



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: 41 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?

- (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] 8 marks

Question 2.1 [maximum 3 marks] 3 marks

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

Under the MLCBI, the appropriate date for determining the centre of a debtor’s main interest (COMI) or whether an establishment exists is the date of commencement of the foreign insolvency proceeding. When determining the COMI, the courts attempt to ensure that the location of the foreign proceeding in fact corresponds to the actual location of the debtor’s COMI as would be readily ascertainable by third parties at the time of commencement of the foreign proceeding. Therefore, although the COMI of a debtor can move, if this move occurs close to the commencement of the foreign proceeding, it may be difficult for the debtor to satisfy the court that its COMI is in the new location as the COMI must be readily ascertainable by its creditors and a recent move may not be sufficiently evident that the debtor’s COMI has changed from the old location to the new one.

In determining the COMI of a debtor, the courts will consider two key factors which are assessed based on the facts and evidence which was presented and/or available at the date of commencement of the foreign proceeding, namely (i) the location where the central administration of the debtor takes place and (ii) which is readily ascertainable as such by creditors of the debtor.

While these are the two key factors the court will consider, there are additional factors which will be considered and assessed based on the evidence as at the time of commencement of the foreign proceeding including the location of the debtor's books and records and the location where financing was organised or authorised.

Essentially, in determining a debtor's COMI or whether an establishment exists, the court will undertake a holistic assessment of all the above factors based on the evidence that was presented or available at the time of the commencement of the foreign proceeding. Depending on the available evidence and the particular circumstances of each case, the different factors will be weighted accordingly as the court strives to ensure that the location of the foreign proceeding actually corresponds with the debtor's COMI.

Interestingly, the US Second Circuit of Appeals in the case of *Morning Mist Holdings Ltd v Kryz (Matter of Fairfield Sentry Ltd)*, adopted a slightly different approach and considered that a debtor's COMI should be determined based on its activities at or around the time the US bankruptcy proceeding is filed although the court may also consider the period between the commencement of the foreign proceeding and the filing of the US bankruptcy proceeding to ensure that a debtor has not manipulated its COMI in bad faith.

Question 2.2 [maximum 3 marks] 3 marks

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

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

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

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

Statement 1

This statement refers to Article 30(c) – Concurrent foreign non-main proceedings.

This article provides that in the event of two concurrent foreign non-main proceedings, the court must grant, modify or terminate relief for the purpose of facilitating co-ordination of the proceedings.

Statement 2

This statement refers to Article 32 – the hotchpot rule.

The hotchpot rule is intended to prevent situations in which a creditor might obtain more favourable treatment than the other creditors in the same class by obtaining payment of the same claim in insolvency proceedings in different jurisdictions.

Statement 3

This statement refers to Article 16 – recognition presumptions.

This article provides a rebuttable presumption that the debtor's registered office, or individual's habitual residence, is the centre of the debtor's main interests. Interestingly, although a key concept, COMI is not defined in the MLCBI.

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 had to consider whether to exercise its power to grant an indefinite moratorium where to do so would (a) in substance prevent English creditors from enforcing their English law rights in breach of a principle which provides that a debt governed by English law cannot be discharged or compromised by a foreign insolvency proceeding unless the creditor submits to the relevant foreign insolvency proceeding (the Gibbs Rule); and/or (b) prolong the stay after the Azeri restructuring had come to an end.

An application for an indefinite moratorium had been made by an Azeri foreign representative appointed under a restructuring scheme. Under the Cross Border Insolvency Regulation, the Azeri representative was entitled to an automatic indefinite moratorium upon her appointment without the need for creditor consent. This therefore conflicted with the Gibbs Rule. The court found that as a matter of settled practice, it should not exercise its power under the Cross Border Insolvency Regulation to grant the indefinite moratorium as to do so would be in breach of the Gibbs Rule and would also allow the moratorium to continue after the restructuring had ended.

The court stated that it could only grant an indefinite moratorium where the stay would be necessary to protect the interest of the creditors and the stay would be appropriate to achieve such protection. In the circumstances of this case, the court found that the requested moratorium was not necessary to protect the creditors and in any event, it was not an appropriate way of achieving the protection sought therefore it declined to exercise its discretion to grant a stay under Article 21 of the MLCBI.

The Court of Appeal's decision confirms that the English courts will not grant an indefinite moratorium where to do so would conflict with settled English law and any requested stay must also be necessary and proportionate.

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]

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**.

Upon recognition, the court in an enacting state must review any interim relief granted under article 19 and any discretionary relief granted under article 21 to ensure that they are consistent with the law of the domestic proceeding and if not, modify accordingly. The review

of the reliefs previously granted should also entail as far as possible, any such modifications to ensure that the relief granted is in accordance with the domestic proceeding.

The correct answer is here art. 29 (a) on concurrent proceedings.

Under article 18, the foreign representative in the foreign main proceeding has an ongoing obligation to update the court on developments. From the time of filing the recognition application, the foreign representative must immediately update the court in the enacting State of (i) any substantial change in the status of the recognised foreign proceeding or the status of the foreign representative's appointment and (ii) any other foreign proceeding regarding the same debtor that becomes known to the foreign representative.

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

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 access and co-ordination rights which allows the representative to have direct access to the courts in State A.

Under article 9, the foreign representative will be able to enjoy certain rights such as being able to apply directly to the court in State A prior to making a recognition application. This enables the representative to have standing before the courts in State A without the need for recognition. This therefore allows the foreign representative to move swiftly which is a major advantage in cross-border insolvency.

Under article 11, the foreign proceeding will also have standing to access the courts of State A, prior to making a recognition application, and apply to commence proceedings there provided that the requirements for commencing proceedings in State A are met. This is particularly useful in a cross-border insolvency where there is an urgent need to preserve and/or protect the company's assets.

The foreign representative would also be able to benefit from articles 25, 26 and 27 of the MLCBI, which all contain provisions to facilitate co-operation and co-ordination between the representative and the courts in State A. Together, these articles require State A and the foreign representative to co-operate and co-ordinate in a cross border insolvency.

These access and co-ordination rights are beneficial to the foreign representative as they enable him to efficiently and effectively have conduct of the insolvency proceedings in the courts of State A thereby saving on costs while being able to seek appropriate relief to preserve and/or protect the company's assets.

Question 3.2 [maximum 5 marks]

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

In addition to the foregoing, the courts in State A will also consider the following articles of the MLCBI:

Article 3 – supremacy of other international obligations

The court in State A will consider whether there are any international treaties or multi-state agreements which conflict with the MLCBI. Under article 3 of the MLCBI, if the MLCBI conflicts with such treaties or agreements, the treaty or agreement is supreme and is to be followed rather than the MLCBI.

Article 15 – evidential requirements

Pursuant to article 15, there is a prescribed list of documents which must accompany the recognition application. These include a copy of the decision commencing the foreign proceedings and appointing the foreign representative in State B; or a certificate from the court of State B confirming the existence of the foreign proceedings; or in the absence of both of these, any other evidence acceptable to the court of State A of the existence of the proceedings in State B and the appointment of the foreign representative. The court will also consider whether an order should be made for documents in the language of State B to be translated to the official language of State A.

Article 17 – procedural requirements and COMI/establishment

Under article 17, assuming that the evidential requirements prescribed by article 15 have been met, the application must have been submitted to the competent court or authority of State A which can grant recognition in accordance with article 4.

Based on the evidence presented and/or available at the date of commencement of the foreign insolvency proceeding, the court would also need to consider where the debtor’s COMI is located or whether there is an establishment in State B. If the court is not satisfied that the debtor has a COMI or establishment in State B, the recognition application in State A will be unsuccessful as the foreign proceeding cannot be recognised as such for the purpose of the MLCBI.

Article 6 – public policy considerations

Pursuant to article 6, the courts in State A will consider whether there are any public policy considerations which justify a refusal of the recognition application. Under article 6, a recognition application may be refused if the court considers that the recognition is manifestly contrary to the public policy of State A, however, this exception should be interpreted very narrowly and should be sparingly used to refuse recognition.

Article 1(2) – excluded proceedings

Although the MLCBI applies generally, states are permitted to exclude certain proceedings, and therefore the courts of State A must also consider whether there are any exclusions which could potentially affect the recognition application.

If these above requirements are satisfied, it is likely that the foreign representative’s appointment in State B will be recognised in State A.

Question 3.3 [maximum 5 marks] 2 marks

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

Pre- recognition relief

Pursuant to article 19, upon the application for recognition of the foreign proceedings in State B, the foreign representative may apply for relief. This type of relief is referred to as pre-recognition relief because it is available from the time of the filing the application to the time the application is decided upon. In order for pre-recognition relief to be granted pursuant to article 19, the foreign representative must satisfy the State A court that there is an urgent need for the relief to protect the assets of the debtor or the interest of the creditors.

The pre-recognition relief available to the foreign representative includes:

- (a) A freezing injunction;
- (b) A stay of execution against the debtor's assets;
- (c) Entrusting the administration or realisation of all or parts of the debtor's assets located in State A to the foreign representative or another person designated by the court, in order to protect and preserve the value of the assets; and
- (d) Any other relief under article 21.

Although pre-recognition relief is only available on an urgent and provisional basis, it is useful as there is often an urgent need to preserve and protect a company's assets and this may be delayed pending determination of the recognition application. The fact that pre-recognition relief is available upon the filing of the recognition application, allows the foreign representative to quickly preserve the company's assets and protects against further mismanagement and potential dissipation where there has been wrongdoing.

When deciding whether to grant pre-recognition relief, the courts will consider whether the requested relief will protect the interests of the creditors and any other interested persons. The court will not grant interim relief if these conditions are not satisfied, however, the court may grant interim relief subject to such conditions it deems to be in the interest of protecting the creditors and any other interested persons.

Unless extended, pre-recognition relief terminates upon the recognition of the foreign insolvency proceedings and the court may refuse to grant interim relief if the relief sought would interfere with the foreign main proceeding.

Post-recognition relief

Pursuant to article 20, there are certain post-recognition reliefs which will be automatic if State A eventually grants the recognition application and the State B proceedings are recognised as the foreign main proceedings.

Under article 20, once the recognition application is granted, subject to the laws of State A:

- a) There is a stay on the commencement or continuation of individual actions or individual proceedings involving the debtor's assets, rights, obligations or liabilities;
- b) There is a stay of execution against the debtor's assets; and
- c) There is a suspension of the right to transfer, encumber or otherwise dispose of the debtor's assets.

Following recognition, the courts in State A also have the discretion to grant relief under Article 21, however, the powers provided by article 21 are more extensive than the automatic relief granted by article 20. Therefore, the circumstances of a particular case may require the court in State A to exercise its discretion and grant wider relief than that available under article 20. Article 21 also contains a non-exhaustive list of relief that may be granted, therefore, the courts in State A are able to adopt a flexible approach when considering the particular relief that may be necessary in a specific case. In addition to the relief that may be granted under article 20, pursuant to article 21, the court may also grant relief which includes:

- a) 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;
- b) Extending any interim relief granted under article 19; and
- c) Granting any additional relief that may be available to a domestic liquidator or office holder under the laws of State A.

Similar to the pre-recognition interim relief, the court must be satisfied that the relief requested is necessary to protect the assets of the debtor or the interest of creditors. Additionally, in order to obtain article 21 relief, the foreign representative must satisfy the courts in State A that the relief being sought is related to assets that should be administered in the foreign non-main proceeding or information required in those proceedings.

The relief sought is restricted in the sense that the court may not grant the requested relief if it considers that if it grants the relief sought, this will interfere with proceedings in another insolvency, especially the foreign main proceeding. Additionally, the court is restricted in that: (i) they will not grant an indefinite automatic moratorium in support of a foreign restructuring, (ii) the court does not have jurisdiction to apply foreign insolvency law to a contract governed by English law pursuant to the Gibbs rule, and (iii) the Cross Border Insolvency Law does not apply to enforcement of an insolvency related in personam default judgment.

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

1. **Adequate protection:** Pursuant to Article 22 of the Model Law any interim relief under Article 19 of the Model Law or any post-recognition relief under Article 21 of the Model Law require the court in State A to be satisfied that the interests of the creditors and the other interested persons, including the debtor, are adequately protected and any relief may be subject to conditions as the court considers appropriate.
2. **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.
3. **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] 1 mark

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

Pre-recognition relief terminates upon the recognition of the foreign insolvency proceedings unless extended under article 21. Upon recognition, the court will assess the pre-recognition relief that has been granted and decide whether it will continue, discharge or vary such relief. In this instance, the court would consider whether the worldwide freezing order is necessary to protect the interests of the debtor and its creditors. It is unlikely that the court would continue the worldwide freezing order as it is an interim remedy designed to preserve the debtor's assets pending the foreign representative being recognised. Once recognised, the

representative will be able to seek other relief which is more appropriate to protect the interests of the debtor and creditors.

QUESTION 4 (fact-based application-type question) [15 marks in total] 14 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]; 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]. 4 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.

This is an application for recognition of the liquidation of the Bank pursuant to the MLCBI.

As a starting point, the court must be satisfied that (i) the liquidation proceeding falls within the meaning of a ‘foreign proceeding’ under article 2(a) of the MLCBI and (ii) whether the Applicants fall within the description of ‘foreign representatives’ as defined by article 2(d) of the MLCBI.

Whether the Bank’s liquidation constitutes a foreign proceeding within the meaning of article 2(a) of the MLCBI

When deciding whether the liquidation proceeding falls within the meaning of a foreign proceeding, pursuant to article 2(a), the court is required to consider whether the liquidation is a collective judicial or administrative proceeding in a foreign state, authorised or conducted under a law relating to insolvency, involving the Bank’s assets and affairs being subject to the control or supervision of a foreign court, for the purpose of reorganisation or liquidation. These requirements are to be considered as a whole.

The first element of this question is whether the liquidation proceeding in Country A is a collective judicial or administrative proceeding under the laws of Country A.

(i) Is the liquidation a collective judicial or administrative proceeding

Based on the facts of the case, I am satisfied that the Bank’s liquidation constitutes a collective administrative proceeding.

To constitute a proceeding, the liquidation must be a statutory framework that constrains the Bank’s actions and regulates the final distribution of its assets. Pursuant to the LBBA, upon receiving confirmation of NB’s decision to revoke the Bank’s licence, the Bank is placed into liquidation and DGF is automatically appointed as liquidator. NB and DGF are both public authorities and DGF has full and exclusive rights to manage the Bank to the exclusion of the Bank’s former management. The Bank has therefore been placed into liquidation pursuant to the LBBA which has constrained the Bank’s actions by virtue of placing its management powers in the hands of DGF who is then able to make the final distribution of the Bank’s assets during the liquidation. This in my view is an administrative action based on the laws of Country A and therefore satisfies that requirement.

In terms of whether this is a collective proceeding, it has been established that the court must consider whether substantially all of the assets and liabilities of the Bank are dealt with in the proceedings. Under the LBBA, DGF is vested with the powers of a liquidator and is able to deal with all the assets and liabilities of the Bank with a view to achieving the best outcome for all stakeholders of the Bank. The liquidation is governed by a scheme that provides for dealing with the Bank’s assets and liabilities and DGF is responsible for the administration of this scheme which will invariably entail the calling in and distribution of the Bank’s assets.

Based on the extensive powers given to the DGF under the LBBA, it is reasonable to conclude that the DGF has control and authority to deal with substantially all of the Bank's assets for the benefit of its creditors. In my view, this is a collective procedure.

- (ii) Are the proceedings being conducted in a foreign state under a law relating to insolvency

The next consideration is whether the liquidation is being conducted in a foreign state under a law relating to insolvency. The Bank's liquidation is being conducted outside of the UK pursuant to the insolvency laws of Country A (LBBA), that is, a foreign state. It is clear that the LBBA is a statutory framework in Country A designed to coordinate in an organised manner, the winding up of insolvent banks in Country A.

- (iii) Do the proceedings involve the Bank's assets and affairs being subject to the control or supervision of the foreign court for the purpose of reorganisation or liquidation

The proceeding relates directly to the Bank's assets as under the BBVA, the liquidator is granted the power to, amongst other things, manage and take over the Bank, locate and recover property belonging to the Bank and dispose of the Bank's assets. The purpose of the liquidation appears to be to wind up the Bank's affairs by selling its assets and paying its creditors. These are standard powers given to a liquidator in insolvency proceedings and are designed to enable the liquidator to maximise the returns possible through the liquidation. The proceedings therefore directly involve the Bank's assets and affairs.

The next consideration is whether the liquidation is subject to the control or supervision of the courts of Country A. Pursuant to article 2(a) of the MLCBI, the assets or affairs of the Bank can be subject to direct or indirect control or supervision. *In the matter of Agrokor DD EWHC 2791 (Ch)* the court confirmed that the existence of government controls did not necessarily prevent the proceedings from being subject to the control and supervision of the court. Additionally, the control or supervision need not be by a centralised court and can include regulatory authorities who are providing the function of a court. Generally, the threshold for control or supervision under the MLCBI is low. The NB and DGF are governmental entities and therefore, without more, would not be considered as a court. However, they could be considered as regulatory bodies and as outlined above, this may be sufficient to satisfy this criterion. In view of the wide powers granted to the DGF, which is responsible for oversight once liquidation has commenced, I am of the view that the proceedings are being controlled and supervised by the DGF. The substantial powers given to the DGF in the proceedings (which have been outlined above) is sufficient for me to find that the liquidation is subject to the control of the DGF.

Having considered all these factors as a whole, I am satisfied that the Bank's liquidation constitutes a foreign proceeding within the meaning of article 2(a).

Great answer.

Whether the Applicants fall within the description of 'foreign representatives' as defined by article 2(d) of the MLCBI.

To be considered as a foreign representative under article 2(d), the Applicants must satisfy the court that they are (a) a person or body, (b) authorised to act in a foreign proceeding and (c) authorised to administer the reorganisation or liquidation of the Bank's assets or affairs or to act as a representative of the foreign proceeding.

There is no question that Ms G and the DGF constitute a person and body respectively. This criterion is therefore satisfied.

Having already concluded that these are foreign proceedings, the next criterion is whether Ms G and DGF are authorised to act. The DGF is clearly authorised to act pursuant to article 77 of the LBBA which automatically appoints the entity as the liquidator of the Bank. The DGF is then able to delegate its powers to qualified persons although it may retain some residual powers.

In this case, the DGF delegated its powers to Ms G by a decision of its executive board of directors made in accordance with the LBBA. The authorisation granted to Ms G has not been revoked and Ms G has not been removed. She is authorised to sell the Bank's assets and is responsible for administering the liquidation of the Bank. In respect of DGF, although it has delegated powers to Ms G it has retained the power to, amongst other things, claim damages from a related party of the Bank and the power to arrange for the sale of the Bank's assets. The DGF is therefore still authorised to deal with the Bank's assets notwithstanding its delegation of certain powers to Ms G and retains a supervisory role.

In all the circumstances, I am satisfied that Ms G and the DGF are foreign representatives within the meaning of article 2(d) of the MLCBI and they are both authorised to act in the liquidation of the Bank.

*** End of Assessment ***