



**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: 38,5 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] 6 marks**

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

#### **Question 1.1**

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

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

#### **Question 1.2**

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

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

### Question 1.3

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

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

### Question 1.4

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

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

### Question 1.5

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

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

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

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

#### Question 1.6

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

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

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

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

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

#### Question 1.7

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

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

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

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

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

#### Question 1.8

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

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

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

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

(d) None of the above.

### Question 1.9

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

(a) Enforcement of insolvency-related judgments.

(b) An indefinite moratorium continuation.

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

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

### Question 1.10

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

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

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

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

(d) All of the above.

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

Under the Model Law, the date for determining the COMI of a debtor or whether an establishment exists is the date of commencement of the foreign proceeding.<sup>1</sup> This is similar to the approach taken under the relevant Recast European Insolvency Regulation (EIR).

However, there has not been consistency in the determination of the appropriate date for determining the debtor’s COMI or establishment as there have been multiple approaches in multiple jurisdictions. They include:<sup>2</sup>

(a) The date of commencement of the foreign proceeding for which recognition is sought;

<sup>1</sup> UNCITRAL Model Law on Cross-Border Insolvency with Guide to Enactment and Interpretation, page 75, paragraph 159

<sup>2</sup> Digest of Case Law on the UNCITRAL Model Law on Cross-Border Insolvency, page 49, paragraph 10

- (b) The date of the application for recognition;
- (c) The date the court is called upon to decide the application;
- (d) A date determined by reference to the operational history of the debtor.

It is said that the approach adopted by the United States has been to consider the COMI upon filing of the recognition application in respect of the foreign insolvency proceeding.<sup>3</sup> However, the US Courts have taken cognizance of the EIR and other international interpretations as stated in the case of *Morning Mist Holdings Ltd v Krys (Matter of Fairfield Sentry Ltd)* (2nd Cir Appeals Apr. 16, 2013). This flexible approach is said to have been followed in *Re Toisa Limited judgment by ICC Judge Catherine Burton of 29 March 2019*.<sup>4</sup>

It is said that 'the Australian approach' is to determine the COMI upon the hearing of the recognition application.<sup>5</sup>

### Question 2.2 [maximum 3 marks] 3 marks

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

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

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

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

1. Statement 1
  - a. Provision/concept - Concurrent foreign non-main proceedings. Article 30(c) of the Model Law provides that where two concurrent foreign non-main proceedings have been recognised, the court is to grant, modify or terminate relief for the purpose of facilitating coordination of the proceedings.
  - b. Relevant model law article - Article 30(c) of the Model Law
  
2. Statement 2
  - a. Provision/concept- this is the rule of payment in concurrent proceedings, also known as the "hotchpot rule". This principle deals with the equalisation of distributions between creditors of the same class in different States. The rule is that where a creditor has received a part payment of a claim in respect of his

<sup>3</sup> Herman Jeremiah and Kia Jeng Koh, "Singapore: Timing Is Everything: Different Approaches To The Relevant Date For Determining COMI In Cross-Border Recognition Proceedings", 15 August 2019,

<sup>4</sup> Footnote 88 of the Module 2A Guidance Text

<sup>5</sup> Herman Jeremiah and Kia Jeng Koh, "Singapore: Timing Is Everything: Different Approaches To The Relevant Date For Determining COMI In Cross-Border Recognition Proceedings", 15 August 2019,

claim in a proceeding of a foreign state, he shall not receive a payment for the same claim in the enacting state from the same debtor, unless he receives a sum that is proportionally less than what he has already received.

b. Relevant model law article - Article 32 of the Model Law

3. Statement 3

a. Provision/concept – this is in relation to the COMI of the debtor. 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 (COMI is undefined in the Model Law). This is similar to the principle under the EIR

b. Model law – Article 16(3) of the Model Law

**Question 2.3 [2 marks] 2 marks**

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

The appeal was against the decision of the English High Court to dismiss an application for the indefinite continuation of a stay of proceedings in relation to the claims of English creditors following the bank’s restructuring.

The issue to be decided by the Court of Appeal was whether the court should not exercise its power to grant a stay beyond the automatic stay under art.20 where to do so would in substance would:

- a. prevent the English creditors from enforcing their English law rights in accordance with the “Gibbs rule” or
- b. prolong the stay after the end of the reconstruction<sup>6</sup>

The Court of Appeal upheld the decision of the High Court for the reasons that:

- a. the court was not satisfied that the rights of the creditors, on whose behalf the foreign representative was seeking the indefinite continuation of a stay of proceedings, required protection and that this was the best way to achieve it. This is because the said creditors had received all that they were entitled to under the restructuring process. The Gibbs rule afforded the challenging creditors certain rights under English law and there was nothing in the Model Law to detract from those rights.
- b. it would be ‘anomalous’ to grant an indefinite stay order to last beyond the foreign proceedings when the foreign representative and such proceedings ceased to exist; this would be ‘inconsistent’ with the procedural and supporting role of the Model Law

**Question 2.4 [2 marks] 1 mark**

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

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<sup>6</sup> OJSC International Bank of Azerbaijan, Practical Law



### Duty of the court in an enacting state, after the recognition of a foreign main proceeding

- Under Article 20 of the Model Law, automatic mandatory relief can be obtained from the enacting court in case the recognised foreign proceeding qualifies as a foreign main proceeding. The relief under Article 20 is only available where the foreign proceeding is a foreign main proceeding.
- Under Article 21 of the Model Law, which applies to both main or non-main foreign proceedings,
  - Subject to the relief granted under Article 20:
    - Staying execution against the debtor's assets
    - Suspending the right to transfer, encumber or otherwise dispose of any assets of the debtor
  - Providing for the examination of witnesses, the taking of evidence or the delivery of information concerning the debtor's assets, affairs, rights, obligations or liabilities
  - Entrusting the administration of the debtors' assets to another person designated by the court
  - Granting additional relief in accordance with the laws of the enacting state
- The relief granted under Article 20 is automatic mandatory relief, whereas the relief granted under Article 21 is discretionary relief

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

### Duty of information of the foreign representative

Under Article 18 of the Model Law, 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] 8,5 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] 3 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?

Chapter 2 of the Model Law deals with "*Access of Foreign Representatives and Creditors to Courts in this State*". Access to local courts for representatives of foreign insolvency proceedings and for creditors and authorization for representatives of local proceedings to

seek assistance elsewhere, is one of the four main features of the Model Law. The provisions on access address both inbound and outbound aspects of cross-border insolvency.<sup>7</sup>

As for inbound requests, the provisions in Chapter 2 gives the foreign representative the following benefits:

1. Article 9 entitles the foreign representative to apply directly to a court in the enacting State. The foreign representative has the benefit of avoiding the time consuming and costly step of having to apply for the foreign proceeding to be recognised in the enacting state. However, this is tempered by the limitation in Article 10.
2. The foreign representative can also apply to commence a local proceeding in the enacting State on the conditions applicable in that State (Article 11)
3. Under Article 12, the foreign representative is entitled to participate in a proceeding regarding the debtor in the enacting state
4. Articles 13 and 14 provide for foreign creditors to have equality with domestic creditors in relation to their rights before the domestic courts.<sup>8</sup> Specifically, Article 13 ensures that foreign creditors have the same rights as creditors in the enacting State without affecting the ranking of the claims in the enacting state.
5. Foreign creditors should be provided with timely notice (Article 15)

**For full marks on this question, you should also address the coordination rights in art. 25-27.**

### **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.

Article 17 sets out when the court in the enacting state may take a decision to recognise a foreign proceeding, that is where a request has been made in accordance with the relevant sections of the Model Law, including the following

1. where it is a foreign proceeding and an application made by the foreign representative within the meaning of Article 2,
2. where the application for recognition is submitted to the competent authority under Article 4,
3. where the application for recognition fulfils the further requirements in Article 15(2) are met,
4. there is no public policy ground based on which the recognition should not be granted (Article 6)

the recognition application should be granted as a matter of course (unless).

Article 15(2) requires the following evidence to be submitted with the application for recognition:

1. Evidence of the commencement/existence of the foreign proceeding or appointment of a foreign representative, such as

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<sup>7</sup> UNCITRAL Model Law on Cross-Border Insolvency Law with Guide to Enactment and Interpretation, Part Two: Guide to Enactment and Interpretation, page 27

<sup>8</sup> Neil Hannan, Cross-Border Insolvency: The Enactment and Interpretation of the UNCITRAL Model Law, Springer 2017, pg 91

- a. a certified copy of the decision commencing the foreign proceeding and the decision appointing the representative,
  - b. a certificate from the foreign court affirming the existence of the foreign proceeding and affirming the appointment, or
  - c. other evidence of that appointment that is acceptable to the receiving court
2. statement identifying all foreign proceedings in respect of the debtor that are known to the foreign representative – this requirement has more to do with granting of relief, than it does with the actual recognition<sup>9</sup>

The court is entitled to presume the authenticity of the documents, but have the power to require that the documents be legalised – Article 16

Article 17 sets out the basis on which it will be decided whether a foreign proceeding is a main proceeding or a non-main proceeding.

The foreign proceeding shall be recognized:<sup>10</sup>

- (a) As a foreign main proceeding if it is taking place in the State where the debtor has the centre of its main interests; or
- (b) As a foreign non-main proceeding if the debtor has an establishment within the meaning of subparagraph (f) of article 2 in the foreign State.

Article 17(3) provides that an application for recognition ought to be decided at the earliest possible time.

However, the court of the enacting state has the authority to modify or terminate the recognition if it is shown that the grounds for granting it were fully or partially lacking or have ceased to exist. (Article 17(4))

**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.

### **Question 3.3 [maximum 5 marks] 2 marks**

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

The relief that can be granted are recognised (mainly) under Article 19 and 21 of the Model Law. The relief that is available to a party is dependant on:

1. the time during which the relief is granted (that is, whether it is provisional or permanent relief)

<sup>9</sup> UNCITRAL Model Law on Cross-Border Insolvency Law with Guide to Enactment and Interpretation, Part Two: Guide to Enactment and Interpretation, page 66

<sup>10</sup> *Idem*, Part One: UNCITRAL Model Law on Cross-Border Insolvency, Article 17

2. the type of foreign proceeding for which the relief is granted (that is, whether the foreign proceedings are main or non-main proceedings)

As for the time during which the relief can be granted (whether it is a main or non-main foreign proceeding):

1. before the recognition is granted (after the application is filed) until the application is decided upon where relief is urgently needed to protect the assets of the debtor or the interests of the creditors. This is provided for in Article 19 of the Model Law.
2. After the application is granted and the foreign proceeding is recognised. This is provided for in Articles 20 and 21 of the Model Law.

As for the type of foreign proceeding for which the relief is granted (whether before or after the foreign proceeding is recognised):

1. Relief for a foreign main proceeding – Articles 19, 20 and 21
2. Relief for a foreign non-main proceeding - Articles 20 and 21

It should be noted that the relief under Article 20 is automatic and the relief under Article 21 is discretionary relief.

Relief that may be granted before the recognition of the foreign main or non-main proceeding, that is, relief available under Article 19:

- a stay of execution against the debtor's assets;
- entrusting the administration or realisation 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
- certain relief that is available under Article 21:
  - suspending the right to transfer, encumber or otherwise dispose of any assets of the debtor (Article 21(c));
  - 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 (Article 21(d)); and
  - granting any additional relief that may be available to a domestic liquidator / office holder under the laws of the enacting State (Article 21(g)).

Relief that may be granted upon the recognition of a foreign main proceeding, that is, relief available under Articles 20 and 21:

- (a) relief available with automatic effect:
  - (i) Commencement or continuation of individual actions or individual proceedings concerning the debtor's assets, rights, obligations or liabilities is stayed;
  - (ii) Execution against the debtor's assets is stayed; and
  - (iii) The right to transfer, encumber or otherwise dispose of any assets of the debtor is suspended.
- (b) Discretionary relief:
  - (i) 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;
  - (ii) 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;
  - (iii) Extending relief granted under paragraph 1 of article 19;
  - (iv) Granting any additional relief that may be available to the domestic liquidator or other office holder under the law of the enacting State.

Relief that may be granted upon the recognition of a foreign non-main proceeding, that is, relief available under Articles 21 (all discretionary relief):

- (a) Commencement or continuation of individual actions or individual proceedings concerning the debtor's assets, rights, obligations or liabilities is stayed;
- (b) Execution against the debtor's assets is stayed; and
- (c) The right to transfer, encumber or otherwise dispose of any assets of the debtor is suspended.
- (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 domestic liquidator or other office holder under the law of the enacting State.

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

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

### Question 3.4 [maximum 1 mark] ½ mark

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

In the IBA Case Appeal, the English Court of Appeal held that it would be 'anomalous' to grant an indefinite Moratorium to last beyond the foreign proceedings when the foreign representative and such proceedings ceased to exist; this would be 'inconsistent' with the procedural and supporting role of the Model Law.

Here it should be mentioned that art. 21 provides for other forms for protection leaving the freezing order un-warranted.

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

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

#### (1) Background

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

95% of the Bank's shares through various corporate entities (including some registered in England).

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

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

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

### ***Classification of the bank as troubled***

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

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

### ***Classification of the bank as insolvent***

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

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

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

### ***Provisional administration***

The Deposit Guarantee Fund (DGF) is a governmental body of Country A tasked principally with providing deposit insurance to bank depositors in Country A. However, the Affidavit explained that the DGF is also responsible for the process of withdrawing insolvent banks from the market and winding down their operations via liquidation. Its powers include those related to early detection and intervention, and the power to act in a bank's interim or provisional administration and its ultimate liquidation.

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

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

### **Liquidation**

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

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

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

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

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

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

However, article 48(3) of the DGF Law empowers the DGF to delegate its powers to an "authorised officer" or "authorised person". The "Fund's authorised person" is defined by article 2(1)(17) of the DGF Law as: "*an employee of the Fund, who on behalf of the Fund and within*

*the powers provided for by this Law and / or delegated by the Fund, performs actions to ensure the bank's withdrawal from the market during provisional administration of the insolvent bank and/or bank liquidation".*

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

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

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

## **(2) The Bank's liquidation**

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

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

Those operations included:

- (i) a breach, for eight consecutive reporting periods, of the NB's minimum capital requirements;
- (ii) 10 months of loss-making activities;
- (iii) a reduction in its holding of highly liquid assets;
- (iv) a critically low balance of funds held with the NB; and
- (v) 48% of the Bank's liabilities being dependent on individuals and a significant increase in "adversely classified assets" which are understood to be loans, whose full repayment has become questionable.

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



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

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

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

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

#### **QUESTION 4.1 [maximum 15 marks]**

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

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

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

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

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

*4.1.1 Whether the Bank's liquidation comprises a "foreign proceeding" within the meaning of article 2(a) of the MLCBI*

1. Considering whether Country A not adopting the Model Law is an impediment to the recognition of the insolvency proceedings in England, it should be noted that:
  - (a) The CBIR 2006 does not rely on reciprocity; in that, the UK Court is not limited to relief that would only be provided by the foreign state if a similar application was made to the foreign court
  - (b) Therefore, the UK Court can recognise foreign proceedings even if the foreign state (in this case Country A) has not adopted the Model Law
  
2. Since the Bank's registered office is situated in Country A, it could be said that, in accordance with article 16(3) of the Model Law, there is a rebuttable presumption that the place of the registered office of the debtor is the place of its COMI. This would make the foreign proceeding in Country A, the foreign **main** proceeding under article 2(b) of the Model Law.
  
3. A "Foreign proceeding" has been defined under Article 2(a) of the Model Law (which is replicated in the CBIR 2006, Schedule 1, Article 2(b)(i)) 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.*"
  
4. This can be broken down into several elements:
  - (a) a proceeding (including an interim proceeding);
    - (i) the liquidation proceeding commenced on 18 December 2015 and on 14 December 2020, the Bank's liquidation was extended to an indefinite date
    - (ii) Therefore, the liquidation proceedings are 'proceedings' within the purpose of the Model Law.
  
  - (b) that is either judicial or administrative;
    - (i) since the procedure has been initiated by the DGF, this would most likely constitute an administrative procedure.
  
  - (c) that is collective in nature;
    - (i) this is pursuant to the focus of the Model law to provide "*a coordinated, global solution for all stakeholders of an insolvency proceeding.*"<sup>11</sup>
    - (ii) A key consideration is whether, subject to priority and exclusions under local law, whether substantially all of the debtors assets are dealt with in the proceeding
    - (iii) In the case of *In Re Agrokor*,<sup>12</sup> it was held that "*collective*" should mean "*relating to the debtor and its own creditors*", not "*to the debtor and creditors of others*".
    - (iv) The facts provided indicate that
      - (A) Mr Z, who held approximately 95% of the Bank's shares through various corporate entities (including some registered in England, was the Bank's majority beneficial owner
      - (B) Proceedings were issued in the High Court of England and Wales (Chancery Division) against various defendants on 11 February 2021

<sup>11</sup> Paragraph 69, UNCITRAL Guide to Enactment and Interpretation

<sup>12</sup> [2017] EWHC 2791 (Ch)

- (C) monies have been sent to many overseas companies, including entities incorporated and registered in England.
  - (D) creditors' claims totalling approximately USD 1.113 billion
  - (E) The Affidavit states that the Bank's current, estimated deficiency exceeds USD 823 million
  - (v) It, therefore, appears as though substantially all of the assets and liabilities of the Bank are dealt with in the Insolvency proceeding
- (d) that is in a foreign State;
    - (i) in this case, the liquidation is in Country A, which is a foreign state
  - (e) that is authorised or conducted under a law relating to insolvency;
    - (i) although the law may not be labelled as insolvency law (e.g. company law), if it nevertheless deals with or addresses insolvency or severe financial distress, would come within the meaning of "a law relating to insolvency" under the Model Law
    - (ii) in this case, it is clear that the law governing the insolvency proceeding of the Bank deals with "*addresses insolvency or severe financial distress*" as
      - (A) the law that deals with the insolvency procedures in country A is Banks and Banking Activity (LBBA).
      - (B) This law sets out in detail when a company ought to be classified as 'troubled', 'insolvent', 'provisional administration' and 'liquidation; which are all procedures concerning insolvency
  - (f) in which the assets and affairs of the debtor are subject to control or supervision by a foreign court;
    - (i) the amount of control required is relatively low
    - (ii) it should be formal in nature but it can be potential, rather than actual and
    - (iii) can be indirect rather than direct, in that the control can be exercised by the insolvency representative where the said representative might be subject to the court's control
    - (iv) both assets and affairs of the debtor should be subject to control or supervision
    - (v) in the present case, the liquidator, the DGF, appears to be independent from inference and scrutiny of public authorities and the National Bank.
    - (vi) It is unclear from the facts whether the DGF is subject to the supervision of the court. This in turn, renders it uncertain as to whether the "assets and affairs of the debtor are subject to control or supervision by the court in Country A.
    - (vii) However, the DGF could be considered to be a foreign court under the definition of the same in the CBIR 2006 – Schedule 1 – Article 2(f), where "foreign court" means a judicial or other authority competent to control or supervise a foreign proceeding. In which case, DGF would be both the foreign representative and the foreign court.
  - (g) which proceeding is for the purpose of reorganisation or liquidation.
    - (i) In this case, the purpose of the proceeding is for the insolvency (liquidation) of the Bank.

5. However, even if this cannot be recognised as a foreign proceeding within article 2(a) of the Model Law, the High Court is empowered to recognise the foreign

proceedings if it considers for any other reason that it is the appropriate forum to consider the question or provide the assistance requested under Article 4(2)(b) of the CBIR 2006.

*Conclusion*

6. If it can be proven that the assets and affairs of the debtor are subject to control or supervision by the court of Country A, then it is likely that the Bank's liquidation will comprise a "foreign proceeding" within the meaning of article 2(a) of the Model Law. If not, the High Court may choose to recognise the proceedings under Article 4(2)(b) of the CBIR 2006

**Great answer!**

4.1.2 Whether the Applicants fall within the description of "foreign representatives" as defined by article 2(d) of the MLCBI

1. In this case, the applicants are the DGF, who is the liquidator and Ms G, in her capacity as authorised officer of the DGF.
2. A "foreign representative" has been defined under s. 2(d) of the Model Law (which is replicated in the CBIR 2006, Schedule 1, Article 2(b)(j)) as:
  - a. a person or body, including one appointed on an interim basis,
  - b. authorized in a foreign proceeding
  - c. to:
    - i. administer the reorganization or the liquidation of the debtor's assets or affairs or
    - ii. to act as a representative of the foreign proceeding
3. A person authorised to act as a representative of the foreign proceeding:
  - a. could be a person authorized specifically for the purposes of representing the foreign proceedings;
  - b. need not be made by the court, but could even be made by a special agency;<sup>13</sup> and
  - c. Could be an interim appointment, but the appointment needs to have commenced

*A person or body authorized in a foreign proceeding, to administer the liquidation*

4. Whether or not the "foreign representative" is authorized to act as a representative of a debtor's liquidation or reorganization is determined by the applicable law of the State in which the insolvency proceedings began.<sup>14</sup>
5. In the present case, the DGF is a body that is authorised to
  - a. begin the process of removing a bank that has been classified as insolvent from the market (Article 34).
  - b. administer the Bank's affairs, including manage the bank and all powers of the bank's management (Articles 35(5) and 36(1))

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<sup>13</sup> Paragraph 84, UNCITRAL Guide to Enactment and Interpretation

<sup>14</sup> *Idem*, Paragraph 34

- c. 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 (Article 37)
- d. When the DGF becomes the liquidator under Article 77, exercise the full powers of a liquidator under the law of Country A, which include
  - i. Alienating the bank's property and funds
  - ii. Investigating the bank's history and bring claims against parties believed to have caused its downfall, which include
    - 1. the power to exercise management powers and take over management of the property (including the money) of the bank;
    - 2. the power to compile a register of creditor claims and to seek to satisfy those claims;
    - 3. the power to take steps to find, identify and recover property belonging to the bank;
    - 4. the power to dismiss employees and withdraw from/terminate contracts;
    - 5. the power to dispose of the bank's assets; and
    - 6. the power to exercise "such other powers as are necessary to complete the liquidation of a bank".
  - iii. powers of sale, distribution and the power to bring claims for compensation against persons for harm inflicted on the insolvent bank
- e. to delegate its powers to an "authorised officer" or "authorised person" (article 48(3))

6. Considering the authority given to the DGF, it is clear that the DGF is authorised to administer the liquidation; directly or through a delegate appointed under article 48(3) of the DGF Law. Therefore, the DGF is a 'foreign representative' within the meaning of Article 2(d) of the Model Law.

*Authorisation to act as a representative of the foreign proceeding*

7. The DGF has, in turn, delegated its powers under article 48(3) of the DGF Law, to an "authorised officer" or "authorised person". In the present case, the current authorised person is Ms G. the DGF deleted its powers through Resolution 1513.
8. Ms G's appointment need not be made by the court and may be made on an interim basis. It is also sufficient that Ms G's appointment is made for the purposes of representing the foreign proceedings, as opposed to administering the said proceedings.
9. Resolution 1513:
- a. delegates to Ms G 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, which includes
    - i. the authority to sign all agreements related to the sale of the bank's assets in the manner prescribed by the DGF Law.

- ii. 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 (Article 37)
  - iii. power to delegate its powers to an "authorised officer" or "authorised person" (article 48(3))
- b. 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.
10. Therefore, whilst Ms G has not been granted the full powers of administering the liquidation (as certain powers have been excluded from Resolution 1513 and have been retained by the DGF), Ms G has been given sufficient powers to enable her to represent the foreign proceedings. This brings her within the purview of a 'foreign representative'.

**\* End of Assessment \***