



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.**
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- 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: 42 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] 9 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.

When determining the COMI or whether establishment exists, of a debtor, the appropriate date is the date of commencement in the foreign proceedings.

However, in the US judgment of *Morning Mist Holdings* the COMI was dictated by activities close to the date when the Chapter 15 petition was made. The Court could give consideration to the time between foreign insolvency proceedings taking place and the petition filing to ensure that the COMI has not been manipulated. By bringing this date forward, it allows the court to consider any activities or functions in relation to the proceedings, to the analysis of the COMI.

The COMI does have the ability to change. If the change is close to the date of the foreign proceedings commencing, the evidence will be harder to establish, particularly the requirement for the COMI to be readily accessible to third parties, in particular creditors. In addition, if there is a perception that the debtor may be manipulating the COMI or acting in bad faith, then the COMI and dates may change.

In previous cases, Judges have also considered the date of the recognition application, the date the Court decides on the application and a dates reference to the operational history of debtors.

To obtain recognition as foreign non-main proceedings, the debtor must have had an establishment in the jurisdiction. An establishment is a place which carries out non-transitory economic activity, before the commencement of any bankruptcy proceedings, or an economic activity with human means and goods/services.

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 – Concurrent foreign non-main proceedings (Article 30c), unless there are multiple foreign non-main proceedings, then no foreign proceeding will take preference.

Statement 2 – The hotchpot rule (Article 32), creditors cannot be preferred by receiving multiple payments on the same claim in different jurisdictions.

Statement 3 – Presumption of COMI (Article 16c) it is presumed that the registered office is the COMI, as defined in the MLCBI.

Question 2.3 [2 marks] 2 marks

In the *IBA* case appeal, the English Court of Appeal upheld the decision that the court should not exercise its power to grant the indefinite Moratorium Continuation. **Please explain.**

The appeal was based on the English courts (who have implemented the Cross Border Insolvency Regulation) not having jurisdiction to grant an indefinite Moratorium Continuation. The CoA held that the issue related to whether the case was as a matter of settled practice, whether the court could exercise this power to:

- (1) prevent English creditors from enforcing under the Gibbs Rule, and
- (2) for the stay of the Azeri reconstruction to be prolonged.

In summary, the representative had been recognised in England as the foreign main proceeding, and requested relief of an ongoing moratorium. However, two creditors appealed

to the application being made. However, the Gibbs Rule doesn't allow debts governed in England to be paid in foreign insolvency proceedings, unless the creditor has submitted to those proceedings.

The court rejected the appeal, as the application could not avoid the Gibbs Rule. The English law took precedent on the basis of the universalist approach by letting them be compromised in the scheme, without the consent of the creditors.

The matter highlighted the conflicting approach between the territorialist route under the Gibbs Rule and modified universalism under the Model Law, which the Cross Border Insolvency Regulation relies.

However, the matter was then heard by the Court of Appeal, who found in favour of the creditors on both counts, on the following basis:

- (1) can only be granted if the initial stay was necessary to protect creditors and if it was an appropriate use. The CoA held that neither was satisfied.
- (2) the information obligation in article 18 of the Model Law requests a substantial change to the proceedings. The CoA held that once foreign proceedings end, the representative is no longer in office. Therefore, the relief should terminate.

Question 2.4 [2 marks] 1 mark

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**.

Prior to the outcome of an application for recognition, an enacting state's court may grant interim relief on an urgent basis, upon application for foreign proceedings to be recognised pursuant to Article 19.

Article 21 refers to the discretionary powers of the court, Article 20 refers to the automatic relief should the foreign proceedings that have been recognised qualify as a foreign main proceeding.

The first paragraph of Article 22 confirms that the granting or denial of relief pursuant to Articles 19 and 21, an enacting state's court must be satisfied that the creditor's interests and other parties are protected. To that end, the court may grant relief to conditions it considers appropriate and can modify or terminate the relief for an affected party.

Article 23 states that a consequence of obtaining recognition is also that foreign representatives have the ability to commence action in accordance with the enacting state's legislation. They can be used to render or avoid legal action which is to the detriment of creditors.

Also, Article 24 states that a further consequence of recognition is that foreign representatives have the ability to intervene in any local proceedings commenced in the enacting state, to which the debtor is a party. Note that the foreign representative must adhere to local requirements.

In addition, Article 20 provides automatic relief when a foreign main proceeding has been recognised. The relief will automatically have 3 affects:

1. Individual actions or proceedings against the debtor's rights, obligations, liabilities or assets will be stayed
2. General stay of execution against the debtor's assets
3. Suspend the ability to encumber, dispose or transfer any assets of the debtor.

These steps are intended to provide additional time to agree orderly cross border proceedings. In additional, Article 20 also creditors a mandatory limitation against the effectiveness of an arbitration trial.

Article 1 of the Model Law and Article 25(1) also force courts to co-operate in full with any foreign courts or foreign representatives. Article 25(2) also allows the enacting state's court to communicate directly with the foreign courts and foreign representatives and to request information or assistance directly from them.

Art. 29 (a) is the right answer

When proceedings have been recognised, Article 18 also provides that the foreign representative has a duty to the enacting state's court to keep them updated if:

- There is a significant change in the foreign proceedings or the appointment
- Any other foreign proceedings commence involving the same debtor

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?

An entity making the foreign proceedings has access to the Court to seek a temporary stay to give 'breathing space'. This provides the enacting state to understand the co-ordination between jurisdictions or any relief which may be necessary.

The rights of access and principles are in place to save time, and consequently cost. On occasion, they may even facilitate the creation of value. They ensure that foreign creditors and representatives have equal rights to local creditors and sufficient notice of events.

Furthermore, it is also intended to provide transparency and comfort, so that it encourages foreign business in the enacting state.

Locus Standi grants access to foreign representatives standing in enacting states court, without any formal requirements.

In the MLCBI, Articles 9, 10, 11, 12, 13 and 14 give access to allow foreign representatives access to the enacting state's courts. The aim of this is reduce the costs and expenses of the proceedings, to mitigate any potential delays. The particular details of these include:

Article 9 is the principle of direct access by a foreign representative. No recognition is required to obtain standing. However, this access does not automatically exist with any other powers or rights.

Article 11 requires that to request the commencement of domestic insolvency proceedings, without having the conditions modified for the opening of any proceedings. No prior recognition is required for this again.

Article 12 requires recognition. Once it has been obtained, the foreign representative will then have standing to make submissions, file petitions, realise and distribute assets.

Furthermore, the co-operation between cross border proceedings is included at Articles 25, 26 and 27, before any recognition has been obtained. The aim of these is to avoid using letters rogatory and request for consular assistance, to be more time efficient and less costly. The main details of these include:

Article 1 of the Model Law and Article 25(1) also force courts to co-operate in full with any foreign courts or foreign representatives. Article 25(2) also allows the enacting state's court to communicate directly with the foreign courts and foreign representatives and to request information or assistance directly from them.

Under Article 26, an officeholder's ability to exercise its powers remain under the supervision of the enacting state's court. The officeholder must do the follow:

- To the maximum extent possible, co-operate with foreign representatives and courts (Article 26, 1)
- Can enter into communications directly with foreign representatives and courts.

In addition to this, Article 27 gives details of the co-operation under the Model Law. This is noted to be non-exhaustive to include all appropriate co-operation. The details included are:

- At the direction of the court, the appointment of the body or person
- Any communication deemed appropriate by the court
- Dealing with the debtor's assets and affairs
- Implementing or approving the co-ordination of proceedings
- Co-ordinating any proceedings which are concurrent and relate to the debtor
- Anything else deemed necessary by the enacting state

Furthermore, there is also guidance on what is effective communication:

- Any communication between courts should bear in mind safeguards and protection to any procedural rights
- Any communication should be open and sufficient notice provided (unless the circumstances are extreme)
- Communications can include formal court judgments and orders, general information given informally, observations, questions and transcripts
- Telephone, video link, fax and email are all sufficient
- Any communication should always be used appropriately, and where beneficial to the parties affected by the insolvency proceedings

In these circumstances, the foreign representative (State B) would have access directly to the court (State A).

Question 3.2 [maximum 5 marks] 4 marks

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

The requirements under the MLCBI for recognition are set out at Articles 6, 15, 16 and 17. Other provisions also do play consequence to any applications. The main factors that will be considered are:

Article 6 provides the enacting state’s court the ability to refuse any actions if it contradicts the public policy of the state. This was tested in England in the case of *Agrokor*, which held that it was a higher threshold than just being against public policy.

For recognition applications the Court needs to consider a number of potential factors. In particular, this was whether any abuse of process had taken place, which was tested in the case of *Nordic Trustee*, where the foreign representative failed to comply with their full and frank disclosure requirements in the application.

Article 15 states the following:

- Foreign representatives can make applications to have their proceedings recognised.
- The application should include (a) certificate of appointment in foreign proceedings, (b) certificate of the foreign court confirming the proceedings & (c) any other potential evidence
- The application must contain a statement of all known proceedings relating to the debtor
- The documents must be translated to the language of the enacting state

Article 16 states the following presumptions:

- If the certificate of appointment indicates proceedings until Article 2(a) and the representative is within Article 2(d), then the Court can make presumptions so too.
- That documents are authentic, even if they have not been legalised
- Unless proof can be shown that the residence or registered office is the COMI.

Article 17 states that:

- The application must meet evidential requirements in Article 15, as listed above and must be filed in the enacting state’s court
- Application must be made at the soonest possible opportunity
- Recognition can be modified/terminated if the grounds change
- If no public policy grounds exist when a request is denied, but Article 15(2) is met, the foreign proceedings qualify under Article 2(d)

- If the debtor's COMI is where the foreign proceedings are, then recognised as foreign main proceedings

For recognition, no reciprocity requirements exist under the Model Law. However, certain states have included their own provisions in relation to reciprocity. These requirements can stop the effect of Model Law and there can be no practical effect after the adoption. An example of this is South Africa's CBIA 2000, which is dormant due to requirements which no state has yet met.

Whilst COMI is not defined, the guidance and European Insolvency Regs give two main factors:

- Location of the central administration
- Where is ascertainable by the debtor's creditors

The court can decide what weight to give to each factor. Also, the Court may also consider these additional factors:

- Books and records location
- Location of any financing/banking/regulation/audits
- Where the cash system is managed
- Principal asset locations
- Employees location
- Commercial policy location
- The law governing any significant contracts and the location they were agreed
- Locations that may host any disputes

Whilst no provisions exist in terms of an abuse of process, the local laws and procedures may dictate one. The Model Law does not stop an enacting state from perceiving once. To this end, the foreign representative would have full and frank disclosure requirements in the enacting state. If inappropriate motives or breaches do occur, which are not disclosed, then it may affect the recognition application.

Article 6 is rarely the basis to refuse applications for recognition, despite it limiting the nature of any relief.

In accordance with Article 3 of the Model Law. Where a conflict may arise between a treaty and the Model Law, the treaty will always take precedent and prevail.

In these circumstances, the foreign representative is likely to obtain recognition in State A.

For full marks on this question, reference should also be made to art. 1(2) on exclusions.

Question 3.3 [maximum 5 marks] 3 marks

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

Prior to the outcome of an application for recognition, an enacting state's court may grant interim relief on an urgent basis, upon application for foreign proceedings to be recognised pursuant to Article 19.

Article 21 refers to the discretionary powers of the court, Article 20 refers to the automatic relief should the foreign proceedings that have been recognised qualify as a foreign main proceeding.

The first paragraph of Article 22 confirms that the granting or denial of relief pursuant to Articles 19 and 21, an enacting state's court must be satisfied that the creditor's interests and other parties are protected. To that end, the court may grant relief to conditions it considers appropriate and can modify or terminate the relief for an affected party.

Article 23 states that a consequence of obtaining recognition is also that foreign representatives have the ability to commence action in accordance with the enacting state's legislation. They can be used to render or avoid legal action which is to the detriment of creditors.

Also, Article 24 states that a further consequence of recognition is that foreign representatives have the ability to intervene in any local proceedings commenced in the enacting state, to which the debtor is a party. Note that the foreign representative must adhere to local requirements.

Detailed below are the different relief available under each specific Article.

Article 21 Relief – Discretionary Relief, available on recognition

- Individual actions and proceedings relating to the debtor's assets can be stayed.
- Debtor's assets can have a staying execution
- Suspension of rights to dispose or transfer assets
- Examine witnesses to take evidence in relation to the debtor's affairs
- Extension of any interim relief
- Additional relief that may be available to domestic liquidators

The relief of the Court in the enacting state is not unlimited. It has been tested and defined in three cases, being *Rubin V Eurofinance*, which held that foreign proceedings as a result of a default judgment were not capable of recognition. The *Gibbs Rules* states that foreign insolvency law will not apply to English contracts. The *IBA* case held that in foreign restricting proceedings won't grant indefinite automatic moratoriums, and also *Fibria V Pan*, where the high courts refused to intervene in the termination of a contract.

Article 20 Relief – Automatic Relief, on recognition of foreign main proceedings

- Stay of individual actions/proceedings relating to a debtor
- Stay of execution against a debtor's assets
- Suspension of transfer/embargo on debtors assets

Article 19 Relief – Interim Relief, which becomes available on application

- Stay of execution on debtor's assets
- Realising the debtor's assets in the enacting state, that are subject to devaluation
- Any of the post action relief in Article 21 (above)

Article 22 Relief

- The interests of persons affected and the foreign representatives must be balanced
- Interests should guide the court in exercising discretionary relief
- Relief can be tailored to certain conditions or modified/terminated

Article 23 Relief

- Only actions available to the local insolvency appointment taker
- Individual creditors cannot apply within the scope

- Stops foreign representatives from being restricted in antecedent transactions

Article 24 Relief

- Allows standing to avoid denial due to local procedures
- Only available where Article 20 and 21 have not been initiated

Discretionary and interim relief are only granted if the court is satisfied that the relief is in the best interests of creditors and other interested parties, to ensure they are protected.

Interim relief requires the court to be satisfied that it is urgently required. The court can give this relief based on certain conditions being met, or modify/terminate it. A court does not have unlimited jurisdiction to grant the relief.

For full marks on this question, reference should also be made to art. 3 and art. 6

Question 3.4 [maximum 1 mark] 1 mark

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

Any relief granted under Article 19 must be consistent with any domestic insolvency proceedings. The Court will review any relief granted, which shall be terminated/modified if inconsistent with any domestic proceedings. This was tested in *Re Dalnyaya Step LLC, Cherkasov & Ors v Olegovich*.

The relief would be intended to help stop any dissipation of assets and preserve value for the benefit of creditors and shareholders. Representatives may act independently to the parties, where the application is based on facts at the hearing, and there may be changes in circumstances.

Worldwide freezing orders can be granted on an interim basis, however they are unlikely to be considered for post recognition relief, given that the MLCBI extends the effects indefinitely. However, any assets are likely to be dealt with pursuant to the law in the foreign state. The proceedings can generally be recognised when the law of the enacting states allows.

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

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

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

Answer 4.1.1

England has implemented MLCBI and the Cross Border Insolvency Regulations.

The Model Law should apply to any proceedings under Article 2(a), however enacting states may decide to exclude banks from the Model Law, requiring a special regulatory regime. Exclusions must be expressly referred to in the national insolvency law. However, it is noted that it does not apply in this instance.

Pursuant to Article 2(a), in order to be classed as a Foreign Proceedings, the following elements need to be met:

- There must be an ongoing proceeding (this can include interim proceedings)
- The proceedings must be either administrative or judicial
- The proceedings must be collective in nature
- The proceedings should be in a foreign state

- It must be conducted and authorised in a relevant insolvency law
- The affairs and assets are until control/supervision of the foreign court
- The purpose is for liquidation or reorganisation

In the *Agrokor* case, the elements were considering in the English courts. *Agrokor* was located in Croatia and was subject to the EAP. Similarly, *Agrokor* made an application to the English Courts, under the CBIR 2006, for recognition.

The recognition was challenged by a bank with a claim in excess of EUR1b. It was challenged on the following bases:

- Did the law specifically relate to insolvency?
- The matter was no passed for the purposes of recognition
- Does the EAP qualify as collective proceedings, which is subject to control by a foreign Court?
- Would the recognition be against the public policy in England?

The English Court in this matter held that:

- Any questions of foreign law should be decided by the English Court as expert evidence
- It is possible to recognise single proceedings without a group
- Providing that the local law deals with financial distress, it is sufficient for insolvency
- Court Supervision is low under the Model Law
- Provided that the purpose is to protect the economic system, it satisfies reorganisation or liquidation for the CBIR.

The section was also tested again in *Sturgeon Central Asia Balanced Fund Ltd*, where the Court held that the context is that it is a purposeful approach. On this basis, the purpose can just be financial distress or liquidation.

In this scenario, the Bank does have ongoing proceedings, that are administrative. Furthermore, given the weight of the *Agrokor* case, the proceedings are collective and are in the foreign state.

The Bank is always conducted and authorised under the local law in Country A. As can be seen in the *Agrokor* case, this just needs to deal with financial distress, so appears to be sufficient.

The affairs and the assets of the company are under the control and supervision of the court in Country A. *Agrokor* held that this was a low burden under the Model Law, therefore the DGF's involvement would like to be sufficient to satisfy this.

The purpose does appear to be for the Liquidation of the Bank. This was announced to be indefinite on 12 December 2020, however the *Sturgeon* case confirmed that the purpose only had to be to liquidate. Therefore, based on the case law, it would appear that the Bank would satisfy this element too.

The proceedings appear to be governed by established rules, revoking the power of the bank's management, requiring the affairs and assets to be wound down, therefore constituting proceedings.

The proceedings also appear to be an out of court process. As both DG and NB are public authorities, they are administrative in nature.

As certain creditors are not included in the process, it will not be classified as collective. However, in isolation this is not a ground for failing the test. As there appears to be no assets being dealt with outside of the liquidation, it would therefore be collective.

The liquidation is in a foreign state, therefore the failure to adopt MLCBI is not relevant.

As NB and DGF are government bodies and are responsible for conducting the liquidation, neither party will be of a court nature, but regulatory. In addition, the court does not appear to have engaged in the liquidation process. The liquidation process therefore is controlled by a third party, and DGF acts as the foreign court.

Finally, the liquidation's aim is to sell assets to pay creditors and wind up the affairs. DGF has been appointed, which has crystallised further creditor claims. In addition, the extension provided on 14 December on the sale of the assets, clearly show the purpose of the proceedings.

Based on all the information available, it is likely that the Bank's liquidation would compromise a foreign proceeding under Article 2(a) of the MLCBI.

For full marks on this question applying facts to the element of insolvency law as well as a more elaborate discussion on the requirement of collective in nature is required.

Answer 4.1.2

In order to be considered a foreign representative, the following elements need to be considered:

- A body or person (including interim appointments)
- Authorised to act in a foreign proceeding
- Administer the liquidation of the debtors assets/affairs
- Acting as a representative in the foreign proceedings

The Model Law does not state that a foreign representative needs to be authorised by the foreign court, being any judicial which has the ability to supervise or control the foreign proceeding.

These characteristics are defined in order to limit the scope for any applications made under the Model Law.

In this case, there were the following Applicants:

- Ms G, as authorised officer
- DGF

In the first instance, Ms G is an authorised person, who is acting in the foreign proceedings. She is administering the liquidation of the assets and affairs and is acting as a representative. Ms G also has the ability to sell assets of the company.

DGF is the only other body who can control the liquidation, who have delegated their powers to Ms G. Despite that Ms G does not have the power to make certain claims does not affect this.

Based on the information, it is likely that Ms G will be considered an authorised foreign representative pursuant to Article 2(d). The only consideration may be that Ms G does not have full authority to sell the assets of the Bank, therefore it may be considered that she can't fully administer the Liquidation.

DGF also still holds the overriding control over the Liquidation, therefore a Court may consider that Ms G is not solely administering the estate.

Secondly, DGF is a body, that has been acting in the foreign proceedings. It is having influence on the administration the liquidation of the assets and affairs of the Bank. It is also acting as a representative.

DGF may not be considered as a foreign representative in the circumstances, as it has delegated to Ms G to deal with the Liquidation proceedings. Therefore, it is not directly administering the liquidation and isn't directly acting as a representative.

However, given the close links of DGF historically administering the Liquidation and the overriding control over Ms G, it is still likely to be consider an authorised foreign representative under Article 2(d).

*** End of Assessment ***