



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 marks: 36 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]

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

Question 1.1

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

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

Question 1.2

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

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

Question 1.3

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

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

Question 1.4

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

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

Question 1.5

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

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

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

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

Question 1.6

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

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

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

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

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

Question 1.7

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

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

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

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

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

Question 1.8

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

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

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

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

(d) None of the above.

Question 1.9

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

(a) Enforcement of insolvency-related judgments.

(b) An indefinite moratorium continuation.

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

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

Question 1.10

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

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

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

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

(d) All of the above.

QUESTION 2 (direct questions) [10 marks in total] 9 marks

Question 2.1 [maximum 3 marks] 3 marks

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

Pursuant to the Guide to Enactment and Interpretation of the UNCITRAL Model Law on Cross-Border Insolvency (i.e. Part two of UNCITRAL’s January 2014 publication of the Model Law), the appropriate date for determining the COMI or the existence of an establishment of a debtor is the date the foreign proceeding was commenced. At paragraph 159, the Guide to Enactment and Interpretation states:

“With respect to the date at which the centre of main interests of the debtor should be determined, having regard to the evidence required to accompany an application for recognition under article 15 and the relevance accorded the decision commencing the foreign proceeding and appointing the foreign representative, the date of commencement of that proceeding is the appropriate date.”

The Guide to Enactment and Interpretation continues in paragraphs 159 to discuss a number of considerations which support the conclusion that the commencement date of the foreign proceeding is the appropriate for determining the debtor's COMI and goes on at paragraph 160:

"The same considerations apply to the date at which any determination with respect to the existence of an establishment of the debtor should be made. Accordingly, the date of commencement of the foreign proceeding is the relevant date to be considered in making that determination."

Prior to 2014, UNCITRAL provided no guidance as to the date for determining a debtor's COMI/establishment, and the 2014 guidance above followed European Court of Justice decisions interpreting the date for determining COMI in the EU's Regulation on Insolvency Proceedings (see *Susanne Staubitz-Schreiber* [2006] ECR I-701 and *Interedil Srl* [2011] ECR I-9939).

However, common-law courts have not always followed the foregoing approach. For example, in Australia, COMI has been determined as of the date of recognition hearing (see *Re Australian Equity Investors* [2012] FCA 1002, *Indian Farmers Fertiliser Cooperative Ltd v Legend International Holdings Inc* [2016] VSC 308 and *Wood v Astra Resources Ltd* [2016] FCA 1192. US courts have decided that the date for determining COMI is the date of the filing of the application for recognition of the foreign proceeding (see *Re Ran* (2010) 607 F.3d 1017 (5th Cir, CA); *Re Fairfield Sentry Ltd* (2013) 714 F3d 127 (2nd Cir); this approach has been followed by judges in Singapore (in *Re Zetta Jet Pte Ltd* [2019] SGHC 53) and England (in *Re Toisa Ltd* (Judge Burton, unreported, 29 March 2019)).

Question 2.2 [maximum 3 marks] 2 marks

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

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

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

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

Statement 1

Concurrent proceedings, specifically concurrent foreign proceedings. Article 30 of the UNCITRAL Model Law on Cross-Border Insolvency (the "Model Law") is headed "Coordination of more than one foreign proceeding", and sub-article (c) provides:

"If, after recognition of a foreign non-main proceeding, another foreign non-main proceeding is recognized, the court shall grant, modify or terminate relief for the purpose of facilitating coordination of the proceedings."

The effect of 30(c) is that where two or more foreign non-main proceedings are recognised, there is no default priority between them (e.g. based on date of commencement of the foreign proceeding or date of recognition).

Statement 2

The hotchpot rule. Article 32 of the Model Law sets out that the hotchpot rule is without prejudice to secured claims or rights *in rem*.

Statement 3

Presumption of insolvency. Article 31 of the Model Law sets out that recognition of a foreign main proceeding is, for the purpose of commencing an insolvency proceeding in the enacting State, proof that the debtor is insolvent, however this presumption may be rebutted with evidence. **The correct answer is art 16 (3)**

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 *Re OJSC International Bank of Azerbaijan* [2018] EWCA Civ 2082 [2019] Bus LR 1130, the applicant was a foreign representative who had previously obtained recognition in the UK of an Azerbaijani restructuring proceeding—in respect of the International Bank of Azerbaijan (“IBA”)—as the “foreign main proceeding” (pursuant to the Cross-Border Insolvency Regulations 2006 (“CBIR”) which implemented the Model Law in the UK) including an automatic stay of proceedings.

The Azerbaijani proceeding resulted in a restructuring plan proposed by IBA being approved by a large majority of its creditors and then by the Azerbaijan court. At Azerbaijani law, the plan was binding on all affected creditors, including those who did not vote and those who voted against the plan. The foreign representative then applied to the courts of England and Wales to have the stay continued indefinitely so to prevent two creditors—whose debt instruments were governed by English law and had not submitted to the Azerbaijani restructuring proceeding—from pursuing IBA in England for their full debts.

At first instance, Hildyard J rejected the application on the basis that the CBIR did not empower the English court to vary or discharge substantive contract rights conferred by English law. The Court of Appeal affirmed Mr Justice Hildyard’s decision, finding that IBA’s other creditors needed no further protection as the plan had been fully implemented in Azerbaijan. The Court of Appeal further held that, as the foreign proceeding had concluded, the foreign representative no longer holds office and accordingly such representative can no longer seek relief from the English courts and any relief previously granted under the Model Law should terminate.

Question 2.4 [2 marks] 2 marks

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

A court in an enacting State, where a domestic proceeding was previously commenced, after recognising a foreign main proceeding, should ensure that any relief granted under Articles 19 or 21 of the Model Law be consistent with the domestic proceeding as required by Article 29(a)(i).

Pursuant to Article 18 of the Model Law, the foreign representative in the foreign main proceeding has an ongoing duty to keep the court in the enacting State abreast of subsequent information regarding the foreign main proceeding, the foreign representative and any other foreign proceeding:

“Article 18. Subsequent information

From the time of filing the application for recognition of the foreign proceeding, the foreign representative shall inform the court promptly of:

(a) Any substantial change in the status of the recognized foreign proceeding or the status of the foreign representative’s appointment; and

(b) Any other foreign proceeding regarding the same debtor that becomes known to the foreign representative.”

QUESTION 3 (essay-type questions) [15 marks in total] 9 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] 2,5 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?

Prior to applying for recognition of a foreign insolvency proceeding, the person administering the foreign proceeding (the “foreign representative”) has standing (*locus standi*) to apply directly to the courts of the enacting state, including to commence a domestic proceeding.

Pursuant to Article 9 of the Model Law, a foreign representative may apply directly to a court in the enacting State. There is no requirement that the foreign representative obtain any kind of special admission or domestic licence in order to apply to the local courts (paragraph 108 of the Guide to Enactment and Interpretation describes this as, “*thus freeing the representative from having to meet formal requirements such as licences or consular action*”). Further, there is no requirement pursuant to Article 9 of the Model Law that the foreign proceeding be recognised in the enacting State in order that the foreign representative may seek relief from the courts of the enacting State.

Likewise, there no requirement pursuant to Article 11 of the Model Law that the foreign proceeding be recognised in the enacting State for the foreign representative to apply to commence a domestic proceeding in the enacting State pursuant to its insolvency laws.

As explained at paragraph 3(a) of the Guide to Enactment and Interpretation, the Model Law “*provides a framework for cooperation between jurisdictions, offering solutions that help in several modest but significant ways and facilitate and promote a uniform approach to cross-border insolvency*”, with such solutions including that the foreign representative be provided with direct access to the domestic courts “*thereby permitting the foreign representative to seek a temporary “breathing space”, and allowing the courts in the enacting State to determine what*

coordination among the jurisdictions or other relief is warranted for optimal disposition of the insolvency”.

Further, the foreign representative can seek access and co-ordination rights without risking all-embracing jurisdiction being taken by the domestic court, as provided by the safe-conduct clause at Article 10 of the Model Law which holds that the foreign representative or the foreign assets and affairs of the debtor cannot be made subject to the jurisdiction of the courts of the enacting State solely because of an application made pursuant to the Model Law.

For full marks on this question, reference should be made to the rights in art. 25-27 and an overall conclusion that these rights are time and cost preserving.

Question 3.2 [maximum 5 marks] 3 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.

An application for recognition of a foreign proceeding is to be supported by the following evidence:

- (i) a certified copy of the decision commencing the foreign proceeding and appointing the foreign representative, or a certificate from the foreign court affirming the existence of the foreign proceeding and of the appointment of the foreign representative, or (if the foregoing evidence is not available) other evidence acceptable to the domestic court of the existence of the foreign proceeding and of the appointment of the foreign representative (Article 15(2)); and
- (ii) *“a statement identifying all foreign proceedings in respect of the debtor that known to the foreign representative”* (Article 15(3)).

There should also be evidence to assist the domestic court in determining whether the foreign proceeding is main or non-main proceeding (see below) by exhibiting:

- (a) proof of the debtor’s registered office (or habitual residence in the case of an individual), the location of which may be presumed to be the debtor’s COMI unless there is evidence to the contrary (article 16(3)); or
- (b) proof of the debtor having an “establishment” (i.e. a “place of operations where the debtor carries out a non-transitory economic activity with human means and goods or services) in the foreign State (Articles 2(f) and 17(2)(b)).

The application is to be made to a court specified by the enacting State as competent to recognise foreign insolvency proceedings and facilitate cooperation with foreign courts (Articles 4 and 15(d)), and the application shall be decided upon at the earliest possible time (Article 17(3)).

The competent domestic court should recognise the foreign proceeding:

- (a) as a foreign main proceeding if it is taking place in the State where the debtor has its COMI (Article 17(2)(a)); or
- (b) as a foreign non-main proceeding if the debtor has an establishment in the foreign State (Articles 2(f) and 17(2)(b)).

In recognising a foreign proceeding, the domestic court is to confirm, *inter alia*, that the foreign representative has met their evidentiary burden of proving the existence of the foreign proceeding and their appointment (i.e. point (i) above) (Article 17(1)(c)).

There is no requirement for reciprocity from the foreign court (paragraph 47 of The Judicial Perspective on the UNCITRAL Model Law on Cross-Border Insolvency (2013)) or a consideration of comity in recognising a foreign proceeding under the Model Law. In addition, the domestic court should not “*embark on a consideration of whether the foreign proceeding was correctly commenced under applicable law; provided the proceeding satisfies the requirements of*” (i) and (ii) above in determining whether to recognise the foreign proceeding (paragraph 41 of The Judicial Perspective).

However, the domestic court may refuse to grant the application pursuant to the Model Law’s public-policy exception if the court determines that to do so “*would be manifestly contrary to the public policy*” of the enacting state (Article 6).

For full marks on the question, the following should also be addressed:

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.

Question 3.3 [maximum 5 marks] 3 marks

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

The competent domestic court may consider the following pre-recognition relief:

- (i) commencing a domestic proceeding pursuant to the insolvency laws of the enacting State (Article 11);
- (ii) interim relief, if sought from the time of making an application for recognition until the application is decided on, to protect the debtor’s assets or the interests of the creditors, including:
 - a. staying execution against the debtor’s assets (Article 19(1)(a));
 - b. entrusting to the foreign representative or another person, for the purposes of administration or realisation, all or part of the debtor’s assets in the enacting State which are perishable, susceptible to devaluation or otherwise jeopardised, so to protect and preserve their value (Article 19(1)(b));

- c. suspending the right to transfer, encumber or otherwise dispose of any of the debtor's assets (Articles 19(1)(c) and 21(1)(c));
- d. providing for examination of witnesses, taking of evidence or delivery of information concerning the debtor's assets, affairs, rights, obligations or liabilities (Articles 19(1)(c) and 21(1)(d)); and
- e. granting any additional relief that may be available to a person administering a domestic insolvency proceeding under the laws of the enacting State (Articles 19(1)(c) and 21(1)(g)).

The Model Law provides the domestic court with the discretion to refuse such interim relief if it would interfere with the administration of a foreign main proceeding (Article 19(4)).

Any interim granted relief terminates when the application for recognition is decided on, unless extended at the time of recognition (see point 1(e) below).

As for post-recognition relief, whether the foreign proceeding is main or non-main, the domestic court may:

- 1 in order to protect the assets of the debtor or the interests of the creditors:
 - (a) grant the relief set out above at (ii)(c) to (e) (Articles 21(1)(c), (d) and (g)), provided that in respect (ii)(c) such suspension is to the extent that this right has not already been suspended pursuant to the automatic suspension of such rights on recognition (Articles 20(1)(c) and 21(1)(c));
 - (b) stay the commencement or continuation of individual actions proceedings concerning the debtor's assets, rights, obligations or liabilities, to the extent they are not already subject to the automatic stay on recognition (Articles 20(1)(a) and 21(1)(a));
 - (c) stay enforcement against the debtor's assets to the extent that such has not already been effected pursuant to the automatic stay on recognition (Articles 20(1)(b) and 21(1)(b));
 - (d) entrust to the foreign representative or another person, for the purposes of administration or realisation, all or part of the debtor's assets in the enacting State (Article 21(1)(e)); and
 - (e) extend interim relief granted prior to recognition (see above at (ii)) (Articles 19(1) and 21(1)(f));

and
- 2 entrust the distribution of all or part of the debtor's assets in the enacting State to the foreign representative or another person designated by the domestic court, provided that the court is satisfied that the interests of creditors in the enacting State are adequately protected (Article 21(2)).

In granting post-recognition relief to a representative of a foreign non-main proceeding, the domestic court is to be satisfied that the relief relates to assets that, under the law of the enacting State, should be administered in the foreign non-main proceeding or concerns information required in that proceeding (Article 21(3)).

The Model Law at Article 22 also provides for the protection of creditors and other interested persons, including the debtor, in granting, denying or modifying interim relief or post-recognition relief, and may also terminate such relief:

“1. In granting or denying relief under article 19 or 21, or in modifying or terminating relief under paragraph 3 of this article, the court must be satisfied that the interests of the creditors and other interested persons, including the debtor, are adequately protected.

2. The court may subject relief granted under article 19 or 21 to conditions it considers appropriate.

3. The court may, at the request of the foreign representative or a person affected by relief granted under article 19 or 21, or at its own motion, modify or terminate such relief.”

For full marks, again reference should be made to art. 3 (restrictions) and art. 6 (public policy)

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?

A worldwide freezing order granted as pre-recognition interim relief pursuant to Article 19 of the Model Law is unlikely to be continued by the domestic court pursuant to Article 21 on recognition of the foreign proceeding as a foreign main proceeding because the automatic suspension on transferring, encumbering or otherwise disposing of any of the debtor’s assets comes into effect on recognition (Article 20(1)(c)).

Also in a non-foreign a freezing order is un-warranted, since art. 21 provides for another form for protection.

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

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] 11 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]; 7 marks** and
- 4.1.2 whether the Applicants fall within the description of "foreign representatives" as defined by article 2(d) of the MLCBI **[maximum 5 marks]. 4 marks**

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

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

The application and the applicants

This is an application to recognise in England and Wales the liquidation proceeding in Country A in respect of the Commercial Bank for Business Corporation (the "Bank") pursuant to the Cross-Border Insolvency Regulations 2006.

The application is made by the Bank's liquidator in Country A, which is Country A's Deposit Guarantee Fund (the "DGF") and Ms G, an authorised officer of the DGF exercising certain powers delegated by the DGF pursuant to statute. The DGF is a governmental body of Country A tasked primarily with providing deposit insurance to bank depositors in Country A but also with responsibility for the process of withdrawing insolvent banks from the market and winding down their operations via liquidation.

Issues to be decided on this application

Two questions fall for determination in considering whether to grant this application. The first question is whether the liquidation of the Bank is a "foreign proceeding" within the meaning of article 2(a) of the UNCITRAL Model Law on Cross-Border Insolvency (the "Model Law")

adopted by the Cross-Border Insolvency Regulations 2006? Article 2(a) defines a “foreign proceeding” as:

a collective judicial or administrative proceeding in a foreign State, including an interim proceeding, pursuant to a law relating to insolvency in which proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganization or liquidation

Article 2(e) of the Model Law defines a “foreign court” as “a judicial or other authority competent to control or supervise a foreign proceeding”.

The second question is whether the Applicants fall within the description of “foreign representatives” as defined by article 2(d) of the Model Law. Article 2(d) sets out:

“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;

Country A’s insolvency and liquidation regime for banks

The liquidation is pursuant to Country A’s *Law of Banks and Banking Activity* (the “LBBA”), which provides a specific insolvency procedure for banks. The procedure is initiated when the National Bank of Country A (presumably a central bank) classifies a bank as “troubled” because it meets at least one criterion set out in article 75 of the LBBA or for any of the reasons specified in regulations promulgated pursuant to the LBBA. If the troubled bank fails to bring its activities in line with the National Bank’s requirements within 180 days, the National Bank must either recognise the bank as compliant or classify it as insolvent. Article 76 of the LBBA contains a test for solvency to be determined by the National Bank.

Pursuant to article 34 of Country A’s *Deposit Guarantee Fund Law* (“DGF Law”), once a bank has been classified as insolvent, the DGF begins a process of removing the insolvent bank from the market which can include a period of provisional administration. During such provisional administration, article 36(5) of the DGF Law provides a moratorium on, *inter alia*, satisfaction of claims and enforcement against the bank’s assets.

Provisional administration is followed by liquidation. Article 77 of the LBBA provides that the DGF becomes liquidator of a bank when it is notified that the National Bank has decided to revoke an insolvent bank’s licence. At this juncture, the DGF acquires the full powers of a liquidator pursuant to Country A’s laws.

The liquidation process appears to have many of the hallmarks of such processes at English law. For example, all powers of the bank’s management and control bodies are terminated and the liquidator may step in and take over the management of the bank. The liquidator has the power to dispose of the bank’s assets. Offsetting of counterclaims against debts owing to their bank is prohibited. And, the liquidator has the power to compile a register of creditor claims and to seek to satisfy those claims.

Pursuant to articles 3(3) and 3(7) of the DGF Law, the DGF is independent of the National Bank, and neither public authorities nor the National Bank or public authorities may interfere in the DGF’s exercise of its functions and powers. Pursuant to article 48(3) of the DGF Law, the DGF may delegate its powers to an authorised officer or authorised person, the latter of which is defined at article 2(1)(17) of the DGF Law as an employee of the Fund. Article 35(1) of the DGF Law sets out that an authorised person must have “high professional and moral

qualities” along with certain professional experience, reputation and qualifications. An authorised officer is said to be accountable to the DGF for their actions.

The liquidation proceeding in respect of the Bank

The National Bank classified the Bank as troubled on 19 January 2015.

On 17 September 2015, the National Bank classified the Bank as insolvent pursuant to article 76 of the LBBA, and that day the DGF began the process of withdrawing the Bank from the market and appointing a Ms C as interim administrator. This apparently marked the beginning of the provisional administration period.

On 17 December 2015, the National Bank revoked the Bank’s licence and resolved that it be liquidated. On 18 December 2015, the DGF commenced the liquidation proceeding and appointed a Ms C as the DGF’s authorised person. On 17 August 2020, the DGF replaced Ms C with Ms G, albeit Ms G’s appointment delegated only certain powers under the DGF Law and expressly excluded others.

Investigations during the liquidation uncovered a potential multi-million dollar fraud resulting in funds transferred to many companies abroad, including some in this jurisdiction. Proceedings were issued in the High Court of England and Wales (Chancery Division) against various defendants on 11 February 2021. Those proceedings are not before me, but I understand that as of the date making this application there has not yet been any determination in those proceedings.

Analysis and decision

Based on the foregoing, the liquidation proceeding regarding the Bank is an administrative proceeding in Country A pursuant to its laws relating to insolvency for the purpose of reorganization or liquidation. Those elements meet some of the requirements of article 2(a) of the Model Law.

However, I am unclear as to whether the liquidation proceeding is collective in nature, as required by article 2(a), given the lack of evidence on this point. All that the evidence shows in respect of whether proceeding is collective is that the DGF’s powers include “*the power to compile a register of creditor claims and to seek to satisfy those claims*”. Otherwise, the evidence indicates that the procedure is that of withdrawing insolvent banks from the market and winding down their operations via liquidation, which is consistent with the DGF’s statutory role in respect of insolvent banks which have their licence revoked. As set out at paragraph 62 of the *Guide to Enactment and Interpretation* accompanying the Model Law as part two of its publication (UNCITRAL Secretariat, Vienna: 2014):

For a proceeding to qualify for relief under the Model Law, it must be a collective proceeding because the Model Law is intended to provide a tool for achieving a coordinated, global solution for all stakeholders of an insolvency proceeding. It is not intended that the Model Law be used merely as a collection device for a particular creditor or group of creditors who might have initiated a collection proceeding in another State. Nor is it intended that the Model Law serve as a tool for gathering up assets in a winding up or conservation proceeding that does not also include provision for addressing the claims of creditors.

I am accordingly, not convinced that the liquidation process is collective.

Moreover, this application must be denied because there is no evidence that in the liquidation proceeding “the assets and affairs of the debtor are subject to control or supervision by a foreign court” as required by article 2(a) of the Model Law. Supervision of the foreign proceeding by a court or other authority competent to control or supervise the proceeding in that jurisdiction is a hard-edge requirement of article 2(a). As liquidator, the DGF is the administrator of the liquidation proceeding and there is no evidence that it is supervised, even in a passive way, by any court or authority. It would not be tenable to argue that the DGF is a supervising authority over the authorised person – Ms C followed by Ms G – as those individuals are officers/employees of the DGF and are merely exercising powers delegated by the DGF as liquidator; this is made abundantly clear given that the delegation to the current authorised person, Ms G, expressly reserves certain powers from her.

Accordingly, this application to recognise the liquidation of the Bank in Country A as a foreign proceeding pursuant to the Cross-Border Insolvency Regulations 2006 is dismissed. The failure to prove the collective nature of the liquidation proceeding and the failure to show that the DGF is supervised or controlled by a competent court or authority are each fatal to the application.

For full marks on this question, it should be clearly explained what is meant by “pursuant to a law relating to insolvency” and it should also be discussed if the proceeding is for the purpose of reorganisation or liquidation. Although I don’t agree with your conclusion on collectivity and supervision, the arguments are well put forward.

That said, if I am incorrect and the liquidation proceeding is both collective and supervised by a court/authority, I would find that the applicants have standing as a foreign representative. According to *The Judicial Perspective of the Model Law* (UNCITRAL Secretariat, Vienna: 2013) at paragraph 32:

The definitions of “foreign representative” and “foreign proceeding” are linked. In order to fall within the definition of a “foreign representative”, a person must be administering a “collective judicial or administrative 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” or be acting as a representative of the foreign proceeding.

The DGF is clearly a body appointed and authorised as the Bank’s liquidator to administer the liquidation of the Bank’s assets and wind-up its affairs pursuant to article 77 of the LBBA when it was notified that on 17 December 2015 the National Bank had revoked the Bank’s licence and resolved that it be liquidated. Further, Ms G is merely exercising delegated authority from the DGF, which delegation is expressly permitted by article 48(3) of the DGF Law. While the evidence on this application was adduced by way of affidavit rather than a certified copy of the decision commencing the foreign proceeding or a certificate from the foreign court affirming the existence of the foreign proceeding and of the appointment of the foreign representative, article 15(2)(c) of the Model Law allows, in the absence of such evidence, any other evidence acceptable to the court of the existence of the foreign proceeding and of the appointment of the foreign representative. I find that the affidavit evidence would be sufficient to establish the appointment of the DGF and Ms G as foreign representatives if the liquidation proceeding were collective and subject to supervision by a competent court/authority.

Application dismissed.

For full mark on this question, it should also be discussed whether the split in power affects the recognition as a foreign representative and a more elaborate answer on the powers.

*** End of Assessment ***