding in this State. It is also noted that, in the case of a foreign main proceeding, the stay and suspension referred to in p1 of Article 20 shall be modified or terminated pursuant to p2 of Article 20 if inconsistent with the proceeding in this State.

As stated in Article 18 of the MLCBI, the foreign representative is required to inform the court promptly of any substantial change in the status of the recognized foreign proceeding or the status of the foreign representative's appointment and of any other foreign proceeding regarding the same debtor that becomes known to the foreign representative.

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

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

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

Question 3.1 [maximum 4 marks] 3 marks

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

The foreign representative can benefit from the temporary "breathing space" spawned from access to the courts in State A. Additionally, this relief allows the courts in the enacting State to determine what co-ordination among the jurisdictions is warranted for the handling the insolvency in the most efficient way.

Article 9 of the Model Law sets out how the co-operation and direct communication between a court of the enacting State and other courts, insolvency representatives any group representative appointed. The Model Law enables the court to cooperate directly with the foreign courts and the foreign representatives. The ability of the courts in parallel proceedings to communicate directly with and to request information or assistance from foreign courts or foreign representatives will alleviate the issue having to use time-consuming and antiquated procedures as it relates to previous methods of communication. In both insolvency proceedings, there is the necessity for quick action as chaotic or unforeseen circumstances could arise or the value of assets could evaporate, so this stated relief is beneficial for all parties.

Article 10 of the Model Law sets out the scope of the co-operation to the maximum extent possible under Article 9 of the Model Law. For instance, the implementation of co-operation would be subject to any mandatory rules applicable in the enacting State, and privacy or confidentiality rules already put in place would still apply.

Article 11 of the Model Law sets out the limitation of the effect of communication under Article 9 of the Model Law. This article is based upon recommendation 244 of the Legislative Guide where it is noted that just because a court communicates with another court, that does not imply a substantive effect on the authority or powers of the court, the matters before it, its orders or the rights and claims of parties participating in the communication. Even with these limits, the co-ordination with the courts can still lead to agreements on a range of matters, including approval of insolvency agreements developed in cross-border proceedings.

For full marks on this question, reference should also be made to art. 25-27

Question 3.2 [maximum 5 marks] 2 marks

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

The evidence required for a recognition of a foreign proceeding are set out in Articles 15 – 17 of the MLCBI. For instance, a foreign representative may apply to the court for recognition of the foreign proceeding to which the foreign representative has been appointed (Article 15). Additionally, in the absence of proof to the contrary, the debtor’s registered office (“**RO**”) (or an individual’s habitual residence) is presumed to be the centre of the debtor’s main interests (“**COMI**”) (Article 16). It is also note that an application for recognition of a foreign proceeding must be decided upon at the earliest possible time and recognition can be modified or terminated if it is shown that the ground for granting it were fully or partially lacking or have ceased to exist.

As stated in Article 21 of the MLCBI, an application for recognition shall be accompanied by:

- A certified copy of the decision appointing the group representative; or
- A certificate from the foreign court affirming the appointment of the group representative; or
- Any other evidence concerning the appointment of the group representative that is acceptable to the court.

It is also stated in Article 21 that a statement should be made to accompany the application which identifies:

- Each enterprise group member participating in the foreign planning proceeding;
- All members of the enterprise group and all insolvency proceedings that are known to the group representative that have been commenced in respect of enterprise group members participating in the foreign planning proceeding; and
- Where the enterprise group member subject to the foreign proceeding has the COMI in the State in which that planning proceeding is taking place and that that proceeding is likely to result in added overall combined value for the enterprise group members subject to or participating in that proceeding.

Please also note that the court may require a translation of documents as it relates to the recognition application into the official language of this State.

As stated in Article 28 of the MLCBI, restrictions on the foreign main proceedings in State A will not prevent the commencement of domestic insolvency proceedings in State B, so long as the debtor has assets in this State. Therefore, the effects of that proceeding shall be restricted to the assets of the debtor that are located in this state and, to the extent necessary to implement cooperation and coordination established in Articles 25-27, to any other assets of the debtor that, under the law of this State, should be administered in that proceeding. It is also noted that in some situations, a local proceeding would have to include certain assets located abroad, especially when there is no foreign proceeding available in the State where the assets are located.

Article 28 also provides for the effects of the proceeding in the enacting State to extend, to the extent necessary, to other property of the debtor that should be administered in that proceeding; however, there are two restrictions to that extension:

- The extension is permissible to the extent necessary to implement cooperation and coordination under Articles 25-27; and
- The foreign assets must be subject to administration in the enacting State under the law of the enacting State.

Regarding the judicial scrutiny that must be overcome for a recognition application to be successful, Article 17 of the MLCBI notes that where a person is appointed in the enacting State and in another State, the appointment in the other State could not diminish that person's obligations under the law of an enacting State. It is stated in Article 17, that any person to be appointed in that capacity should have the appropriate experience and knowledge of insolvency matters, including international experience and knowledge where relevant. That knowledge and experience should be heavily scrutinized before the appointment is made to ensure that it is appropriate to the particular relevant parties concerned. In addition, a successful recognition application must consider the nature of the enterprise group, including the level of integration of its members and its business, when deciding whether to appoint a single or the same insolvency representative in different jurisdictions.

With further regards to the judicial scrutiny, relevant case law on Article 28 referred to a case where a local proceeding was held to be properly commenced in the recognizing State on the basis that the relief that could be granted on recognition of a foreign proceeding provided procedural support for that proceeding and would not substantially change the creditor's claim.

It is also noted, however, that it would be consistent with the Model Law to allow for that enacting State to adopt a more restrictive test before domestic insolvency proceedings can be opened which allows for some ambiguity in future situations where two insolvency proceedings may conflict.

Also, with regard to restrictions, whilst there is no reciprocity requirement in the Model Law, it should be noted that some States have included reciprocity provisions, when enacting the Model Law, in relation to recognition. These reciprocity requirements have the ability to significantly undermine the effectiveness of the Model Law, as demonstrated by the South African approach to reciprocity.

For full marks on this question, the following should be included in the answer:

1. Exclusions: If the debtor is an entity that is subject to a special insolvency regime in State B, the foreign representative should first of all check if the foreign proceedings regarding that type of a debtor are excluded in State A based on Article 1(2) of the implemented Model Law in State A.
2. Restrictions;- Existing international obligations of State A: Based on Article 3 of the Model Law, the court in State A should also check if there are no existing international obligations of State A (under a treaty or otherwise) that may conflict with granting the recognition application under the implemented Model Law in State A.
3. Judicial scrutiny: While the court in State A is able to rely on the rebuttable presumptions set forth in Article 16 of the Model Law, in the context of Article 17 of the Model Law the court will have to assess whether either the COMI or at least an establishment of the debtor is located in State B where the foreign proceedings were opened. If the COMI of the debtor is in State B the foreign proceedings should be recognised as foreign main proceedings and if only an establishment of the debtor is in State B the foreign proceedings should be recognised as foreign non-main proceedings. Without a COMI or at least an establishment of the debtor in State B, recognition cannot be granted by the court in State A.
4. Public policy exception: Finally, the court in State A should also ensure based on Article 6 of the Model Law that the recognition application is not manifestly contrary to public policy of State A.

Question 3.3 [maximum 5 marks] 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 states that interim relief should be available while a recognition application is pending. To expand, where relief is urgently needed to protect the assets of the debtor or the interests of the creditors, the court may, at the request of the foreign representative, grant provisional relief during the period between the time the application is filed until the application is decided upon.

Examples of relief which can be granted include:

- A stay against the debtor's assets;
- Entrusting the administration of all or part of the debtor's assets located in this State to an administrator;
- Suspending the right to transfer, encumber or dispose of the assets of the debtor;
- Providing for the examination of witnesses; and
- Granting any additional relief available to a domestic liquidator under the laws of the enacting State.

However, it is also noted that the court may refuse to grant the above-mentioned relief if such relief would interfere with the administration of a foreign main proceeding, the relief does not

concern information required in a foreign non-main proceeding, or the relief does not relate to assets that should be administered in the foreign non-main proceeding.

Article 21 of the Model Law provides limits to the appropriate relief the court of the enacting State is able to grant. Examples of limits to the appropriate relief decided by various English Supreme Court cases are listed below:

- The Rubin v Eurofinance SA case ruled on the question of whether a judgment based on insolvency avoidance powers, obtained in default of the appearance of the defendants, could be recognised and enforced in the UK. It was eventually ruled that the enforcement of an insolvency default judgment directly related to a particular person is not covered by the MLCBI;
- In the case Fibria Celulose S/A v Pan Ocean Co Ltd, it was ruled that applying foreign insolvency law to an English law governed contract is outside of the scope of appropriate relief that the English court can grant; and
- The IBA Case led to the ruling that the English court does not have the jurisdiction to grant a foreign representative of a foreign main proceeding an indefinite continuation of an automatic moratorium that resulted from an earlier recognition order. It is noted that even if the justice in this case had the jurisdiction to grant the relief based on Article 21 of the Model Law as requested in the application, the balancing of interests required to be undertaken pursuant to Article 22 of the Model Law made it clear that he still may have not ruled to grant the relief.

The above examples strictly relate to English case law, and so it is noted, that if these cases were heard in other jurisdictions, there may have been different rulings which may have been more aligned with the MLCBI.

For full marks, the answer should also include art. 3 and art. 6.

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?

A worldwide freezing order granted as pre-recognition interim relief under Article 19 would be unlikely to continue as post-recognition relief under Article 21 of the MLCBI if the court is not satisfied that the interests of the creditors and other interested persons, including the debtor, are adequately protected. A worldwide freezing order would be particularly uncommon, due to the expense and security required. However, a freezing order would be much more required prior to the implementation of an insolvency practitioner, who would have other powers at his/her disposal, as opposed to after a foreign representative gets involved.

Here it should be mentioned that art. 21 provides for different form for protection leaving the freezing order unwarranted.

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]

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 whether the Bank's liquidation comprises a "foreign proceeding" within the meaning of article 2(a) of the MLCBI **[maximum 10 marks]**; and **9 marks**

4.1.1

A foreign proceeding is defined in Article 2(a) as a collective judicial or administrative proceeding in a foreign State, including an interim proceeding, pursuant to a law relating to insolvency in which proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganization or liquidation.

- Importantly, it is noted in the text that all aspects of this definition, although broken down separately below, should be considered cumulatively and as a whole.
- To break down this definition further and apply the facts of the case please see below.

The Bank entered provisional administration on 17 September 2015 and liquidation on 17 December 2015.

The first requirement is that the proceeding must be a collective judicial or administrative proceeding in a foreign State.

- A proceeding which qualifies for relief under the Model Law must be “collective” in nature to provide a tool for achieving a coordinated, global solution for all stakeholders of an insolvency proceeding. In evaluating whether a given proceeding is collective, one must consider whether substantially all of the assets and liabilities of the debtor are dealt with in the proceeding, subject to local priorities and statutory exceptions, and to local exclusion relating to the rights of secured creditors. It is noted that a proceeding should not be considered to fail the collective test purely because a class of creditors’ rights is unaffected by it.
 - The above case of the Bank states that when the Bank enters liquidation, all money liabilities due to the bank are deemed to become due – which is a criterion for the collective proceeding definition above.
 - It is also noted that the Deposit Guarantee Fund (“**DGF**”), responsible for winding down insolvent banks’ operations via liquidation, is granted the power to compile a register of creditor claims and to seek to satisfy those claims. Also, on 7 September 2020, the DGF resolved to approve an amended list of creditors’ claims totalling approximately USD 1.113 billion.
 - In the provisional administration, DGF was granted have full and exclusive rights to manage the bank and all powers of the bank’s management. In the liquidation, DGF was granted the power to exercise management powers and take over management of the property (including the money) of the bank. Moreover, in the case *Betcorp Limited* the court held that a liquidation operating in parallel to a receivership that only represented secured creditors’ interests, was a collective proceeding because the liquidator must distribute assets on a pro-rata basis to creditors of the same priority, even though the receivership that had control of substantially all the debtor’s assets was not a collective proceeding.
 - I conclude that the various criteria for a collective proceeding are met in this case as the creditors are being allowed to participate collectively and all of the money liabilities due to the bank are deemed to become due. Also, the *Betcorp Limited* case shows that a parallel proceeding can be deemed collective, even though the provisional administrator (in this case) has control of the management of the bank.
 - Also, 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. This extension will allow all of the creditors to submit their claims for determination and to participate in the proceedings collectively.

It is also noted in the definition that the proceeding could be an interim proceeding.

- The above case of the Bank was an interim proceeding for the length of the liquidation (which would have been sufficient for the definition of the foreign proceeding) until 14 December 2020, when the liquidation was extended indefinitely (which is also sufficient in our context).

The third requirement is that the proceeding be “pursuant to a law relating to insolvency” to acknowledge that some liquidations or reorganizations may have been conducted under law that is not labelled as insolvency law but deals with or addresses insolvency or severe financial distress.

- Under the Model Law, a liquidation may be conducted under law that is not labelled as insolvency law (like the company law), but which deals with insolvency or severe financial distress. This aspect of the definition is particularly broad, and I conclude that the Law of Country A on Banks and Banking Activity (“**LBBA**”), which classifies entities as “troubled” or “insolvent” if they meet certain criteria set out above, sufficiently meets the criteria as a law relating to insolvency.
- This criterion could not be separated from the judicial or administrative proceeding requirements as upheld in the conclusion reached in the case *Raithatha v Ariel Industries PLC*.
- I do also note that the term “insolvency” is not defined under the Model Law so this criterion would be the most lenient to reach in my view.

The fourth requirement is that the proceeding is one in which the assets and affairs of the debtor are subject to control or supervision by a foreign court.

- In the case of the Bank, there is no control nor supervision of the liquidation by a foreign court – although the Model Law does not specify the level of control or supervision required to satisfy this aspect of the definition. It is noted in the GEI, however, that mere supervision of an insolvency representative by a licensing authority would not be sufficient.
- There is no evidence that Ms. G is supervised by a body that could be considered a foreign court. I note that in this case, Ms. G, in her capacity as the authorised officer of DGF, applied for recognition of the liquidation of the Bank before the English court. However, before that time, there was not obvious supervision of the liquidation by a foreign court.
- However, I do note the case *Betcorp Limited* where it was found that a voluntary (solvent) liquidation proceeding in Australia was found to be subject to supervision by a judicial authority based on, in essence, the interplay that was still present between the liquidators and the court in the proceeding. To expand, it was upheld that where the actions of the liquidator were reviewed by the court, the process became judicial.
- Also, the GEI indicates that, whilst the control or supervision required under Article 2 should be formal in nature, it may be potential rather than actual. Additionally, Courts have confirmed that if both the assets and affairs of the debtor are subject to control by the liquidator, the requirement may be met in a variety of situations and the court may ultimately become involved because the nature of the proceeding has to change.
- Importantly, the GEI (para. 75) notes that proceedings in which the court gains control or supervision of a liquidation at a late stage should not be excluded from meeting the requirements of the definition.
- Ultimately, this requirement of the definition is the most ambiguous, in relation to whether or not the proceeding properly meets the status of a foreign proceeding. However, I believe that the courts have provided enough wiggle room, as noted above, for this criterion of the definition to be met, particularly with the above point noting that proceedings where courts gain involvement in a late stage of an insolvency process should not be excluded.

The fifth requirement is that the proceeding is for the purposes of liquidation or reorganization.

- The GEI notes several proceedings that would not be classified as for the purpose of reorganization or liquidation such as those that are designed to prevent waste, rather than to liquidate the insolvency estate.
- It is noted in this case that the NB classified the Bank as insolvent, pursuant to its law, formally revoked the Bank's banking licence, and resolved that it be liquidated. The DGF started liquidation procedures shortly after and appointed Ms C as the first of the DGF's authorised persons delegating her with liquidator powers.
- Every fact in this case points to this proceeding being for the purpose of liquidation or reorganization as opposed to asset preservation or preventing dissipation. Ultimately, this proceeding was a liquidation as all powers of the banks were terminated, all liabilities are due, and the DGF has the powers to bring claims.

Conclusion

- After taking all of the facts of the case into consideration, I conclude that this proceeding meets the definition of a foreign proceeding. As noted above, the only requirement of the definition with ambiguity as to whether it has been met is that of the supervision or control by a foreign court. However, I believe that the court supervision is potential rather than actual in this case and came to be at the late stages of the insolvency process, after a liquidator (Ms. G) who is a "leading bank liquidation professional" and has powers and exclusions to her powers comparable to a court-supervised liquidator, has control over the assets and affairs of the debtor. All other requirements of the definition have been met.

Good answer, for full marks it should be addressed that the proceeding is administrative. Re the court supervision, see the following:

1. The term "*foreign court*" is defined at article 2(e) of the MLCBI and means: "*a judicial or other authority competent to control or supervise a foreign proceeding*".
2. The Guide to Enactment notes: "*87) A foreign proceeding that meets the requisites of article 2, subparagraph (a), should receive the same treatment irrespective of whether it has been commenced and supervised by a judicial body or an administrative body. Therefore, in order to obviate the need to refer to a foreign non-judicial authority whenever reference is made to a foreign court, the definition of "foreign court" in subparagraph (e) includes also non-judicial authorities.*"
3. In ***Re Sanko Steamship Co Ltd*** [2015] EWHC 1031 (Ch) Simon Barker QC, noted that a foreign proceeding may be recognised where the control or supervision of the proceeding is undertaken by a non-judicial administrative body.
4. The Guide to Enactment states: "*74) The Model Law specifies neither the level of control or supervision required to satisfy this aspect of the definition nor the time at which that control or supervision should arise. Although it is intended that the control or supervision required under subparagraph (a) should be formal in nature, it may be potential rather than actual. As noted in paragraph 71, a proceeding in which the debtor retains some measure of control over its assets, albeit under court supervision, such as a debtor-in-possession would satisfy this requirement. Control or supervision may be exercised not only directly by the court but also by an insolvency representative where, for example, the insolvency representative is subject to control or supervision by the court. Mere supervision of an insolvency representative by a licensing authority would not be sufficient.*"
5. In this case the DGF has control of all of the Bank's assets and overall control of the liquidation.
6. 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.

7. 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.
8. Taking these factors into account, the Bank's liquidation is *administrative*. The assets and affairs of the Bank are subject to the control of the DGF, an official body which exercises its powers in the liquidation free from intervention by government or the NB and which should be considered, for the purposes of the definition set out in article 2(e) of the MLCBI, as a "*foreign court*".

4.1.2 whether the Applicants fall within the description of "foreign representatives" as defined by article 2(d) of the MLCBI [**maximum 5 marks**]. **4 marks**

A foreign representative is defined in Article 2(d) in the MLCBI as a person or body, including one appointed on an interim basis, authorized in a foreign proceeding to administer the reorganization or the liquidation of the debtor's assets or affairs or to act as a representative of the foreign proceeding.

- In the GEI (para. 86), it is noted that the foreign representative does not have to be authorised by a foreign court, therefore, Ms. G, as the authorised officer, sufficiently fulfils this aspect of (or absence in) the definition.
- It is also noted in the same paragraph that the definition is sufficiently broad to include appointments that might be made by a special agency other than the court. After the NB decided that the Bank was insolvent, the DGF became the liquidator with the full powers designated under Article 77 of its LBBA. These powers were ultimately delegated to Ms. G who shares her powers with the DGF.
- As long as the certified copy of the decision appointing the representative and a certificate affirming the appointment or other evidence of that appointment is provided to the receiving court, as noted in Article 15 of the Model Law, the appointment of the applicants as foreign representatives should be sufficient under the Model Law.
- It is clearly set out in the facts of the case that Ms. G has the power to administer the liquidation of the debtor's assets or affairs at the time of the application for recognition, which is noted in the definition of the foreign representative.
- The MLCBI does not define the words, "person" or "body" (defined as an artificial person created by a legal authority), so Ms. G, as the authorised officer of DGF and DGF (the applicants) would both apply under this definition.

Good answer, for full marks it should also be discussed if DGF in it self qualifies.

*** End of Assessment ***