



**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 48,5 out of 50 (Well done!)**

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

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

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

#### **Question 1.1**

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

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

**(d) All of the above.**

#### **Question 1.2**

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

- (a) **The existence of a statutory basis in national (insolvency) laws for co-operation and co-ordination of domestic courts with foreign courts or foreign representatives.**
- (b) The difficulty of agreeing multilateral treaties dealing with insolvency law.
- (c) The practical problems caused by the disharmony among national laws governing cross-border insolvencies, despite the success of protocols in practice.

**(d) None of the above.**

### Question 1.3

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

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

Commented [BT1]: Page 21

### Question 1.4

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

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

### Question 1.5

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

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

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

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

**Question 1.6**

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

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

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

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

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

**Question 1.7**

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

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

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

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

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

**Question 1.8**

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

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

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

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

(d) None of the above.

**Question 1.9**

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

(a) Enforcement of insolvency-related judgments.

(b) An indefinite moratorium continuation.

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

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

**Question 1.10**

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

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

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

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

(d) All of the above.

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

**Question 2.1 [maximum 3 marks] 3 marks**

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

**Answer**

According to the Digest of Case Law on UNCITRAL Model Law on Cross-Border Insolvency, there are 4 possible dates for determining the COMI. These are:

1. The date of commencement of the foreign proceedings;
2. The date of the application for recognitions;
3. The date the court in which the application is made in State A is a competent court our Authority to decide the application; and
4. A date determined by reference to the operational history of the debtor.

The date of commencement (the approach adopted in the UK and Europe) is considered the appropriate date for determining the COMI having regard to Article 15 and the relevance accorded to the decision commencing the foreign proceedings and appointing the foreign representative. The commencement date is also considered the appropriate date for the determining the COMI because the business activity of the debtor would have ceased upon the commencement of the foreign insolvency proceeding. All that may exist thereafter is the foreign insolvency proceeding and the activity of the foreign representative in administering the insolvent estate. The date of commencement is also considered appropriate as it avoids different outcomes in different states.

When determining the date of the COMI, the court will also consider any change of the COMI that is made close in proximity to the commencement of the proceedings. This there is a requirement that the COMI must be readily ascertainable by third parties and the court is cautious against debtors attempting to manipulate the COMI in bad faith.

The US Court of Appeal (5<sup>th</sup> Circuit) in re Ran 607 F 3d 1017 (5th Cir, 2010) however, held that the relevant date for determining COMI is the date as at the filing of the recognition application. The Court of Appeal reached that view after opining that an undertaking of the COMI inquiry at the time of the filing of the recognition petition favoured consistency in recognition outcomes across jurisdictions.

On the other hand, in Australian, the courts have held that the relevant date at which to determine COMI is at the time of the court's decision on the recognition application. In determining the date, the court have regard to historical facts which led to the position at that time.

**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."*

**Answer**

1. Statement 1 relates to Article 30(c). This article concerns the co-ordination of more than one foreign proceeding. It provides that if after recognition of a foreign non-main proceeding, another non-main proceeding is recognised, the court shall grant, modify or terminate relief for the purpose of facilitating coordination of the proceedings.
2. Statement 2 relates to Article 32 and the hotchpot rule. This rule aims at avoiding situations where one creditor may obtain more favourable treatment than other creditors in the same class by obtaining payment of the same claim in insolvency proceedings in different states. The hotchpot rule prevents this by preventing a creditor who has received payment in relation to its claim in a foreign insolvency proceeding

from receiving a further payment for the same claim in a domestic insolvency proceeding in the enacting state regarding the same debtor so long as the payment to the other creditors of the same class is proportionally less than the payment the creditor has already received. This principle, however, does apply to secured claims.

3. Statement 3 relates to Article 16 which deals with presumptions concerning recognition. While the key concept of COMI is undefined in the MLCBI, Article 16(3) provides that in the absence of proof to the contrary (a rebuttable presumption), the debtor's registered office, or habitual residence in the case of an individual, is presumed to be the debtor's COMI.

### **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.**

#### **Answer**

The English law principle known as 'the Gibbs rule' provides that a debt governed by English law could not be discharged or compromised by a foreign insolvency proceeding and a debt under the insolvency law of a foreign country was only treated as discharged in England if it was discharged under the proper law applicable to the contract.

The Court of Appeal in the *IBA* case had to consider whether it should exercise its discretionary power under the CBIR (equivalent of MLCBI Article 21) to grant an indefinite stay requested by IBA. It also considered the effects of such a stay (after the end of an Article 20 automatic stay) on English creditors in light of the Gibbs Rule.

It was held that the court would not exercise its discretionary power to grant a stay under Articles 21(1)(a) and (b) of the CBIR (which implemented the MLCBI), going beyond the automatic stay that would be granted under Article 20. This was because, had the MLCBI ever contemplated the continuance of relief when the foreign proceedings had ended, the court found that the MLCBI would have explicitly said so.

The court was also not satisfied that the indefinite stay sought by IBA was necessary to protect the interests of IBA's creditors nor was it an appropriate way of achieving such protection.

It was the court's view that to grant a discretionary stay under Articles 21(a) and (b) would in substance prevent the English creditors, (who were creditors of IBA under a \$US20m term facility and \$US500m Notes issued by IBA, both of which were governed by English law) from enforcing their English law rights in accordance with the Gibbs rule and/or would prolong the stay after the reconstruction had come to an end.



**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**.

**Answer**

The most relevant article is Articles 29, which deals with coordinating domestic proceedings and foreign proceedings and Article 21, which deals with interim relief.

Article 29 provides that the court can grant any relief under Article 21 (the court's discretionary powers) but such relief must be consistent with the domestic proceeding. Before granting such relief, the court must be satisfied that the relief is necessary to protect the assets of the debtor or the interest of the creditors.

We should note that since the foreign proceedings here are recognised as the main proceedings, Article 20 (automatic relief) does not apply (see Article 29(a)(ii)).

The foreign representative in the foreign main proceedings will have an ongoing duty towards the enacting State to provide subsequent information pursuant to Article 18. The representative should inform the court promptly of (a) any substantial change in the status of the recognised proceedings or the status of the foreign representative's appointment; and (b) any other foreign proceeding regarding the same debtor that becomes known to the foreign representative.

**QUESTION 3 (essay-type questions) [15 marks in total] 14,5 marks**

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

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

**Question 3.1 [maximum 4 marks] 4 marks**

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

**Answer**

The access and co-ordination rights will benefit the foreign representative in terms of enabling a better result to be achieved in this cross-border insolvency. The MLCBI allows the foreign representative access to the courts of State A (the enacting State) which will permit the representative to seek certain temporary “breathing space” and allowing the court in State A to determine what co-ordination with State B or other relief is necessary for the efficient disposal of the insolvency.

The access rights will save time and expense by removing jurisdictional barriers which often leads to delays. Cross-border insolvencies are inherently chaotic and value evaporates quickly with the passage of time. Therefore, these access rights provide a benefit to the foreign representative in the execution of his duties.

The foreign representative will benefit from certain access rights provided by Articles 9 and 11. Article 9, for example, entitles the foreign representative to apply directly (automatic standing) to the court in State A. The foreign representative will therefore have standing before the State A court, without need for the foreign proceedings to be recognised in State A. This is a benefit to the foreign representative.

Article 11 also provides the basis for the foreign representative’s standing to access the courts of State A, entitling him/her to apply to commence proceedings in State A so long as all the requirements for opening such proceedings are otherwise met. Recognition is not a precondition to that commencement on the basis that the proceedings may be crucial in cases of an urgent interim relief needed to preserve the assets of the debtor. This is a benefit to the foreign representative.

These access rights will facilitate the co-operation and co-ordination between the court of State A and the foreign representative. Co-operation is not dependent upon recognition and Articles 25 and 26 was not intended to limit the jurisdiction of the courts of State A in assisting the foreign representative. Courts can freely communicate with the representative without needing to worry about the status of the representative. It saves time and costs. The MLCBI does not prescribe what appropriate co-ordination is appropriate in any given circumstance. Instead, the MLCBI, through Article 27, provides a non-exhaustive list of appropriate means of co-operation that may be of benefit to the foreign representative, even prior to making a recognition application. The foreign representative can also benefit from the additional forms of co-operation mentioned in the Practice Guide.

### **Question 3.2 [maximum 5 marks] 5 marks**

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

#### **Answer**

Articles 15 and 17 of the MLCBI are relevant to the evidential requirements and procedure for the recognition of the proceedings in State A.

In addition to the proceedings in State B being a foreign proceeding under Article 2(a) and the foreign representative qualifying within the meaning of Article 2(d), the State A courts will also consider the following.

Firstly, the court will also require that the foreign representative provide (a) a certified copy of the decision commencing the foreign proceedings in State B and appointing the foreign representative; or (b) a certificate from the court of State B confirming the existence of the foreign proceedings and the appointment; or (c) 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. This requirement should be easily met, given that it is said that the proceedings in State B being a foreign proceeding under Article 2(a) and the foreign representative qualifying within the meaning of Article 2(d).

Secondly, the court in State A will consider whether the application is made by the foreign representative in a court in State A referred to in Article 4. That is, the State A court must satisfy itself that it is a competent court or authority to grant recognition.

The application must also be accompanied by a statement from the foreign representative that identifies all foreign proceedings, known to the foreign representative, in relation to the debtor. The court may also require that documents not in the official language of State A be translated to that language.

The court will also consider the public policy grounds for denying recognition in State A and whether there are grounds exists in this case for refusing to recognise the State B proceedings. Pursuant to Article 6, the recognition can be refused where it is manifestly contrary to the public policy of State A. The public policy exception should be construed narrowly and as such it should be rarely used to refuse recognition. This was confirmed in the English case of *Agrokor*, where it was held that the use of the term 'manifestly' in Article 6 requires a higher threshold than the recognition only being contrary to public policy.

Additionally, the court should consider whether there has been an abuse of process in the case before it. This could exist where the foreign representative has failed to provide full and frank disclosure. There is no explicit requirement to consider abuse of process under the MLCBI, but the courts of State A may consider this under its domestic law or procedural rules, and this may affect the application for recognition.

The State A court should also consider whether, pursuant to Article 1(2), State A has excluded certain proceedings from the implemented MLCBI. While the MLCBI generally applies to any foreign proceeding falling within the definition of Article 2(a), State A is permitted to exclude certain business entities which it deems subject to special regulatory regimes. Entities subject to such regimes may include banks, insurance companies, utilities, financial and investment institutions; commodity exchange members, clearing houses, certain licensed financial service providers, consumers and stock and commodity brokers.

The court will also consider the location of the COMI and establishments of the debtor as this will determine whether the proceedings in State B are recognised as the main or non-main proceedings under Article 17(2).

Note that there are no reciprocity requirements in State A and so the court need not consider this.

The State A court must also decide the application at the earlier possible time pursuant to Article 17(3)).

The Court must also consider any existing international obligation on State A. Art 3 provides that if there are such obligations on State A that may conflict with the recognition application, the court must consider this.

**Question 3.3 [maximum 5 marks] 5 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.

**Answer**

Pre- recognition relief

Pre-recognition relief is available pursuant to Article 19.

Under Article 19, the foreign representative may apply for relief upon the application for recognition of the foreign proceedings in State B. This relief may last from the time of the filing the application to the time the application is decided upon. The State A court must be satisfied that the relief is urgently needed to protect the assets of the debtor or the interest of the creditors. The relief granted by the court may include:

- (a) A stay of execution against the debtor's assets;
- (b) 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, that by their nature or because of other circumstances, are perishable, susceptible to devaluation or otherwise in jeopardy; or
- (c) Relief under article 21(1)(c),(d) and (g).

This relief is beneficial to the foreign representative as it aids in urgently preserving assets from dissipation even before the foreign proceedings are recognised. The relief is only available on an urgent and provisional basis, pending the recognition decision. The interim relief will terminate upon the recognition of the proceedings, unless it is extended under Article 21(1)(f).

In granting the relief, the court in State A will seek to foster coordination of pre-recognition relief with any foreign main proceedings. Therefore, pursuant to Article 17(4), where the proceeding in State B is not the main proceedings, the court in State A may refuse to grant relief if such relief would interfere with the foreign main proceeding.

Additionally, when granting the relief under Article 19, the State A court must be satisfied that the interest of the creditors and other interested persons are protected (see Article 22). The court may therefore choose to grant relief subject to conditions aimed at protecting those interests.

Post-enforcement relief

If the State B proceedings are eventually recognised as the foreign main proceedings, Article 20 provides for certain automatic relief. This includes that the commencement or continuation of individual actions or individual proceedings concerning the debtor's assets, rights, obligations or liabilities is stayed. Execution against the debtor's assets is also stayed and the right to transfer, encumber or otherwise dispose of any assets of the debtor is suspended. In essence, there is an automatic moratorium. The scope, and modification or termination of the stay and suspension will be affected by the laws of State A.

Additionally, under Article 21, the State A court will have the power to grant discretionary relief including a stay of the commencement or continuation of individual actions, stay of execution against the debtor and suspending the right to transfer, encumber or otherwise dispose of assets. Article 21 discretionary powers are broader than those under Article 20. The list of relief in Article 21 is also non-exhaustive. However, the court must be satisfied that the relief is necessary to protect the assets of the debtor or interest of the creditors.

When granting relief in non-main foreign proceedings under Article 21, the State A court must also be satisfied that the relief being granted relates to the foreign non-main proceedings or information required in those proceedings. The relief should not interfere with proceedings in another insolvency, especially the foreign main proceedings.

In terms of limitations to relief under Article 21, it is necessary to consider whether State A has adopted the approach of English case law under the CBIR. Based on such case law, the CBIR (which implemented the MLCBI) (i) did not apply to enforcement of an insolvency-related in personam default judgment (ii) did not apply to English law governed contracts and (iii) did not give the court jurisdiction to grant an indefinite automatic moratorium in light of the Gibbs Rule.

In granting pre or post enforcement relief, the state should also consider existing international obligations on State A as well as public policy exceptions.

**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?

**Answer**

The extension of pre-recognition interim relief is allowable pursuant to Article 19(3) which allows a continuation of such a relief pursuant to Article 21(1)(f).

However, under Article 21(1)(f), in order for the court to grant relief, it must be satisfied that the order is necessary to protect the assets of the debtor or interest of the creditors. Where the foreign representative fails to show this, the court is unlikely to continue the pre-recognition worldwide freezing order under Article 21.

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] 15 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]. 5 marks**

**While not all facts provided in the fact pattern for this question (Question 4) are immediately relevant for your answer, please do use, where appropriate, those relevant facts that directly support your answer.**

For the purpose of this question, you may further assume that the Bank is **not excluded** from the scope of the MLCBI by article 1(2) of the MLCBI.

### **Answer**

The Applicants have applied for recognition of the liquidation of the Bank before the English court based on the CBIR, the English adopted version of the MLCBI. In determining whether the liquidation proceedings should be recognised, I am first required to consider whether the liquidation proceedings fall within the meaning of a “foreign proceeding” under Article 2(a) of the MLCBI and whether the Applicants fall within the description of “foreign representatives” under Article 2(d). I set out my decision below.

#### Whether the Bank’s liquidation comprises a foreign proceeding within the meaning of Article 2(a) of the MLCBI?

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

For our purpose, the Bank liquidation in Country B must simply satisfy two elements. It must be:

- (a) a collective judicial or administrative proceeding in a foreign state pursuant to a law relating to insolvency; and
- (b) a in which proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign court for the purpose of reorganisation of liquidation.

Courts have generally considered these characteristics as cumulative and held that they should be considered as a whole. The inquiry is also factual in nature.

The first consideration here is whether the Bank liquidation proceedings in Country A is a collective judicial or administrative proceeding pursuant to the laws of Country A. That is, whether it is a collective statutory framework that constrains the company’s (the Bank’s) actions and regulates the final distribution of all the assets of the company. It should be noted that, in terms of proving that the proceedings is “collective” an exclusion of certain creditor interests may indicate that a process is not collective. However, that is only one factor to consider.

In my opinion, this element has been satisfied. When the Bank was placed in administrative liquidation 18 December 2015 pursuant to the laws of Country A, DGF automatically became the liquidator of the Bank and was vested with the full powers of a liquidator under the law of Country A. Those powers include powers of sale, distribution and the power to bring claims for compensation against persons for harm inflicted on the Bank. Some of those powers was delegated to Ms G, one of the Applicants before me. In exercise of its statutory role, DGF resolved to approve an amended list of creditors’ claims totalling approximately USD 1.113 billion. In essence, the liquidation of the Bank under the DGF Law is a collective insolvency proceeding based on the desirability of achieving a coordinated solution for all stakeholders of the Bank. It is an imposition of an orderly regime that affects the rights and obligations of all creditors and all assets of the Bank.

All this is done pursuant to the laws of Country A (DGF Law). Under this law, a two staged process/regime is established whereby DGF has powers and duties first as a provisional

administrator and then as a liquidator. This two stage process is part of the statutory duty of DGF to withdraw insolvent banks from the market and winding down their operations through a liquidation process. Within this process, DGF has full and exclusive rights to manage the Bank and all powers of the Bank's management. It is clearly a statutory framework that constrains the company's (the Bank's) actions and regulates the final distribution of the assets of the Bank.

I am also satisfied that the second element I mentioned above has been met. The proceedings under the DGF Law is clearly a proceeding in which the assets and affairs of insolvent banks (the debtor) are subject to control or supervision by a foreign court for the purpose of reorganisation or liquidation. The requirement under Article 2(a) for the affairs of the Bank to be "subject to control or supervision" may not only be directly by a court but also indirectly by an insolvency representative or body which is supervised by the court or other regulatory authority. Additionally, I rely on the decision in the Lex Agrokor case which established that the level of court supervision required by the MLCBI, and invariably the CBIR, is relatively low. A potential, as opposed to actual or indirect control, will suffice.

In the circumstances before me, the liquidator is Ms G, and pursuant to Article 35(1) of the DGF Law, she is accountable to the DGF for her actions and may exercise the powers delegated to her by the DGF in pursuance of the Bank's liquidation. DGF is a regulatory authority in Country A tasked principally with providing deposit insurance to bank depositors in Country A. The "control or supervision" element has therefore been met.

Finally, the entire administrative process which I outlined relates to the assets of the Bank for purpose of reorganisation or liquidation. It deals with a procedure for addressing insolvency or severe financial distress of banks in Country A. The Agrokor case confirmed that English law does not require that the legislation in question be labelled as an "insolvency law". It is sufficient that the law deals with insolvency or severe financial distress. In the circumstances, I find that the entire administrative process set out by the DGF law to deal with insolvent banks is a The liquidation stage, at which the Bank is currently at, is a collective administrative proceeding in a foreign state pursuant to a law relating to insolvency.

Moving to the second requirement. I also find that The second requirement is also met. The proceeding concerns the assets and affairs of the debtor for the purpose of reorganisation of liquidation. This is clear on the face of the law which:

- (a) grants the liquidator the power to manage and take over the insolvent Bank;
- (b) the power to compile a register of creditor claims and to seek to satisfy those claims;
- (c) the power to take steps to find, identify and recover property belonging to the bank;
- (d) the power to dispose of the bank's assets;
- (e) the power to exercise "such other powers as are necessary to complete the liquidation of a bank" and
- (f) the powers of sale and distribution and to bring claims for compensation against persons for harm inflicted on the insolvent bank.

All these are accepted features of liquidation proceedings, with which the MLCBI is concerned. The DGF provisions were also intended to protect the stability of the economic system of Country A from systemic shocks through restructuring banks.

In all the circumstances, I am satisfied that the Bank liquidation is a foreign proceeding within the meaning of Article 2(a) of the MLCBI.

Great answer

whether the Applicants fall within the description of “foreign representatives” as defined by article 2(d) of the MLCBI

In order for the Applicants to be classified as a foreign representative, they must show that they are either a person or body, including one appointed on an interim basis, authorised in a foreign a foreign proceeding to administer the reorganisation or liquidation of the debtor’s assets or affairs or to act as a representative of the foreign proceeding. This definition is sufficiently broad to include appoints that might be made by a special agency other than the court. The focus should be on the authorisation being in the course of the foreign proceedings rather than upon the body providing the authorisation. The authorisation may be issued by a court, law or even the debtor itself. Where an authorisation is relied upon, the person or body claiming to be authorised must have the power to administer the debtor’s affairs at the time of the application for recognition.

I have already concluded that these proceedings are foreign proceedings. I must therefore determine whether the Applicants are foreign representatives in respect of those proceedings.

Starting with Ms G, she is acting her capacity as authorised officer of the DGF of Country A in respect of the liquidation of the Bank. Ms G’s appointment was made pursuant to a Decision of the Executive Board of the Directors of the DGF, No 1513 (Resolution 1513). Resolution 1513 was made pursuant to the DGF Law. Resolution 1513 has not been revoke, nor has there been a subsequent Decision by DGF to remove Ms G. She has the authority to act as liquidator of the Bank at the time of her application herein. I therefore find that she qualifies as a foreign representative for the purpose of the MLCBI/CBIR.

I come to a similar decision in relation to DGF. It too is authorised to act as liquidator in respect of the Bank in the foreign liquidation proceedings in Country A. 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 (17 December 2015). While Resolution 1513 delegated most of its power as liquidator to Ms G, DGF retained 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 these excluded powers remained vested in the DGF under its formal appointment as liquidator of the Bank. At the time of this application, therefore, it too retains authority to act as liquidator in the foreign proceedings and has thus satisfied Article 2(d) of the MLCBI/ the CBIR.

**\* End of Assessment \***