



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: 34,5 out of 50

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

QUESTION 1 (multiple-choice questions) [10 marks in total] 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? [Paragraph 7.1 Page 20]

- (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**? [Paragraph 10, Page 43]

(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? [Paragraph 8.3.4, Page 32]

- (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] 9 marks

Question 2.1 [maximum 3 marks] 2 marks

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

The date of commencement of the foreign proceeding, is the appropriate date for determining the COMI, or whether an establishment exists.

[Para 158-160, Page 75 of UNCITRAL Model Law]

Article 17, subparagraph 2(a) provides if a foreign proceeding is taking place in the State where the debtor has the centre of its main interests it should be recognized as a main proceeding, however it does not address the question of the relevant date. With respect to the date at which the centre of main interests of the debtor should to be determined, having regard to the evidence required to accompany an application for recognition under article 15 and the

relevance accorded the decision commencing the foreign proceeding and appointing the foreign representative, the date of commencement of that proceeding is the appropriate date.

Where the business activity of the debtor or reorganising entity ceases after the commencement of the foreign proceeding the COMI is determined by referring to the date of commencement of those proceedings or where the reorganizing entity have a COMI can be determined by reference to the date of the commencement of those proceedings. The date of commencement of the foreign proceeding is the relevant date to be considered in making the determination with respect to the existence of an establishment of the debtor and COMI.

It is unlikely that a debtor could move its COMI after the commencement of insolvency proceedings, in any event, if the COMI were to move, it should not affect the decision as to centre of main interests for the purposes of the Model Law, since the date relevant to that determination is the date of commencement of the foreign proceeding. If movement of the COMI is in close proximity to the commencement of the foreign proceedings, the appropriate evidence for this will be harder to establish, in particular the requirement that the COMI must be readily ascertainable by third parties, such as creditors of the debtor.

In this answer you should also mention that it is not explicitly mentioned in the MLCBI and different jurisdictions take slightly different approaches

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. Coordination of more than one foreign proceeding

If, after recognition of a foreign non-main proceeding, another foreign non-main proceeding is recognized, the court shall grant, modify or terminate relief for the purpose of facilitating coordination of the proceedings and no foreign proceeding is a priori treated preferentially.

Statement 2 – Article 32. Rule of payment in concurrent proceedings

A creditor who has received part payment in respect of its claim in a proceeding pursuant to a law relating to insolvency in a foreign State may not receive a payment for the same claim in a proceeding under the same debtor, so long as the payment to the other creditors of the same class is proportionately less than the payment the creditor has already received. This is to ensure an equal treatment of creditors of the same class is established without affecting the ranking of claims.

Statement 3 - Article 16. Presumptions concerning recognition

In the absence of proof to the contrary, the debtor's registered office, or habitual residence in the case of an individual, is presumed to be the centre of the debtor's main interests.

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.**

The IBA appeal case discuss the limit of the appropriate relief which English court able to provide as described under Article 21.

According to the Court of Appeal, the case did not involve an issue of whether the court had no power to deal with and decide the dispute. Instead, the issue in this case was whether as a matter of settled practice the court should not exercise its power to grant the indefinite Moratorium Continuation where to do so would:

(a) in substance prevent the English creditors (that is, the Challenging Creditors) from enforcing their English law rights in accordance with the Gibbs Rule; and / or

(b) prolong the stay after the Azeri reconstruction has come to an end.

The Court of Appeal answered both (a) and (b) in favour of the respondents (the Challenging Creditors).¹³⁵

As far as (a) above is concerned, the court of Appeal held that an English court could only properly grant the indefinite Moratorium Continuation if it were satisfied of two things: first, the stay would have to be necessary to protect the interests of IBA's creditors and, secondly, the stay would have to be an appropriate way of achieving such protection. The Court of Appeal held that neither of these conditions had been satisfied.

In respect of (b) above once the foreign proceeding has come to an end and the foreign representative no longer holds office, there is no scope for further orders in support of the foreign proceeding to be made and any relief previously granted under the Model Law should terminate

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**.

Article 29. "Coordination of a proceeding under the enacting State and a foreign proceeding"

This article maintains impotency of the local proceeding over the foreign proceeding.

Where a foreign proceeding and a proceeding under the enacting State are taking place concurrently regarding the same debtor, the court shall seek cooperation and coordination under articles 25, 26 and 27, and the following shall apply:

Situation 1: where a domestic proceeding exist at the time of the application for recognition of the foreign proceeding:

(i) Any relief granted under article 19 or 21 must be consistent with the proceeding in enacting State; and

(ii) Article 20 does not apply, If the foreign proceeding is recognized in enacting State as a foreign main proceeding.

Situation 2: where domestic proceeding exist after recognition, or filing of the application for foreign proceeding.

Any relief granted under either article 19 or article 21 shall be reviewed by the court and shall be modified or terminated if inconsistent with the domestic insolvency proceeding. For a foreign main proceeding, the stay ad suspension granted under article 20 shall be remodified or terminated if inconsistent with domestic proceeding.

Article 18. Subsequent information

From the time of filing the application for recognition of the foreign proceeding, the foreign representative shall promptly inform the court promptly of:

(a) Any substantial change in the status of the recognized foreign proceeding or the status of the foreign representative's appointment; The purpose of the obligation is to allow the court to modify of terminate the consequences of recognition. and

(b) Any other foreign proceeding regarding the same debtor that becomes known to the foreign representative. This information is important for court to consider whether relief should be coordinated with proceeding commenced after the decision on recognition and to facilitate the cooperation.

QUESTION 3 (essay-type questions) [15 marks in total] 8,5 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] 3 marks

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

The access and coordination rights provided to foreign representative in article 9 of the Model Law can benefit the foreign representative by providing expedited and direct access to court in State A without having to meet formal requirements such as licenses or consular action. A

foreign representative also has standing to request the commencement of an insolvency proceeding in State A provided that all requirements for commencement of such proceedings are met. This right expressed in Article 11 of the Model Law, allows the foreign representative to request commencement of insolvency proceeding without prior recognition of foreign proceeding as the commencement of the insolvency proceeding may be crucial in preserving the assets of the debtor. Article 13 of the Model Law, allows the foreign creditors to have the same rights as the creditors who reside in the State A without affecting the ranking of claims in the enacting state which is also known as the anti-discrimination principle. However, a claim of a foreign creditor cannot be given a lower priority than that of general unsecured claims solely because the holder of such claim is a foreign creditor. These access rights and anti-discrimination principles together with the safe conduct rules under Article 10 of the Model Law aim to save time and expenses and create value creation for the foreign representative. Ultimately these provisions provide comfort and transparency where recoveries are made easier for foreign representative without being burdened with unnecessary domestic proceedings.

For full marks on this question, you should include art. 25-27 in your answer.

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 purpose of the MLCBI is to have a simplified process and provide a clear framework to recognize the foreign proceeding. Article 15 of the MLCBI lists down the evidential requirements for foreign representative for recognition application of foreign proceedings to be successful. The following evidence is required when making the application for recognition of foreign proceedings:

1. a certified copy of the decision commencing the foreign proceeding and appointing the foreign representative; or
2. a certificate from the foreign court affirming the existence of the foreign proceeding and of the appointment of the foreign representative
3. In the absence of evidence referred to in subparagraphs (a) and (b), any other evidence acceptable to the court of the existence of the foreign proceeding and of the appointment of the foreign representative
4. a statement identifying all foreign proceedings in respect of the debtor that are known to the foreign representative. This document is required not so much for the decision on recognition, but for the granting of the relief.

The court may require a translation of documents supplied in support of the application for recognition into an official language of the enacting State. Article 15 further mentioned that the court is not required to issue notice for recognition application under MLCBI, however the court may be subject to issuance of such notice where the court is bound by such legal requirement pursuant to its own rules.

Further article 16 of MLCBI establishes the presumptions concerning the recognition application. The presumptions set forth are as follows:

1. If the decision or certificate referred to in paragraph 2 of article 15 indicates that the foreign proceeding is a proceeding within article 2(a) (of the Model Law) and that the foreign representative is a person or body within the meaning of article 2(d) of MLCBI,

the court is entitled to presume so. This presumption has been relied upon the practice where the court commencing the proceeding includes the information regarding the nature of foreign proceeding and foreign representative in its orders.

2. The court is entitled to presume that documents submitted in support of the application for recognition are authentic, whether or not they have been legalised. This does not stop the court from its discretion to decline to rely on the presumption of authenticity or to conclude that evidence to the contrary prevails.
3. In the absence of proof to the contrary, the debtor's registered office, or habitual residence in the case of an individual, is presumed to be the centre of the debtor's main interests

Recognition will be granted pursuant to Article 17 of the MLCBI once the above mentioned requirements are met and the recognition can be modified or terminated if it shown that the grounds for granting it were fully or partially lacking or have to cease to exist. The court in the enacting State is limited to the jurisdictional pre-conditions set out in the definition of "foreign proceeding" as set forth in Article 2(a) of the Model Law. If the Foreign proceeding takes place in the state where the debtor has its COMI, the foreign proceedings to be recognised as foreign main proceedings (paragraph 2(a) and if the debtor only has an establishment in the foreign state where the foreign proceedings were opened, then the foreign proceedings will be recognised as non-main proceeding.

Further to the above the foreign representative is also required to promptly update the court of i) any substantial change in the status of the recognised foreigner proceeding or status of the foreign representative appointment and ii) any other foreign proceeding regarding the same debtor that becomes known to the foreign representative pursuant to article 18 of the MLCBI.

For full marks, the following should be included:

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

Question 3.3 [maximum 5 marks] 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 MLCBI explain pre reliefs that may be granted upon application for recognition of a foreign proceeding until the recognition application is decided upon. These reliefs are granted on the request of the foreign representative where the reliefs are urgently needed to protect the assets of the debtor or the interest of the creditors and help prevent dissipation of assets and preserve the status quo for the benefit of stakeholders. The following are the relief granted prior to the recognition of foreign proceeding which are provisional in nature:

- Staying execution against the debtor's assets;
- Entrusting the administration or realisation of all or part of the debtor's assets located on the state to the foreign representative or another person designated by the court, in order to protect and preserve the value of assets that, by their nature or because of other circumstances are available, perishable, susceptible to devaluation or otherwise jeopardy.
- Any relief mention on paragraph 1(c), (d) and (g) of th article 21 of MLBCI.
 - (a) suspending the right to transfer, encumber or otherwise dispose of any assets of the debtor;
 - (b) providing for the examination of witnesses, the taking of evidence or the delivery of information concerning the debtor's assets, affairs, rights, obligations or liabilities; and
 - (c) granting any additional relief that may be available to a domestic liquidator / office holder under the laws of the enacting State.

Further, the court may refuse to grant relief if such relief would interfere with the administration of a foreign proceeding. The reliefs granted under article 19 are ceases when the application for recognition is decided upon.

Post-recognition relief are explained under article 20 and 21 of the MLCBI. Article 20 of MLCBI provides the automatic relief when a foreign proceeding is recognised whereas article 21 of MLCBI provides the discretionary relief as it falls under the court power to provide post recognition relief.

Article 20 provides the following automatic relief to foreign main proceeding:

1. a stay of the commencement or continuation of individual actions or individual proceedings concerning the debtor's assets, rights, obligations or liabilities;
2. (b) a stay of execution against the debtor's assets; and
3. (c) a suspension of the right to transfer, encumber or otherwise dispose of any assets of the debtor.

The following are the relief set forth in article 21 of the MLCBI which are discretionary in nature and the court may grant at the request of the foreign representative where is necessary to protect the assets of the debtor or the interest of the creditors:

1. Staying the commencement or continuation of individual actions or individual proceedings concerning the debtor's assets, rights, obligation or liabilities to the extent they have not been stayed under paragraph 1(a) of article 20
2. Staying execution against the debtor's assets to the extent it has not been stayed under paragraph 1(b) of article 20
3. Suspending the right to transfer, encumber or otherwise dispose of any assets of the debtor to the extent it has not been suspended under paragraph 1© of article 20
4. providing or the examination of witness, the taking of evidence or the delivery of information concerning the debtor's asset, affairs, rights obligation or liabilities
5. Entrusting the administration or realisation of all pr part of the debtor's assets located in this State to the foreign representative or another person designated by the court
6. Extending relief granted under paragraph 1 of article 19
7. Granting any additional relief that may be available.

Paragraph 3 of article 21 explain that the relief granted in favour of non-main proceeding should not give unnecessary broad powers to the foreign representative and the relief granted should not interfere with the administration of another proceeding, in particular the main proceeding.

In the English cases such as *Rubin v Eurofinance SA*, *Fibria Celulose S/A v Pan Ocean Co Ltd* and *The IBA* case the court has determined certain limits to the appropriate relief of the MLCBI that it believe it is able to grant.

The discretionary reliefs under article 19 & 20 of the MLCBI may be granted to foreign main and non-main proceeding, however the automatic relief under article 20 of MLCBI can only be granted to foreign main proceeding.

Article 22 of the MLCBI protect the balancing interest between the relief granted to foreign representative and the interest of the person that may be affected by the relief. In granting or denying the relief under article 19 and 20 of the MLCBI or to modify or terminate the relief, the court must be satisfied that the interest of the creditors and other interested person, including the debtor are adequately protected. In order protect the creditors and any interested persons, the court may subject the relief granted under article 19 and 20 of the MLCBI to conditions it consider appropriate.

Exceptions and limitations to the scope of the stay and suspension and the possibility of modifying or terminating the stay or suspension are determined by provision governing comparable stays and suspensions in insolvency proceedings under the laws of enacting state.

As an effect of recognition of the foreign proceeding under article 17, a foreign representative has standing to initiate actions under the law of enacting state to avoid or otherwise render ineffective legal acts detrimental to the creditors.

For full mark on this question, the answer should include the following:

1. Existing international obligations of State A: Based on Article 3 of the Model Law, the court in State A should again verify that there are no existing international obligations of State A (under a treaty or otherwise) that may conflict with granting the requested relief under the implemented Model Law in State A.
2. Public policy exception: The court in State A should, based on Article 6 of the Model Law, also again verify that the relief application is not manifestly contrary to public policy of State A.

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?

The reliefs granted under article 19 are ceases when the application for recognition is decided upon and further Article 21 (discretionary post-recognition relief), the court in the enacting State must be satisfied that the interests of the debtor's creditors and other interested parties are adequately protected.

Here it should be mentioned that art. 21 provides for other forms for protection leaving the freezing order un-warranted.

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

Read the following facts very carefully before answering the questions that follow.

(1) Background

The Commercial Bank for Business Corporation (the Bank) has operated since 1991. The Bank's registered office is situated in Country A, which **has not** adopted the MLCBI. As of 13 August 2015, the Bank's majority ultimate beneficial owner was Mr Z, who held approximately 95% of the Bank's shares through various corporate entities (including some registered in England).

The Bank entered provisional administration on 17 September 2015 and liquidation on 17 December 2015. Investigations into the Bank have revealed that it appears to have been potentially involved in a multi-million dollar fraud resulting in monies being sent to many overseas companies, including entities incorporated and registered in England.

Proceedings were issued in the High Court of England and Wales (Chancery Division) against various defendants on 11 February 2021 (the English Proceedings).

An affidavit (the Affidavit) sets out a detailed summary of the legislation of Country A's specific insolvency procedure for Banks. The procedure involves initial input from the National Bank (the NB) and at the time that the Bank entered liquidation, followed a number of stages:

Classification of the bank as troubled

The NB may classify a bank as "troubled" if it meets at least one of the criteria set down by article 75 of the Law of Country A on Banks and Banking Activity (LBBA) or for any of the reasons specified in its regulations.

Once declared "troubled", the relevant bank has 180 days within which to bring its activities in line with the NB's requirements. At the end of that period, the NB must either recognise the Bank as compliant, or must classify it as insolvent.

Classification of the bank as insolvent

The NB is obliged to classify a bank as insolvent if it meets the criteria set out in article 76 of the LBBA, which includes:

- (i) the bank's regulatory capital amount or standard capital ratios have reduced to one third of the minimum level specified by law;
- (ii) within five consecutive working days, the bank has failed to meet 2% or more of its obligations to depositors or creditors; and
- (iii) the bank, having been declared as troubled, then fails to comply with an order or decision of the NB and / or a request by the NB to remedy violations of the banking law.

The NB has the ability to classify a bank as insolvent without necessarily needing to first go through the troubled stage. Article 77 of the LBBA accordingly provides that a bank can be liquidated by the NB directly, revoking its licence.

Provisional administration

The Deposit Guarantee Fund (DGF) is a governmental body of Country A tasked principally with providing deposit insurance to bank depositors in Country A. However, the Affidavit explained that the DGF is also responsible for the process of withdrawing insolvent banks from the market and winding down their operations via liquidation. Its powers include those related

to early detection and intervention, and the power to act in a bank's interim or provisional administration and its ultimate liquidation.

Pursuant to article 34 of the DGF Law, once a bank has been classified as insolvent, the DGF will begin the process of removing it from the market. This is often achieved with an initial period of provisional administration. During this period:

- (i) the DGF (acting via an authorised officer) begins the process of directly administering the bank's affairs. Articles 35(5) and 36(1) of the DGF Law provide that during provisional administration, the DGF shall have full and exclusive rights to manage the bank and all powers of the bank's management.
- (ii) Article 36(5) establishes a moratorium which prevents, *inter alia*: the claims of depositors or creditors being satisfied; execution or enforcement against the bank's assets; encumbrances and restrictions being created over the bank's property; and interest being charged.

Liquidation

Liquidation follows provisional administration. The DGF is obliged to commence liquidation proceedings against a bank on or before the next working day after the NB's decision to revoke the bank's licence.

Article 77 of the LBBA provides that the DGF automatically becomes liquidator of a bank on the date it receives confirmation of the NB's decision to revoke the bank's licence. At that point, the DGF acquires the full powers of a liquidator under the law of Country A.

When the bank enters liquidation, all powers of the bank's management and control bodies are terminated (as are the provisional administrators' powers if the bank is first in provisional administration); all banking activities are terminated; all money liabilities due to the bank are deemed to become due; and, among other things, the DGF alienates the bank's property and funds. Public encumbrances and restrictions on disposal of bank property are terminated and offsetting of counter-claims is prohibited.

As liquidator, the DGF has extensive powers, including the power to investigate the bank's history and bring claims against parties believed to have caused its downfall. Those powers include:

- (i) the power to exercise management powers and take over management of the property (including the money) of the bank;
- (ii) the power to compile a register of creditor claims and to seek to satisfy those claims;
- (iii) the power to take steps to find, identify and recover property belonging to the bank;
- (iv) the power to dismiss employees and withdraw from/terminate contracts;
- (v) the power to dispose of the bank's assets; and
- (vi) the power to exercise "such other powers as are necessary to complete the liquidation of a bank".

The DGF also has powers of sale, distribution and the power to bring claims for compensation against persons for harm inflicted on the insolvent bank.

However, article 48(3) of the DGF Law empowers the DGF to delegate its powers to an “authorised officer” or “authorised person”. The “Fund’s authorised person” is defined by article 2(1)(17) of the DGF Law as: *“an employee of the Fund, who on behalf of the Fund and within the powers provided for by this Law and / or delegated by the Fund, performs actions to ensure the bank’s withdrawal from the market during provisional administration of the insolvent bank and/or bank liquidation”*.

Article 35(1) of the DGF Law specifies that an authorised person, must have: *“...high professional and moral qualities, impeccable business reputation, complete higher education in the field of economics, finance or law...and professional experience necessary.”* An authorised person may not be a creditor of the relevant bank, have a criminal record, have any obligations to the relevant bank, or have any conflict of interest with the bank. Once appointed, the authorised officer is accountable to the DGF for their actions and may exercise the powers delegated to them by the DGF in pursuance of the bank’s liquidation.

The DGF’s independence is addressed at articles 3(3) and 3(7) of the DGF Law which confirm that it is an economically independent institution with separate balance sheet and accounts from the NB and that neither public authorities nor the NB have any right to interfere in the exercise of its functions and powers.

Article 37 establishes that the DGF (or its authorised person, insofar as such powers are delegated) has extensive powers, including powers to exercise managerial and supervisory powers, to enter into contracts, to restrict or terminate the bank’s transactions, and to file property and non-property claims with a court.

(2) The Bank’s liquidation

The Bank was formally classified by the NB as “troubled” on 19 January 2015. The translated NB resolution records:

“The statistical reports-based analysis of the Bank’s compliance with the banking law requirements has found that the Bank has been engaged in risky operations.”

Those operations included:

- (i) a breach, for eight consecutive reporting periods, of the NB’s minimum capital requirements;
- (ii) 10 months of loss-making activities;
- (iii) a reduction in its holding of highly liquid assets;
- (iv) a critically low balance of funds held with the NB; and
- (v) 48% of the Bank’s liabilities being dependent on individuals and a significant increase in “adversely classified assets” which are understood to be loans, whose full repayment has become questionable.

Despite initially appearing to improve, by September 2015 the Bank’s financial position had deteriorated further with increased losses, a further reduction in regulatory capital and numerous complaints to the NB. On 17 September 2015, the NB classified the Bank as insolvent pursuant to article 76 of the LBBA. On the same day, the DGF passed a resolution

commencing the process of withdrawing the Bank from the market and appointing Ms C as interim administrator.

Three months later, on 17 December 2015, the NB formally revoked the Bank's banking licence and resolved that it be liquidated. The following day, the DGF initiated the liquidation procedure and appointed Ms C as the first of the DGF's authorised persons to whom powers of the liquidator were delegated. Ms C was replaced as authorised officer with effect from 17 August 2020 by Ms G.

Ms G's appointment was pursuant to a Decision of the Executive Board of the Directors of the DGF, No 1513 (Resolution 1513). Resolution 1513 notes that Ms G is a "leading bank liquidation professional". It delegates to her all liquidation powers in respect of the Bank set out in the DGF Law and in particular articles 37, 38, 47-52, 521 and 53 of the DGF Law, including the authority to sign all agreements related to the sale of the bank's assets in the manner prescribed by the DGF Law. Resolution 1513 expressly excludes from Ms G's authority the power to claim damages from a related party of the Bank, the power to make a claim against a non-banking financial institution that raised money as loans or deposits from individuals, and the power to arrange for the sale of the Bank's assets. Each of the excluded powers remains vested in the DGF as the Bank's formally appointed liquidator.

On 14 December 2020, the Bank's liquidation was extended to an indefinite date, described as arising when circumstances rendered the sale of the Bank's assets and satisfaction of creditor's claims, no longer possible.

On 7 September 2020, the DGF resolved to approve an amended list of creditors' claims totalling approximately USD 1.113 billion. The Affidavit states that the Bank's current, estimated deficiency exceeds USD 823 million.

QUESTION 4.1 [maximum 15 marks]

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

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

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

The following will attribute in order to determine whether the Bank's liquidation comprises a "foreign proceeding" within the meaning of article 2(a) of the MLCBI,

1. A proceeding (including an interim proceeding)
2. That is either judicial or administrative;
3. That is collective in nature

Model Law is intended to achieve a coordinated, global solution for all stakeholders of an insolvency proceeding. The liquidation of the Bank was initiated by Deposit Guarantee Fund (DGF) to prevent multi-million dollar fraud resulting in monies being sent to many overseas companies. The purpose of the liquidation was to prevent detriment to investors and to realise and recover assets for the benefit of all creditors and stakeholders. Whether the substantially all of the assets and liabilities of the debtor

are dealt with in the proceeding, subject to local priorities and statutory exceptions and to local exclusions relating to the rights of secured creditors.

4. That is in a foreign state
The application is made at foreign state (UK)
5. That is authorised or conducted under a law relating to insolvency
Even though the liquidation of the Bank was not conducted under the law of insolvency, it was nevertheless deals with insolvency or severe financial distress. This evidence with the statement that by September 2015 the Bank's financial position had deteriorated further with increased losses and a further reduction in regulatory capital. In which the assets and affairs of the debtor are subject to control or supervision by a foreign court or other competent authority; and
The assets of the Bank under supervision of Deposit Guarantee Fund (DGF) who is the regulated body in Country A.
6. Which proceeding is for the purpose of reorganisation or liquidation
They may take various forms, including proceedings that are designed to prevent dissipation and waste, rather than to liquidate or reorganize the insolvency estate; proceedings designed to prevent detriment to investors rather than to all creditors (in which case the proceeding is also likely not to be a collective proceeding); or proceedings in which the powers conferred and the duties imposed upon the foreign representative are more limited than the powers or duties typically associated with liquidation or reorganization, for example, the power to do no more than preserve assets. The purpose of the proceeding was to recover the assets which within the meaning of CBIR.

Whether a foreign proceeding possesses or possessed those elements would be determined at the time the application for recognition is considered by reference to the sate of commencement of the foreign proceeding.

For full marks on this question it should be explained – preferably with reference to the guide to enactment or court cases what is meant by “insolvency”, “foreign court” and include a discussion on whether this procedure is administrative.

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].

Foreign representative may be a person authorized in the foreign proceedings to administer those proceedings, which would include seeking recognition, relief and cooperation in another jurisdiction, or they may simply be a person authorized specifically for the purposes of representing those proceedings.

Foreign representative have the following elements;

- a person or body, including one appointed on an interim basis;
Ms G, in her capacity as authorised officer of the Deposit Guarantee Fund (or DGF) of Country A together with the DGF are the foreign representatives. Further article 2 (e) mentioned that the appointment of foreign representative might be made by a special agency other than the court. It also includes appointment made on an interim basis.
- authorised in a foreign proceeding;
“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".

Based on the above its noted that Ms.G's excluded from claim damages from a related party of the Bank, non banking financial institution that raised money as loans or deposits from individual and the power to arrange for the sale of the bank's assets. However, this excluded powers are vested with the DGF. Since the application is made by both Ms. G and the DGF it would probably prudent for both of them to act jointly as the foreign representative further to the above, article 15 requires either a certified copy of the decision appointing the representative, a certificate affirming the appointment or other evidence of that appointment that is acceptable to the receiving court.

- to administer the reorganisation or liquidation of the debtor's assets or affairs or to act as representative of the foreign proceeding. The Model Law does not specify that the foreign representative must be authorised by the foreign court. Ms. G was appointed by the DGF Ms. G have all the powers that the DGF would have as a liquidator.

For full marks you should also in detail discussed if the DGF could be considered a foreign representative.

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.

*** End of Assessment ***