



SUMMATIVE (FORMAL) ASSESSMENT: MODULE 2A

THE UNCITRAL MODEL LAWS RELATING TO INSOLVENCY

This is the **summative (formal) assessment** for **Module 2A** of this course and is compulsory for all candidates who **selected this module as one of their compulsory modules from Module 2**. Please read instruction 6.1 on the next page very carefully.

If you selected this module as **one of your elective modules**, please read instruction 6.2 on the next page very carefully.

The mark awarded for this assessment will determine your final mark for Module 2A. In order to pass this module, you need to obtain a mark of 50% or more for this assessment.

INSTRUCTIONS FOR COMPLETION AND SUBMISSION OF ASSESSMENT

Please read the following instructions very carefully before submitting / uploading your assessment on the Foundation Certificate web pages.

1. You must use this document for the answering of the assessment for this module. The answers to each question must be completed using this document with the answers populated under each question.
2. All assessments must be submitted electronically in MS Word format, using a standard A4 size page and a 11-point Arial font. This document has been set up with these parameters – **please do not change the document settings in any way. DO NOT** submit your assessment in PDF format as it will be returned to you unmarked.
3. No limit has been set for the length of your answers to the questions. However, please be guided by the mark allocation for each question. More often than not, one fact / statement will earn one mark (unless it is obvious from the question that this is not the case).
4. You must save this document using the following format: **[student ID.assessment2A]**. An example would be something along the following lines: 202122-336.assessment2A. **Please also include the filename as a footer to each page of the assessment** (this has been pre-populated for you, merely replace the words “studentID” with the student number allocated to you). Do not include your name or any other identifying words in your file name. **Assessments that do not comply with this instruction will be returned to candidates unmarked.**
5. Before you will be allowed to upload / submit your assessment via the portal on the Foundation Certificate web pages, you will be required to confirm / certify that you are the person who completed the assessment and that the work submitted is your own, original work. Please see the part of the Course Handbook that deals with plagiarism and dishonesty in the submission of assessments. **Please note that copying and pasting from the Guidance Text into your answer is prohibited and constitutes plagiarism. You must write the answers to the questions in your own words.**
- 6.1 If you selected Module 2A as one of your **compulsory modules** (see the e-mail that was sent to you when your place on the course was confirmed), the final time and date for the submission of this assessment is **23:00 (11 pm) GMT on 1 March 2022**. The assessment submission portal will close at 23:00 (11 pm) GMT on 1 March 2022. No submissions can be made after the portal has closed and no further uploading of documents will be allowed, no matter the circumstances.
- 6.2 If you selected Module 2A as one of your **elective modules** (see the e-mail that was sent to you when your place on the course was confirmed), you have a **choice** as to when you may submit this assessment. You may either submit the assessment by **23:00 (11 pm) GMT on 1 March 2022** or by **23:00 (11 pm) BST (GMT +1) on 31 July 2022**. If you elect to submit by 1 March 2022, you **may not** submit the assessment again by 31 July 2022 (for example, in order to achieve a higher mark).
7. Prior to being populated with your answers, this assessment consists of **12 pages**.

ANSWER ALL THE QUESTIONS

Total: 34 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] 6 marks

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

Question 1.1

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

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

Question 1.2

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

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

Question 1.3

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

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

Question 1.4

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

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

Question 1.5

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

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

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

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

Question 1.6

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

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

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

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

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

Question 1.7

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

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

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

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

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

Question 1.8

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

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

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

- (c) While (for purposes of the Model Law) the COMI of a debtor can move, the closer such COMI shift is to the commencement of foreign proceedings, the harder it will be to establish that the move was “ascertainable by third parties”.
- (d) None of the above.

Question 1.9

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

- (a) Enforcement of insolvency-related judgments.
- (b) An indefinite moratorium continuation.
- (c) Both (a) and (b).
- (d) Neither (a) nor (b).

Question 1.10

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

- (a) The UNCITRAL Guide of Enactment and the Practice Guide.
- (b) The UNCITRAL Guide of Enactment and the Legislative Guide – Parts One, Two, Three and Four.
- (c) The UNCITRAL Guide of Enactment and the Judicial Perspective.
- (d) All of the above.

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

Question 2.1 [maximum 3 marks] 1 mark

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

Determining COMI of a debtor is described in paragraph 23 of article 16 of the Model Law. The criteria for determining COMI of a debtor, inter alia location of the debtor’s primary assets, location of the majority of debtor’s creditors, jurisdiction whose law would apply to most disputes, location of the debtor’s primary bank account. Depending on the information presented to the administrator / liquidator, the location of COMI can change.

However, paragraph 19 of article 16 of the Model Law, includes guidance stating that COMI can be ascertained by a third party such as creditors, based on how the creditors dealt with the debtor in the ordinary course of business.

Due to the complicated nature of determining COMI of the debtor, the appropriate date for determining the COMI, or whether an establishment exists, is the date of commencement of the foreign proceeding.

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

Question 2.2 [maximum 3 marks] 3 marks

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

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

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

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

Statement 1: Article 30. Coordination of more than one foreign proceeding – where there are only foreign non-main proceedings, any relief ordered should be coordinated.

Statement 2: Article 32. Rule of payment in concurrent proceedings – Hotchpot rule does not affect the claims as established by the law of the enacting State and is solely intended to establish the equal treatment of creditors of the same class. To the extent that claims of secured creditors or creditors with rights in rem are paid in full. Those claims are not affected by the provision.

Statement 3: Article 16. Presumptions concerning recognition – Meaning of “centre of main interests” is not 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.**

In the *IBA* case appeal, the court explored the issue vis-a-vis granting an indefinite Moratorium Continuation to a foreign representative.

The *IBA* case follows the challenges posed by two creditors who challenged the Moratorium Continuation Application. One of the creditors had unpaid claims against *IBA* under debt instruments governed by English law and had not submitted to the foreign insolvency proceedings in Azerbaijan to which *IBA* was subject (Gibbs rule does not apply), however Azeri law binds all creditors to the restructuring plan. The restructuring plan was intended to terminate on 30 January 2018 however the Court of Appeal held that the purpose of the reconstruction plan was achieved prior to this date.

Considerations made by the Court of Appeal for granting an indefinite Moratorium Continuation were:

- a) Prevent the English creditors from enforcing their English law rights in accordance with the Gibbs Rule

- b) Prolong the stay after the Azeri reconstruction has come to an end.

Article 18 of the Model Law states that foreign representative has obligations to the court to inform them of any changes to the status of the foreign proceeding or the status of the foreign representative's appointment. As mentioned above, the Court of Appeal held the purpose of the reconstruction plan was already achieved.

The Court of Appeal questioned whether grant of such relief would protect the interest of IBA's creditors, and the stay is an appropriate way of achieving such protection. As mentioned above, the purpose of the reconstruction plan has been realized and the claims of the opposing creditors has not been met, therefore such protection is not appropriate.

Question 2.4 [2 marks]

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

Once a recognition of a foreign main proceeding is granted by the enacting State, automatic mandatory relief / stay is given to the debtor under article 20 of the Model Law. This automatic relief applies to any commencement or continuation of individual actions / proceedings concerning the debtor's assets, rights, obligations or liabilities.

The court may provide relief under article 21 of the Model Law at their discretion. The relief covers individual actions / proceedings that may not have been stayed under the provisions in article 20 as well as additional relief including provision to examine witnesses, the taking of evidence or the delivery of information concerning the debtor's assets, rights, obligations or liabilities.

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

After recognition has been granted by the enacting State, it is possible that changes may occur in the foreign proceeding that would have affected a decision on relief or recognition had those facts been known at the time of the application or granting of the recognition. Article 18 of the Model Law provides for a duty on the foreign representative keep the enacting State full informed; to advise the changes, including to the status of the proceeding. Paragraph 2 states that the court can order a status report to be filed.

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

State A implements the Model Law which provides a procedural framework for cooperation between jurisdictions, in this case State A and State B and provides a uniform approach to cross-border insolvency. Without any reciprocity provision, the court in State A cannot deny the recognition order to be requested by the foreign representative solely on the grounds that the court in State B cannot provide equivalent relief to an insolvency representative from State A.

The foreign representative can request access to State A to seek temporary “breathing space” and allowing the court in State A to determine what co-ordination among the two jurisdictions or other relief is warranted for optimal disposition of the insolvency.

Article 9 of the Model Law states that the foreign representative is entitled to apply directly to a court in this State. The foreign representative can have standing before the court in State A without the need for the foreign proceeding opening in State B to be recognized in State A. The foreign representative is thus freed from having to meet formal requirements such as licenses or consular action. However, the access does not automatically vest the foreign representative with any rights or powers. Article 11 of the Model Law gives the foreign representative standing to open domestic insolvency proceedings in State A, provided all requirements for such an opening are otherwise met.

Furthermore, article 10 of the Model Law states that the application made to the court does not subject the foreign representative or the foreign assets and affairs of the debtor to the jurisdiction of the court in State A for any purpose other than the application. This ensures that the court in State A does not assume jurisdiction over all the assets of the debtor on the sole ground that the foreign representative has made an application for recognition of a foreign proceeding.

Provisions under articles 9, 10 and 11 should give foreign investors comfort because these rights ensure that local tools are available to the foreign representative without the need for any separate proceedings in State A to obtain such standing.

Cooperation and coordination will enable consistency of treatment of stakeholders in cross-border insolvencies across State A and B. This will save time and cost to maximise the returns to the creditors and ensure that optimal result can be achieved.

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

Question 3.2 [maximum 5 marks] 2,5 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.

Article 1 paragraph 2 of the Model Law states that the Model Law only applies once assistance has been actively sought or a foreign representative has instigated recognition of foreign proceedings. The article further states that a variety of exclusions from application of the Model Law include specially regulated entities such as banking, credit and insurance institutions,

financial and investment institutions, commodity exchange members, cleaning houses, certain license financial services providers, consumers, and stock and commodity brokers. It is unclear what the business or industry the debtors operate in.

As mentioned above, both the “foreign proceeding” and the “foreign representative” have qualified for the purpose of article 2 (a) and (d) of the Model Law. The articles contain requirements / limitations that needs to be met:

- The proceeding must be administrative or judicial and collective in nature;
- The proceeding must be in a State conducted under a law related to insolvency;
- Assets and liabilities of the Debtor must be subject to control or supervision by a foreign court;
- The proceeding must be for the purpose of reorganization or liquidation;
- The representative must be an appointed person or body authorized in the foreign proceeding; and
- The authorization of the representative is either to administer the reorganization or liquidation of the debtor’s assets or affairs.

Article 15 of the Model Law lists out requirements of information/documents that should be accompanied with the recognition application: certified copy of the decision commencing the foreign proceeding and appointing of the foreign representative; or certificate from the foreign court affirming the existence of the foreign proceeding and of the appointment of the foreign representative. Since the foreign proceeding and foreign representative has qualified under article 2 paragraphs 2 (a) and 2 (d), the requirements in article 15 have been satisfied. This is supported by article 16 paragraph 1, the court can rely upon the evidence presented by the foreign representative.

Article 4 of the Model Law states that recognition of foreign proceedings and cooperation with foreign courts shall be performed by the court, authority or authorities competent to perform those functions in the enacting States. Considerations for any relief is being requested by the foreign representative to the court in State A, therefore recognition of the foreign proceedings is being looks after by the court.

Article 17 paragraph 1 provides criteria for the decision to recognize a foreign proceeding:

- a) The foreign proceeding is a proceeding within the meaning of subparagraph (a) of article 2 – this has been satisfied;
- b) The foreign representative applying for recognition is a person or body within the meaning of subparagraph (d) of article 2 – this has been satisfied;
- c) The application meets the requirements of paragraph 2 of article 15 – this has been satisfied; and
- d) The application has been submitted to the court referred to in article 4 – this has been satisfied.

For full marks on this question, the answer should include:

1. **Restrictions;- Existing international obligations of State A:** Based on Article 3 of the Model Law, the court in State A should also check if there are no existing international obligations of State A (under a treaty or otherwise) that may conflict with granting the recognition application under the implemented Model Law in State A.
2. **Judicial scrutiny:** While the court in State A is able to rely on the rebuttable presumptions set forth in Article 16 of the Model Law, in the context of Article 17 of the Model Law the court will have to assess whether either the COMI or at least an establishment of the debtor is located in State B where the foreign proceedings were opened. If the COMI of

the debtor is in State B the foreign proceedings should be recognised as foreign main proceedings and if only an establishment of the debtor is in State B the foreign proceedings should be recognised as foreign non-main proceedings. Without a COMI or at least an establishment of the debtor in State B, recognition cannot be granted by the court in State A.

3. Public policy exception: Finally, the court in State A should also ensure based on Article 6 of the Model Law that the recognition application is not manifestly contrary to public policy of State A.

Question 3.3 [maximum 5 marks] 2 marks

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

The Debtor's Centre of Main Interest ("COMI") is important on what relief can be granted to the foreign representative post recognition. Under the Model Law, if the COMI is in the jurisdiction where the foreign proceedings have been opened, the proceedings are main insolvency proceedings with automatic mandatory relief. If the debtor only has an establishment in the jurisdiction where the foreign proceedings are opened, the proceedings are non-main proceedings without automatic relief, but only discretionary post-recognition relief granted by the court.

Article 17 paragraph 2 of the Model Law provides rules on how a foreign proceeding would be classified, whether as a foreign main proceeding (if the proceeding takes place in the State where the debtor has the COMI) or as a foreign non-main proceeding (if the debtor has an establishment within the meaning of article 2 (f)).

Article 19 paragraph 1 of the Model Law authorizes the court, at the request of the foreign representative, to grant the type of relief that is usually available only in collective insolvency proceedings, as opposed to individual types of relief that may be granted before the commencement of insolvency proceedings under rules of civil procedure. Relief granted is temporary and includes the following:

- a) Staying execution against debtor's assets;
- b) Entrusting the administration or realization of all or part of the debtor's assets located in the State to the foreign or another person designated by the court, in order to protect and preserve the value of assets that, by the nature or because of other circumstances, are perishable, susceptible to devaluation or otherwise in jeopardy;
- c) Any relief mentioned in paragraph 1 (c), (d) and (g) of article 21.

Paragraph 4 states that the court may refuse to grant relief if such relief would interfere with the administration of a foreign main proceeding.

Pre-recognition relief

Once the foreign representative in State B can prove to the court in State A that interim relief (under article 19) is required to protect the assets of the Debtors and interest of the Debtor's creditors, the court should be able to grant this interim relief. The court cannot refuse to grant this relief (as provided in paragraph 4 of article 19) as there are no other concurrent proceedings.

Post-recognition relief

Post-recognition relief available to the foreign representative in State B will depend on whether the Debtor has COMI in State A or only establishment in State A.

If the Debtor has COMI in State A and the proceeding be classified as foreign main proceeding, the court may grant automatic relief under article 20 of the Model Law to the foreign representative. These are the following relief under article 20 paragraph 1:

- a) Commencement or continuation of individual actions or individual proceedings concerning the debtor's assets, rights, obligations or liabilities is stayed;
- b) Execution against the debtor's assets is stayed; and
- c) The right to transfer, encumber or otherwise dispose of any assets of the debtor is suspended.

Relief under article 21 (mentioned below) may also be granted by the court at their discretion

If the Debtor only has establishment in State A, the court may grant the following relief (under article 21) to the foreign representative extending relief mentioned in article 20 paragraph 1 that have not been stayed as well as the following:

- Providing for the examination of witnesses, the taking of evidence or the delivery of information concerning the debtor's assets, affairs, rights, obligations or liabilities;
- Entrusting the administration or realization of all or part of the debtor's assets located in State A to the foreign representative; and
- Extending relief granted under paragraph 1 of article 19 (mentioned above).

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

1. **Adequate protection**: Pursuant to Article 22 of the Model Law any interim relief under Article 19 of the Model Law or any post-recognition relief under Article 21 of the Model Law require the court in State A to be satisfied that the interests of the creditors and the other interested persons, including the debtor, are adequately protected and any relief may be subject to conditions as the court considers appropriate.
2. **Existing international obligations of State A**: Based on Article 3 of the Model Law, the court in State A should again verify that there are no existing international obligations of State A (under a treaty or otherwise) that may conflict with granting the requested relief under the implemented Model Law in State A.
3. **Public policy exception**: The court in State A should, based on Article 6 of the Model Law, also again verify that the relief application is not manifestly contrary to public policy of State A.

Question 3.4 [maximum 1 mark] 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?

Article 19 of the Model Law allows the foreign representative relief upon application for a recognition of a foreign proceeding. The provisions in article 19 is only available prior to the recognition order being granted and terminates when the application for recognition is decided upon. The relief will only be extended to Article 21 paragraph 1 (f) with the court's discretion as stated in paragraph 3 of article 19.

Extension may only be granted upon the failure of the debtor and its directors to comply with the relief ordered under article 19 and the inability of the foreign representative to discharge its duties without that relief being extended. This may not be the case for certain proceedings.

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] 13 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**]; **8 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.

Article 1(2) of the MLCBI, the Model Law does not apply to proceeding concerning [designate any types of entities, such as banks or insurance companies, that are subject to a special insolvency regime in this State and that this State wishes to exclude from the Law].

The Commercial Bank for Business Corporation (the “Bank”) was classified as troubled on 19 January 2015. Under the Law of Country A on Banks and Banking Activity (“LBBA”), the Bank would have 180 days within which to bring its activities in line with the National Bank’s (the “NB”) requirements once declared “troubled”; the Bank had until 19 July 2015 to meet NB’s requirements. However, the Bank failed to meet such requirements as set out in article 76 of the LBBA for the following reasons, which would result in the Bank to be classified as insolvent:

- The Bank failed to meet 2% or more of its obligations to depositors or creditors for five consecutive working days, in fact, the repayment of 48% of the Bank’s liabilities has become questionable; and
- The Bank breached the minimum capital requirement of NB, which states that the Bank must have at least one third of the standard capital ratio and they breached it for eight consecutive days.

The Bank was officially classified as insolvent on 17 September 2015 pursuant to article 76 of the LBBA. NB revoked the Bank’s license on 17 December 2015, placing the Bank into liquidation. Pursuant to article 77 of the LBBA, Deposit Guarantee Fund, a governmental body of Country A, automatically acquires full power of the liquidator.

Foreign proceeding in Country A is not automatically recognized in the UK, however, DGF and Ms. G can apply for recognition of the Bank’s liquidation procedure. Country A not adopting the Model Law does not affect the recognition application as the UK has no reciprocity provision under the Cross-Border Insolvency Regulation 2006 (“**CBIR**”) and so there is no real “inward bound” consequences for cross-border insolvency.

Under article 2 (a) of the Model Law, a “foreign proceeding” means 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 or liquidation

In order for a foreign proceeding to be eligible for recognition under the Model Law, it must satisfy all of the following:

- Judicial or administrative proceeding – the insolvency proceeding of the Bank is an administrative proceeding based on the rules under the LBBA. In corporate insolvencies, the hallmark of a “proceeding” is one where “a statutory framework that constrains a company’s actions and that regulates the final distribution of a company’s assets”. Powers given to DGF inter alia to take steps to recover property belonging to the Bank, dispose of the bank’s assets, and take creditors claims and satisfy them, therefore the proceeding opened and sought by DGF is administrative in nature.
- Pursuant to an insolvency-related law of the enacting State – the foreign representative is seeking recognition of proceeding in the enacting State pursuant to the CBIR, an

insolvency related law brought to the English court, therefore clearly satisfy this requirement;

- Involvement of creditors collectively – under the GEI paragraphs 69 – 72, the notion of “collective” insolvency proceeding is based on the desirability of achieving a coordinated, global solution for all stakeholders of an insolvency proceeding. Article 36 (5) of the DGF Law 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; interest being charged. The Bank’s creditors composed mainly Mr. Z as the creditor of 95% of the value through various entities; some in England and others in various jurisdictions. The other 5% creditors are unknown. No evidence that Mr. Z or any other creditors have taken individual actions to attack any assets of the Bank however, once recognition granted by the English court, any actions taken by either Mr. Z or the other creditors will be subject to this collective proceeding;
- Control or supervision of the assets and affairs of the debtor by a court or another official body. The idea of control or supervision may be exercised not only directly by the court, but also indirectly by an insolvency representative where, for example, the insolvency representative itself is subject to control or supervision by the court or other regulatory authority. GEI paragraph 74 states mere supervision of an insolvency representative by a licensing authority would not be sufficient – it is unclear whether this insolvency proceeding in Country A involves the court or whether NB is a regulatory body or a mere licensing authority. As stated in point 1, DGF has the power to take control of the Bank’s assets and recover them. DGF is a governmental body Under CBIR, control can be potential rather than actual and indirect rather than direct. Lex Agrokor proceeding gave some control to another official body i.e. the Croatian government similar to DGF. The court recognized the foreign proceeding on this basis therefore the proceeding sought by DGF and Ms. G should be recognized in the same manner; and
- Reorganization or liquidation of the debtor as the purpose of the proceeding – GEI paragraph 77 states that some types of proceeding may satisfy certain elements of the definition of foreign proceeding may nevertheless be ineligible for recognition because they are not for the states purpose of reorganization or liquidation. These forms include proceedings that are designed to prevent dissipation and waste, or to prevent detriment to investors, rather than to liquidate or to reorganize the insolvency estate. It must be noted that on 14 December 2020, the liquidator rendered the sale of the Bank’s assets and satisfaction of creditor’s claims, no longer possible. It is unclear the reason why the foreign representative sought the recognition in England. It could be assumed that there might be assets in England that will resort satisfaction of parts (or in full) of the outstanding creditors’ claims. DGF has the power to take creditors’ claims, recover assets and the power to exercise “such other powers necessary to complete the liquidation of the Bank”. The liquidation proceeding is for the intended purpose of liquidation therefore it satisfies the test.

For full marks on this question a more elaborate explanation on the meaning of a “law related to insolvency” is needed along with more application on facts in this regard. Otherwise, good answer.

On the assumption that NB’s role is more than that of licensing, the liquidation proceeding of Bank qualifies as a “foreign proceeding” under the Model Law. The English court should grant the application of DGF and Ms. G for the proceeding to be recognized in England.

When the liquidation procedure was initiated on 17 September 2015, the DGF appointed Ms C as the interim administrator, the first authorized persons to who powers of the liquidator

were delegated pursuant to article 48 (3) of the DGF Law. Ms C was replaced by Ms G from 17 August 2020.

DGF delegated to her all liquidation powers in respect of the Bank set out in 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. However, the powers given to her excluded 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 loan or deposits from individuals, and the power to arrange for the sale of the Bank's assets.

Under article 2 (d) a "foreign representative" means a person or body, including one appointed on an interim basis, authorized in a foreign proceeding to administer the reorganization or the liquidation of the debtor's assets or affairs or to act as a representative of the foreign proceeding.

The Model Law does not specify that the foreign representative must be authorized by the foreign court, GEI paragraph 86 notes that the definition is thus sufficiently broad to include appointments that might be made by a special agency other than the court. DGF acquired the full power of a liquidator and Ms. G was appointed by DGF. This would result that this test would satisfy the definition of foreign representative.

The Model Law does not define the words "person" or "body" although courts found that a foreign representative might be a firm of accountants, if otherwise qualified, on the basis that a firm can constitute a "person" as required by paragraph (d), and a "body" has been interpreted as meaning "an artificial person created by a legal authority". As per article 35 (1) of the DGF Law, specifies that an "authorize person" such as Ms. G 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. Based on the rules in the DGF Law, Ms. G would satisfy this test.

Foreign representative must have the power to administer the reorganization or liquidation of the debtor's assets or affairs at the time of the application for recognition. DGF automatically acquired all powers of a liquidator, therefore DGF satisfies this test. In Ms. G's case, only certain powers were delegated to her. This does not include the power to arrange for the sale of the Bank's assets, therefore Ms. G does not have full powers to administer Bank's assets currently. If Ms. G was to be recognized as a foreign representative, DGF must consider vesting the power to arrange for the sale of the Bank's assets prior to making the application to the English court.

*** End of Assessment ***