



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: 32,5 out of 50

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

QUESTION 1 (multiple-choice questions) [10 marks in total] 7 marks

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

Question 1.1

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

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

Question 1.2

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

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

Question 1.3

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

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

Question 1.4

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

- (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] 5 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.

The appropriate date of determining COMI of a debtor or whether an establishment exists is the date of commencement of the foreign proceedings. It is possible for the COMI of a debtor to move locations. However, the shifting of COMI closer to the date of commencement of the foreign proceedings, in terms of timing may create issues, among other things, it not being readily ascertainable as the COMI by the creditors (which is a key factor in determining COMI under MLCBI).

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]

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(c) provides guidance on the treatment of concurrent foreign non-main proceedings. In case of more than one foreign non-main proceedings, neither is a priori treated preferentially.

Statement 2: Article 32 sets out the hotchpot rule which provides for the treatment of creditor claims where such creditor seeks relief and payment of outstanding debt in multiple proceedings. However, this is without prejudice to the secured claims.

Statement 3: Article 31 of the Model Law provides that there is a rebuttable presumption of the insolvency of a debtor if a foreign-main proceeding is recognised by an enacting state. **16(3)**

Question 2.3 [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 English Court of Appeal (**CA**) identified that the real issue in the case was whether as a matter of settled practice, the court should exercise its power to grant indefinite moratorium continuation (**IDC**) and if it would: (1) prevent the creditors challenging the IDC, in substance, from enforcing their English law rights in accordance with the rule in *Gibbs*¹ (i.e. debt governed by English law cannot be discharged by foreign proceedings) and/or (2) prolong the stay granted to the debtor after the Azeri reconstruction has ended.

The CA ruled the above issues in favour of the challenging creditors and held that an English court could properly grant an IDC if it were satisfied that (a) the stay would have to be necessary to protect the interest of the creditors and (b) the stay would have to be appropriate way of achieving such protection for the creditors. As neither of these were satisfied in this case, the CA rules in favour of the challenging creditors.

It should also be mentioned that Based on Article 18 of the MLCBI, the English Court of Appeal in the IBA case appeal held that had the MLCBI ever contemplated the continuance of relief after the end of the relevant foreign proceeding, it would have addressed the question explicitly and provided appropriate machinery for that purpose.

¹ *Antony Gibbs and sons v La Societe Industrielle et Commerciale des Metaux* (1890) LR 25 QBD 399 (***Gibbs Rule***)

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**.

The immediate consequence upon recognition of a foreign main proceeding is the grant of automatic mandatory relief under Article 20 of the MLCBI. This includes the grant of automatic stay against the commencement or continuation of actions against the debtor. **Art 29 (a) on concurrent proceedings**

Article 18 of the MLCBI requires the foreign representative (as an ongoing duty) from the time of filing the recognition application for the foreign proceeding, to promptly inform the court in the enacting state of (1) any substantial change in the status of the recognised foreign proceeding or the status of the foreign representative's appointment and (2) any foreign proceeding regarding the same debtor that becomes known to the foreign representative.

QUESTION 3 (essay-type questions) [15 marks in total] 6,5 marks

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

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

Question 3.1 [maximum 4 marks] 2 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?

Access and co-ordination rights can greatly benefit the foreign representative to secure co-operation from the courts and communicate directly with State A.

- Co-operation not dependent upon recognition: These rights are available to the foreign representative of State B even prior to making a recognition application. This is because co-operation rights are not limited to recognition applications and qualification under Article 17 of MLCBI. Even if the foreign proceedings are neither foreign main nor non-main, co-operation can still be granted on the basis of presence of assets (Article 25 MLCBI).
- Comity and scope of cooperation: Given the fact that State A (as implemented through the MLCBI), does not contain any reciprocity provision, and based on the principle of comity, the level of judicial co-operation could be very beneficial to the foreign representative of State B in achieving optimal and efficient results for the stakeholders. This is because the MLCBI is not prescriptive in what appropriate cooperation is and just provides some guidance on measures, means of co-operation (as set out in Article 27 of MLCBI) and procedural framework, for the States to then coordinate and decide based on the given sets of facts and circumstances.
- Consistency of treatment of stakeholders: the co-operation rights granted by State A (enacting State) would enable courts and insolvency representatives of both States to

communicate directly, co-ordinate the treatment of its stakeholders (including the anti-discrimination principles application to foreign creditors) to obtain the most time and cost efficient results for them.

- Mandatory co-operation and Direct Communication: Article 25(1) provides that the courts (and Article 26(1) provides that the insolvency office holders) of the enacting state (i.e. State A in this case) must co-operate with the foreign courts and insolvency officers. The courts and the office holders in the enacting state are entitled to communicate directly with foreign courts and office holders. This makes the co-ordination between the two states very time and cost efficient avoiding the traditional letters rogatory and obtaining requests for consular assistance which could further delay the process unnecessarily.
- Means of co-operation: As mentioned above, article 27 provides an indicative list of types of co-operation that are authorised by the MLCBI. This non-exhaustive list includes flexibility in modes of communication between the 2 States (including open communication such as video-conferencing), co-ordination in relation to assets of the debtors and also concurrent proceedings in relation to the debtors etc. This is of course subject to the decision of the courts based on the circumstances.

It must however be noted that, co-operation is further facilitated by recognition of foreign proceedings which allow the court to provide the foreign representative with more appropriate and customised relief, as and when required.

For full marks you should also address the access rights in art. 9 and 11.

Question 3.2 [maximum 5 marks] 2,5

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.

Evidential requirements (Article 15, MLCBI): For the recognition application to be successful, certain requirements as set out in Article 15 of the MLCBI need to be met. This *inter alia*, includes that

- (1) an application may be made by a foreign representative of State B to the court of State A for recognition of the foreign proceeding in which the foreign representative has been appointed i.e. in State B,
- (2) such application for recognition shall be accompanied by: (a) *A certified copy of the decision commencing the foreign proceeding and appointing the foreign representative; or (b) A certificate from the foreign court affirming the existence of the foreign proceeding and of the appointment of the foreign representative; or (c) In the absence of evidence referred to in subparagraphs (a) and (b), any other evidence acceptable to the court of the existence of the foreign proceeding and of the appointment of the foreign representative.*
- (3) such application for shall also be accompanied by a statement identifying all foreign proceedings in respect of the debtor known to the foreign representative of State B;
- (4) The court may require a translation of documents supplied in support of the application for recognition into an official language of State A.

Presumptions (Article 16, MLCBI)

If the above conditions are satisfied, recognition would be granted to State B under Article 17 of the MLCBI. This is however, subject to certain presumptions concerning the authenticity of documents and the content of the order commencing the foreign proceedings and appointing the foreign representative as further set out below (which the courts of the enacting State would accept concerning the recognition):

1. If the decision or certificate referred to in paragraph 2 of Article 15 above indicates that the foreign proceeding is a proceeding within the meaning of Article 2(a) and that the foreign representative is a person or body within the meaning of 2(d), the court is entitled to so presume. As this is clear from the facts stated, this should not be an issue for the representative of State B.
2. The court is entitled to presume that documents submitted in support of the application for recognition by the foreign representative of State B are authentic, whether or not they have been legalized.
3. In the absence of proof to the contrary, the debtor's registered office, or habitual residence in the case of an individual, is presumed to be the centre of the debtor's main interests.

Disclosure Requirements: The foreign representative of State B has a continuing duty of disclosure towards the courts of State A. He or she must inform the court promptly of any substantial change in the status of the recognized foreign proceeding or of his or her appointment and any other foreign proceeding regarding the same debtor of which the foreign representative becomes aware. This is envisaged in Article 18 of the MLCBI.

Public Policy (Article 6, MLCBI): Apart from these requirements, another thing to note is the public policy requirements of State A i.e. an application may be rejected if the courts of State A under their MLCBI decide that the granting of such application would be undesirable in relation to the public policy of the State and would ultimately be destructive or derogatory to the interests of the stakeholders. This is however in exceptional circumstances (Article 17, MLCBI).

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

1. Exclusions: If the debtor is an entity that is subject to a special insolvency regime in State B, the foreign representative should first of all check if the foreign proceedings regarding that type of a debtor are excluded in State A based on Article 1(2) of the implemented Model Law in State A.
2. Restrictions;- Existing international obligations of State A: Based on Article 3 of the Model Law, the court in State A should also check if there are no existing international obligations of State A (under a treaty or otherwise) that may conflict with granting the recognition application under the implemented Model Law in State A.
3. 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.

Question 3.3 [maximum 5 marks] 2 marks

As far as relief is concerned, briefly explain (with reference to the relevant MLCBI articles) what pre- and post-recognition relief can be considered in the context of the MLCBI, as well

as any restrictions, limitations or conditions that should be considered in this context. For purposes of this question, it can be assumed that there is no concurrence of proceedings.

Pre-recognition relief: Article 19 of the MLCBI allows for the grant of relief to a foreign representative even prior to its recognition. These reliefs are interim in nature and granted to the foreign representative at the time of filing of the recognition application where urgent measures are required usually to protect the assets of the debtor. This applies to both foreign main and non-main proceedings. The reliefs are usually in the form of, among others, (1) a stay of execution against the debtors' assets, (2) entrusting the administration of a part of or all debtors assets in the enacting State (i.e. State A in this case), to the foreign representative (of State B in this case) if it absolutely necessary to protect the value of assets or otherwise, (3) some of post recognition relief like suspension of rights to transfer or encumber any of the debtors' assets, obtaining information, evidence or examination of witnesses or any other related relief available to the domestic insolvency office holder under the laws of the enacting State A could be granted. Article 19(2) allows the enacting State A to implement an appropriate notice of the interim relief granted. However, it must be noted that pursuant to Article 19(4), the courts of the enacting State may refuse to grant any interim relief if it interferes with the administration of foreign main proceedings.

Usually, the provisional reliefs are terminated upon the determination of the recognition application unless expressly extended by the courts as post recognition relief.

Automatic mandatory relief: Article 20 provides automatic reliefs for recognised foreign main proceedings (i.e. where the COMI of the debtor is located). This includes 3 major reliefs as envisaged in Article 20(1)- (a) Stay of commencement or continuation of individual actions against the debtor (this includes arbitration actions), (b) stay of execution against the debtors' assets and (c) suspension of rights to transfer, encumber or dispose assets of the debtor. Article 20(2) allows the enacting State to include the appropriate protections in the law of the enacting State and grants its courts the power to determine whether these aforesaid automatic stay protections should be terminated if contrary to the legitimate interests of the parties.

Post recognition relief: Article 21(1) of the MLCBI grants the courts of the enacting State the discretionary power to allow appropriate reliefs requested by the foreign representatives of both foreign main and non-main proceedings where it is necessary to protect the assets of the debtor or the interests of the creditors. This includes

“(a) Staying the commencement or continuation of individual actions or individual proceedings concerning the debtor's assets, rights, obligations or liabilities, to the extent they have not been stayed under paragraph 1 (a) of article 20; (b) Staying execution against the debtor's assets to the extent it has not been stayed under paragraph 1 (b) of article 20; (c) Suspending the right to transfer, encumber or otherwise dispose of any assets of the debtor to the extent this right has not been suspended under paragraph 1 (c) of article 20; (d) 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; (e) Entrusting the administration or realization of all or part of the debtor's assets located in this State to the foreign representative or another person designated by the court; (f) Extending relief granted under paragraph 1 of Article 19; (g) Granting any additional relief that may be available to [the relevant person or body administering a reorganization or liquidation under the law of the enacting State] under the laws of this State.”

The court may also, at the request of the foreign representative, entrust the distribution of all or part of the debtor's assets located in the enacting State to the foreign representative or another person designated by the court, provided that the court is satisfied that the interests of creditors in this State are adequately protected (Article 21(2)). It must also be noted that in granting relief under this article to a representative of a foreign non-main proceeding, the court must be satisfied that the relief relates to assets that, under the law of the enacting State,

should be administered in such proceedings or concerns information required in such proceedings (Article 21(3)).

While the above provisions indicate that the courts of the enacting State have broad powers to grant reliefs to the foreign representative, the powers are not unlimited. While how a court may exercise such powers depend on several factors, circumstances in the cases, jurisdictions in question, the domestic laws of the enacting State, here have been several instances where the courts have refused to grant reliefs to foreign representatives. A few instances include, (1) where the courts found an *in personam* insolvency related default judgement beyond the scope of MLCBI and refused to grant recognition (*Rubin v Eurofinance SA*²), (2) Through the “*Gibbs Rule*”, the English court found that an English law governed debt cannot be extinguished by foreign proceedings (this if of course a principle in evolution and discussions are made around this rule being interpreted in the context of modified universalism), (3) In the Pan Ocean case, the English court, among others, rejected a claim that the termination of a contract (which was allowed under the domestic law of the state) would fall under the suspension of any commencement or continuation of actions as envisaged in Article 21. The court also held that the intention of seeking appropriate relief in this matter would not include allowing the recognizing English courts to go beyond the relief it would grant under the domestic insolvency law.

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] 0

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?

A worldwide freezing order is essentially an interim relief granted to prevent fraud and to protect the legitimate interests of the parties involved until the court has an opportunity to make a proper assessment of the matter and notify all concerned parties. It is a draconian measure and taken usually as an interim step to avoid an irreparable harm to the interests of the parties and assets of the debtor. Once the matter has been assessed and reasonable protections are in place, the courts are unlikely to continue such extreme measures which would ultimately not benefit the administration of the debtor's estate or interests of the stakeholders involved. 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] 14 marks

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

² [2010] UKSC 46

(1) Background

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

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

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

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

Classification of the bank as troubled

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

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

Classification of the bank as insolvent

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

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

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

Provisional administration

The Deposit Guarantee Fund (DGF) is a governmental body of Country A tasked principally with providing deposit insurance to bank depositors in Country A. However, the Affidavit explained that the DGF is also responsible for the process of withdrawing insolvent banks from

the market and winding down their operations via liquidation. Its powers include those related to early detection and intervention, and the power to act in a bank's interim or provisional administration and its ultimate liquidation.

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

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

Liquidation

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

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

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

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

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

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

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

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

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

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

(2) The Bank’s liquidation

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

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

Those operations included:

- (i) a breach, for eight consecutive reporting periods, of the NB’s minimum capital requirements;
- (ii) 10 months of loss-making activities;
- (iii) a reduction in its holding of highly liquid assets;
- (iv) a critically low balance of funds held with the NB; and

- (v) 48% of the Bank's liabilities being dependent on individuals and a significant increase in "adversely classified assets" which are understood to be loans, whose full repayment has become questionable.

Despite initially appearing to improve, by September 2015 the Bank's financial position had deteriorated further with increased losses, a further reduction in regulatory capital and numerous complaints to the NB. On 17 September 2015, the NB classified the Bank as insolvent pursuant to article 76 of the LBBA. On the same day, the DGF passed a resolution commencing the process of withdrawing the Bank from the market and appointing Ms C as interim administrator.

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

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

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

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

QUESTION 4.1 [maximum 15 marks]

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

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

- 4.1.1 whether the Bank's liquidation comprises a "foreign proceeding" within the meaning of article 2(a) of the MLCBI [maximum 10 marks]; and 10 marks
- 4.1.2 whether the Applicants fall within the description of "foreign representatives" as defined by article 2(d) of the MLCBI [maximum 5 marks]. 4 marks

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

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

As the Bank is not excluded from the scope of MLCBI (or CBIR), we would treat it as an entity being governed by the MLCBI and not subject to any regulatory requirement. For the purposes of this answer, all references of Articles are from the MLCBI as if made to CBIR (enacting legislation of MLCBI in UK), unless otherwise specified.

4.1.1

Article 2(a) provides “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 reorganization or liquidation*”.

In order to ascertain whether the Bank liquidation qualifies as a foreign proceedings under the MLCBI, it would be important to prove that each of the elements in the above definition are satisfied as below:

1. Proceeding and judicial/ administrative in nature:

While there is no elaborate definition or explanation of what constitutes a proceeding in the MLCBI, in the *Agrokar*³ case, the English court suggested that proceedings in relation to corporate insolvencies would include a statutory framework that imposes constraints on a company’s actions and regulates final distribution of a company’s assets. In this case, the NB has clearly set down a criteria under the LBBA (i.e. Legislation in Country A) for the classification of a bank as troubled, insolvent and the consequences and actions taken thereon, including the appointment of the liquidator and “constraining” the bank’s activities to the extent of even shutting down operations in order to preserve the assets of the bank and sell them for the benefit of the creditors. As a proceeding includes interim proceedings, both the “provisional administration” and the “liquidation” under LBBA should qualify as proceedings under MLCBI. In addition to this, the Affidavit provided in relation to Country A’s above LBBA, confirms the processes involved and satisfy the requirement of it being a proceedings under the MLCBI (as an expert opinion which would be relied upon by the recognising English courts).

2. Collective proceedings: The Guide to Enactment and Interpretation of the MLCBI (*GEI*) and the Judicial Perspective in relation to MLCBI adopted in 2011 helpfully discuss the meaning of collective proceedings. The GEI indicates that a “co-ordinated global solution for all stakeholders” should be envisaged in such proceedings. Moreover, a key consideration as stated in paragraph 70 of GEI is whether substantially all assets of the debtor are being dealt with in such proceedings. In addition to this various courts have identified factors to determine the collective nature of the proceedings, which include (1) imposition of an orderly regime that affects all creditors and all assets of the debtor (*Katyanama v Japan Airlines Corporation*⁴), individual parties may not be able to enhance their own interests unilaterally and creditor participation is a reality (*Stanford International Bank Limited*⁵). From the Affidavit, it is clear that there is a

³ In the matter of *Agrokar DD* [2017] EWHC 2781 (Ch) (*Agrokar*)

⁴ 2010 FCA 794 (para 24)

⁵ [2010] EWCA 137 (Civ)

statutory framework i.e. LBBA governs all of the assets of the bank as well as the creditors claims as provided in the powers of the liquidators (page 10 of the fact sheet). The DGF (as liquidator) are entrusted with very broad powers including the disposal of assets, preparing lists of creditor claims and satisfying the claims etc. Even Article 36(5) of the DGF Law provides a Moratorium to be established to avoid the claims of all stakeholders for better administration of the estate of the debtor bank. This all proves that the proceedings under LBBA are in fact collective and intend to provide a global resolution for the debtor bank. Having said that, it is not very clear if the creditors are involved in the process and if there are any specific priorities under the laws of Country A. But largely, from a general overview of the LBBA, it seems that the proceedings may be interpreted as collective in nature given the administration of all of the assets and liabilities of the bank by the DGF.

3. Country A is a foreign state for the purposes of recognition before the English courts.
4. Law relating to insolvency: The GEI (paragraph 73) explains that the fact that liquidation or reorganisation might be conducted under such law would be a law relating to insolvency. It need not be labelled as insolvency law and its not relevant what type of statute or rules it is under, as long as it addresses insolvency and financial distress. The LBBA clearly addresses situations relating to insolvency – it in fact defines a situation of financial stress under Article 75 of the LBBA classifying the bank as “troubled” or recognising it as insolvent if the bank meets the criteria under Article 76. Thus, LBBA as per the Affidavit should be adjudged as an insolvency law.
5. Control/supervision by foreign court: A conjoint reading of the GEI (Paragraphs 74-76) and the *Agrokar* case indicate that the level of court supervision under the MLCBI is relatively low. It can also be potential rather than actual. In *Agrokar*, control was also given to the Croatian government in relation to the insolvency entity, however, that did not negate the supervision of the court. GEI in paragraph 74 also indicates that the control could be indirect by an insolvency representative, who is subject to the supervision by the court or a regulatory authority (*Betcorp Limited*⁶). In further support of this, guidance can be placed on the United States bankruptcy case of *ENNIA Caribe Holdings N.V.*⁷, in which an insurance body with oversight of insurance industry was a body competent to control or supervise the assets and affairs of the debtor. Further, the MLCBI in Article 2(e) defines a foreign court as a judicial or “other authority” competent to control or supervise foreign proceedings. As the LBBA grants the supervisory powers to the DGF which is a governmental body of Country A and is responsible for providing deposit insurance to bank depositors and also for the process of withdrawing insolvent banks and winding down their operations, it may be accepted as a competent authority. Moreover, it (acting through an authorised officer) has the wide powers of provisional administration and liquidation as provided in, inter alia, Article 34 and 77 of the LBBA. These factors are indicative that the DGF may construed to be under the supervision of a foreign regulatory body for the purposes of MLCBI.
6. For the purpose of liquidation or reorganisation: Several provisions of LBBA as set out above clearly indicate that this law of Country A deals with the “liquidation” of the banks once recognised as insolvent. One of the responsibilities of the DGF is to act as provisional as well as ultimate liquidator (Page 9 of factsheet). This would describe as the DGF proceedings within the ambit of the purpose of liquidation under the MLCBI.
7. Generally, as set out in the digest of case law for MLCBI, the inquiry to be made under Article 2(a) is factual in nature and the elements should be interpreted and applied in

⁶ 400 B.R. 266 US

⁷ 599 B.R. 631

light of their international origins. Considering the details of the LBBA and the expert evidence in the Affidavit indicates and as explained above, the proceedings in Country A may be classified as foreign proceedings for the purposes of the MLCBI.

Great answer!

4.1.2

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”.

Just like in foreign proceedings, in order to ascertain whether DGF is a foreign representative under the MLCBI, the following elements should be considered. However, at the outset it must be noted that unlike the foreign proceedings, the MLCBI does not specify that the appointing authority should be a foreign court *per se*. While this may not directly relevant as the DGF is appointed by the State A.

1. Person/Body: As defined in Black’s Law Dictionary, a body is an “artificial person created by a legal authority”. DGF is a government body created under the laws of Country A (as mentioned in the Affidavit – Page 9). Article 2(1)(17) read with Article 48(3) of the DGF Law, respectively defines an authorised officer and empowers the DGF to delegate its powers to an authorised officer or person. So, such authorised person may also considered as a foreign representative (i.e. Ms. G in this case) for the purposes of the MLCBI. The key qualifications of the foreign representative requiring to possess were also laid down in the DGF Law and Ms. G’s credentials are also provided in the Affidavit which confirms Ms. G’s competence to act as the liquidator and the foreign representative of the debtor Bank.
2. Authorised in a foreign proceeding: As mentioned in the case law digest of the MLCBI (paragraph 38, Chapter 1), the courts have emphasised that the focus should be on the determination that the appointment of a foreign liquidator or insolvency officer has been “in the context” or in relation to the foreign proceedings. This includes foreign representatives appointed on an interim basis. It is clear from Article 77 of the LBBA and several provisions of the DGF Law that the DGF (and its authorised representative) have extensive powers (under Article 37 of the DGF Law) in relation to the management and administration of the affairs of the debtor bank in the insolvency proceedings. The authority of Ms. G can further be confirmed by the board resolutions passed by DGF in favour of Ms. G authorising her of all liquidation and related powers (as set out on Page 11).
3. To administer the liquidation or reorganisation of the debtors’ estate and affairs or act as representative of the foreign proceeding: The power to administer the liquidation should be granted to the foreign representative and such representative should hold these powers at the time of making an application for recognition (*Oversight & Control Commission of Avanzit*⁸) before the courts of the enacting State. The application by DGF and MS. G would probably be made on or after the proceedings initiated in the High Court of England and Wales on 11 February 2021. On 17 December 2015, the NB classified the Bank as insolvent under Article 76 of the LBBA, which means that DGF was forthwith entrusted with the liquidation of the Bank, and was thus authorised much before the commencement of the English proceedings. As far as Ms. G is concerned, even was officially appointed as the liquidator with the requisite resolutions replacing Ms. C on 17 August 2020. Thus, the Applicants would likely be construed as foreign representatives for the purposes of the MLCBI as they were appointed prior to the potential making of the recognition application before the English courts.

⁸ SA 385 B.R. 525

*** End of Assessment ***