



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: 43,5 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] 8 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] 10 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.

The appropriate date for determining the COMI of a debtor, or whether an establishment exists, under the MLCBI is the date of the commencement of the relevant foreign insolvency proceeding.

However, decisions from the US courts (*Morning Mist Holdings Ltd v Krys (Matter of Fairfield Sentry Ltd)*) and, more recently the English courts (*Re Toisa* - unreported) have adopted a slightly different approach of determining COMI based on a debtor's activities 'at or around' the date of filing of the relevant petition/application to enter into an insolvency proceedings' (e.g. in the case of US proceedings, the date of filing of a Chapter 15 petition). This increased flexibility in determining the date of assessment of COMI allowed the court to consider activities related to the relevant insolvency process and its functions in carrying out its COMI analysis.

What is clear, regardless of the specific date by which COMI is to be assessed, is that court's will be cautious in reviewing any apparent change of COMI made in close proximity to the commencement of insolvency proceedings: (i) as it will be harder to establish that the new COMI was readily ascertainable by third parties (such as creditors of the debtor) and (ii) as the court's will be mindful of debtors seeking to manipulate their COMI in bad faith.

Question 2.2 [maximum 3 marks] 3 marks

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

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

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

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

Statement 1 – Article 30(c), in the case of more than one foreign non-main proceeding, no foreign proceeding is to be treated preferentially. Accordingly, Article 30(c) provides for the court to grant, modify or terminate relief for the purpose of facilitating coordination of those two proceedings.

Statement 2 – Article 32, the hotchpot rule, a creditor should not obtain more favourable treatment than other creditors in the same class by receiving multiple payments in respect of the same claim from insolvency proceedings in different jurisdictions.

Statement 3 – Article 16(c), rebuttable presumption that the debtor's registered office, or habitual residence in the case of an individual, is presumed to be the debtor's COMI (COMI being an undefined concept in the MLCBI)

Question 2.3 [2 marks] 2 marks

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

England and Wales has implemented the Model Law in the Cross Border Insolvency Regulation (**CBIR**).

The *IBA* case concerned an application made by an Azeri foreign representative appointed in respect of a restructuring scheme. The representative's appointment had previously been recognised as foreign main proceedings by the English Court under the CBIR and her application sought the relief of an indefinite continuation of a moratorium that arose automatically on the recognition of her appointment. Two creditors, who had claims against the debtor entity which were governed by English law, opposed the application on the grounds. They relied on the 'Gibbs Rule', a principle in English law which provides that a debt governed by English law cannot be discharged or compromised by a foreign insolvency proceeding (in this case, the Azeri restructuring), unless that creditor submits to the relevant foreign insolvency proceeding.

At a high level, the case therefore concerned the apparently conflicting (more territorialist) approach under the Gibbs Rule, and the approach of modified universalism that the Model Law (and therefore the CBIR) is built upon.

At first instance, Justice Hildyard found in favour of the creditors and rejected the application on the basis a permanent stay could not be used as a means of avoiding the Gibbs Rule. The domestic integrity of the creditors' claims under English law therefore remained the dominant to the universalist approach of allowing them to be compromised by the Azeri restructuring scheme without the creditors consent.

Mr Justice Hildyard's decision was upheld on appeal to the Court of Appeal. The Court of Appeal reached this conclusion after determining that, as a matter of settled practice, it should not exercise its power under the CBIR to grant the indefinite stay requested where to do so would (i) prevent English creditors from enforcing their English law rights, in breach of the Gibbs Rule and (ii) the stay would remain in place after the Azeri restructuring had concluded.

With regard to (i), the court found the indefinite stay was not necessary to protect the interest of IBA's creditors and that it was not an appropriate way of achieving the requested the Azeri representative sought. Based on the evidence, the possibility of the English creditors' enforcement action jeopardising the Azeri scheme was too indirect so as to be considered necessary (as required pursuant to Article 21(1) of the CBIR. The court also noted that the debtor could introduce a parallel scheme of arrangement in England, but had chosen not to do so.

With regard to (ii) the court noted that the foreign representative's duty of full and frank disclosure to the court of the enacting state requires them to keep them up to date. Here, the indefinite nature of the stay meant that this obligation would extend beyond the end of her appointment in respect of the debtor. It was held the Model Law does not contemplate the continuance of relief after the end of the relevant foreign insolvency proceeding in this way – had that extensive power been intended, it surely would have been included in the text.

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**.

Foreign main proceedings and domestic proceedings can operate concurrently. The most relevant article here is Article 29, which confirms that in the case of concurrent foreign main proceedings and domestic insolvency proceedings, the domestic proceedings have primacy.

In terms of relief, the court should ensure that any interim relief granted under Article 19 of the Model Law and any discretionary relief granted under Article 21 of the Model Law is consistent with the domestic insolvency proceedings. This is provided for by Article 29(a) of the Model Law.

As these are foreign main proceedings, pursuant to Article 29(a)(ii), automatic relief under Article 20 will not apply.

Once recognised, pursuant to Article 18 of the MLCBI, the representative in the foreign main proceeding has an ongoing duty to the court in the enacting state to promptly inform it if (i) there is any substantial change in the status of the recognised foreign proceedings or the status of their appointment and (ii) they become aware of other foreign proceeding regarding the same debtor.

QUESTION 3 (essay-type questions) [15 marks in total] 10,5 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] 4 marks

Prior to making a recognition application in State A, explain how access and co-ordination rights in State A can benefit the foreign representative?

Articles 9 to 14 of the MLCBI provide for certain access rights which allow foreign representatives to have direct access to the courts of an enacting state. This, coupled with certain non-discrimination principles, aim to save time and expense by removing jurisdictional barriers that may otherwise delay steps they wish to take within the relevant enacting state and cause additional expense.

Under Article 9, the foreign representative has direct access to the courts of the enacting state (in this case, State A) without them having obtained recognition within that state. This means the representative has standing to make applications directly to that court. This general right of access is enhanced by Article 11 which provides for a foreign representative to have standing specifically to make an application for the commencement of domestic insolvency proceedings within the enacting state. Article 12 also confers special standing on a foreign representative, but recognition is required and therefore it is not relevant to the scenario in this question.

These access rights assist the foreign representative by:

1. allowing them to seek breathing space in the enacting state – perhaps by seeking interim relief while an application for recognition is pending; and
2. allowing the courts in that jurisdiction to consider what measures can be put in place to co-ordinate between the jurisdictions, for example, by putting in place rules or protocols determining how the relevant jurisdictions will interact together efficiently so as to ensure consistent treatment of stakeholders across borders.

In respect of 2 above, the MLCBI sets out certain provisions which deal with cross border cooperation at Articles 25-27, which are available prior to recognition. These provisions benefit the foreign representative by avoiding the use of more time-consuming and costly procedures such as applying for letters rogatory (letters issued by the domestic court of the court of foreign state seeking certain assistance) and requests for consular assistance. They include:

1. Article 25 – a requirement that courts must co-operate to the maximum extent possible with foreign courts or foreign representatives and that communications between these parties can be direct;

2. Article 26 – similarly, insolvency office holders must cooperate with foreign courts or foreign representatives and can communicate directly.
3. Article 27 – which provides a non-exhaustive and indicative list of types of co-operation authorised under the MLCBI, including the co-ordination of administering and supervising the debtor’s assets and affairs and of concurrent proceedings regarding the same debtor.

In the above scenario, the foreign representative in State B would therefore have direct access to the court’s in State A.

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.

The requirements of qualifying as a foreign proceeding a foreign representative are not considered in this answer on the basis they have been met.

Other requirements for recognition under the MLCBI are set out at Article 17 (*decision to recognize a foreign proceeding*), albeit other provisions of the act are also of consequence to recognition applications.

The additional criteria and factors that a court in an enacting state will consider for recognition include:

1. **Public policy exception (Article 6):** The court of the enacting state has a discretion pursuant to Article 6 to refuse to take any action if it is manifestly contrary to the public policy of that state. In *Agrokor*, the English court clarified that ‘manifestly’ is a higher threshold than the recognition only being contrary to public policy.

In the case of a recognition application, this means the court can have regards to a wide variety of factors: for example, whether the appointment would constitute an abuse of process under domestic law. This was confirmed in *Nordic Trustee v OGX Petroleo*, in which the foreign representatives breach of their duty of full and frank disclosure to the enacting court constituted an abuse of process which resulted in their recognition application to the English court being rejected on public policy grounds.

2. **Article 17(1)(c) and (d):** The recognition application must meet the evidential requirements set out at Article 15 (as considered further below) and have been submitted to the competent court or authority of the enacting state (as defined under Article 4 and specified by each member state).
3. **Evidential Requirements (Article 15):** The application for recognition must be accommodated by a specified list of documents set out in Article 15, including a certified copy of the decision commencing the foreign proceedings and appointing the foreign representative; or a certificate from the foreign court affirming the existence of the foreign proceeding and of the appointment of a foreign representative; or in the absence of the above any other evidence to satisfy the court of the existence of the foreign proceedings and the foreign representatives appointment. Pursuant to Article

16, the court in the enacting state is entitled to rely on a number of presumptions concerning the validity and authenticity of such documents.

4. **COMI or Establishment (Article 17(2)):** The court must be satisfied that the debtor has a COMI or establishment in the state of the foreign proceedings. That determination is, generally, made by reference to the date on which the foreign proceedings were commenced (albeit England and Wales and the US have slightly differing law on this point). In carrying out this assessment, the court in the enacting state can rely on the rebuttable presumption under Article 16(3) that a debtor's COMI is presumed to be its registered office or, for individuals, habitual residence.

The assessment of this requirement will also determine whether the foreign proceedings are recognised as foreign main or foreign non-main proceedings.

If the debtor does not have its COMI or establishment in the state of the foreign proceedings, for example if the debtor only has 'certain' assets in that state, the court must deny an application for recognition.

The court in the enacting state must also decide the recognition application at the earlier possible time (Article 17(3)). In balancing the need to make a determination promptly, the court can have regard to its ability to modify or terminate recognition if it is shown that the grounds for granted it were lacking (either partially or fully) or have ceased to exist altogether (Article 17(4)).

Notably, no reciprocity is required as a condition for recognition.

If each of the above criteria are met, the foreign representatives appointment is likely to be successfully recognised in State A.

For full marks on this 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.

Types and Conditions for Relief

The relief available under the MLCBI can broadly be split into 3 categories:

- (i) interim relief available pre-recognition, while a recognition application is determined (available pursuant to Article 19);
- (ii) automatic relief which automatically post-recognition of foreign main proceedings without further condition (applicable pursuant to article 20); and
- (iii) discretionary relief available post-recognition (available pursuant to Article 21).

Interim relief and discretionary relief (together referred to as ‘appropriate relief’) will only be granted by the court if it is satisfied that the relief granted is in the interests of the debtor’s creditors, and that the other interested parties interests are adequately protected. To allow for flexibility, the court has the power to grant relief on conditions it considers appropriate and/or to request the modification or termination of that relief. This allows the court in the enacting state greater flexibility in complying with the requirement to balance the relief that may be granted and the interests of those that might be affected by such relief (Article 22).

In the case of interim relief, the court must also be satisfied the relief is needed urgently.

While the court’s powers to grant appropriate relief are wide, they are not unlimited. The limits on the type of relief that can be granted are considered below.

Automatic Relief

The automatic relief applicable on recognition of foreign main proceedings pursuant to Article 20 is:

1. a stay on proceedings of individual actions or individual proceedings concerning the debtor’s assets, rights, obligations or liabilities (including a stay on proceedings already commenced and certain arbitral proceedings);
2. a stay of execution against the debtor’s assets (i.e. an inability to execute non-proprietary security interests over assets); and
3. a suspension of the right to transfer, encumber or otherwise dispose of assets of the debtor.

Discretionary Relief

Article 21(1) sets out a list of the common types of discretionary relief granted by the court, but this list is non-exhaustive (as confirmed in the UNCITRAL Guide to Enactment). Such relief includes the automatic relief set out at points 1 to 3 above, in addition to:

- a. providing for the examination of witnesses and/or taking of evidence;
- b. entrusting the administration or realisation of all or party of the debtor’s assets to the foreign representative or other person designated by the court;
- c. extending interim relief (as considered below); and
- d. granting relief akin to that which a domestic liquidator within the jurisdiction of the enacting court would have.

Article 21(2) also provides the court with the power to hand over the debtor’s assets located in the enacting court to the foreign representative. This relief is conditional on the court being satisfied local creditors interests are adequately protected and, where the proceedings recognised are non-main, that it is appropriate for the assets to be dealt with in that jurisdiction (Article 21(4)).

Interim Relief

As set out above, interim relief can be granted while an application for recognition is pending provided it meets the requisite conditions. The relief that can be granted is broad and can include the types of relief granted automatically and on a discretionary basis following recognition set out above.

Restrictions on Relief

The appropriate relief a court in an enacting state can grant is not unlimited. This is demonstrated in the English courts which, having regard to the supremacy of its domestic legislation, have held:

- i. the enforcement of insolvency related in personam default judgment is not covered by the MLCBI. Therefore, a foreign insolvency proceeding arising from such enforcement was not capable of recognition in the UK (*Rubin v Eurofinance SA*);
- ii. they will not apply foreign insolvency law to an English law covered contract (known as the *Gibbs Rule*); and
- iii. they will not grant an indefinite automatic moratorium in support of a foreign restructuring (*IBA*).

These decisions do not represent binding rules applicable to all enacting states. The limits on the relief available under the MLCBI will be determined on an jurisdiction by jurisdiction basis, having regard to the domestic legislation in that enacting state.

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

1. 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.
2. 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?

A worldwide freezing order granted on an interim basis is unlikely to consider as post recognition discretion relief as the MLCBI does not seek to automatically extend the effects of a foreign proceeding indefinitely or without geographical restriction. The debtor and its assets may be dealt with under the laws of the relevant foreign state. Rather, it seeks to allow for a process whereby proceedings can be recognised such that the law of the relevant enacting state is applied.

Here it should also 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 mark** 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.

English Adoption of MLCBI

The United Kingdom has implemented the MLCBI in the Cross-Border Insolvency Regulations 2006 ("**CIBR**"). For the purpose of this answer, it is assumed (i) that the Bank was not incorporated and registered in a member state within the European Union and (ii) that the provisional administration and liquidation procedure referred to were also not implemented by a member state of the European Union. Accordingly, the Recast Insolvency Regulation will not be considered.

As confirmed above, it is also noted that the Bank is not excluded from the MLCBI's scope for the purpose of this question.

Bank's liquidation as a foreign proceeding

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 the control or supervision by a foreign court, for the purpose of reorganisation or liquidation.'

Breaking this down, in order to be a foreign proceeding the Bank's liquidation must:

1. be a proceeding (which can include an interim proceeding);
2. be either judicial or administrative;
3. be collective in nature;
4. be in a foreign state;
5. be authorised or conducted under a law relating to insolvency;
6. involve the Bank's assets and affairs being subject to the control or supervision of a foreign court; and
7. be a proceeding which is for the purpose of reorganisation or liquidation.

In considering whether these criteria are met, various references will be made to the English case of *Agrokor*. The facts of that case bear similarities to this scenario, as the relevant foreign proceeding was a Croatian process which was specifically designed to apply to companies that were of systematic importance to the country's economy. It was therefore a specific and bespoke regulatory process, which was not on its face labelled as an insolvency proceeding. This therefore required the English court to consider the criteria under Article 2(a) with significant care

Considering each of the criteria in turn and applying them to the Bank's liquidation:

1. Proceedings have been defined by the US courts as "a statutory framework that constrains a company's actions and that regulates the final distribution of a company's assets" (*Irish Bank Resolution Corporation (IBRC) Limited*).

The Bank's liquidation is a formal proceeding governed by an established set of rules, which revokes the powers of the existing management of the Bank and provides for its affairs and asset base to be wound down. It therefore appears to constitute proceedings.

2. The Bank's liquidation appears to be an out of court process which is instigated by a decision of the NB and then orchestrated by the DGF, who immediately becomes liquidator of a bank on the date it receives confirmation of the NB's decision to revoke a bank's licence. Both NB and DGF are public authorities and therefore assumed to be administrative in nature. While the Bank's liquidation is therefore not apparently judicial, it is administrative and therefore the second limb of the test is met.
3. A key consideration in determining whether the proceeding is collective in nature is whether substantially all of the assets and liabilities of the debtor are dealt with in the liquidation (as confirmed in the UNCITRAL Guide to Enactment (the **GEI**)). An exclusion of certain creditor interests may therefore indicate that a process is not collective – however, that alone will not be an automatic ground for failing this test.

The Bank's liquidation is governed by a scheme which provides for the Bank's banking activities to stop, for **all** liabilities to crystallise and for the Bank's property and funds to be alienated. Reference is also made to the satisfaction of creditor claims no longer being possible. There is no suggestion that certain types of assets are segregated to be dealt with outside of the liquidation. Accordingly, the liquidation appears to meet the requirement of being collective.

4. The liquidation is outside of the UK and is therefore in a foreign state. Country A's failure to adopt the MLCBI is irrelevant to this determination as the MLCBI, unless amended on adoption, does not require reciprocity. The UK has not made such an amendment.
5. As confirmed in *Agrokor*, a law does not necessarily need to be labelled as insolvency law to meet this criterion. It is sufficient that the law deals with insolvency or severe financial distress.

The LBBA is the law which governs whether the Bank is classified as insolvent and the DGF law governs the process of liquidating the Bank's assets and removing it from the market. Both therefore meet this requirement.

6. *Agroko* also confirms that the level of court supervision required to meet this criterion can be relatively low and does not need to be direct.

Powers and controls in the insolvency proceeding being designated to a government body will not also automatically mean this criteria is not met.

Supervision also does not need to be from a central court and can include regulatory authorities if they are providing the function of a court. For example, in *Ennia Caribe Holdings NV* 594 BR 631, the US court hearing a recognition application held that the regulatory body with oversight of the insurance industry was a body competent to control the assets and affairs of the debtor in accordance with this requirement.

The NB and the DGF are both governmental bodies. Neither entity constitute a court in the traditional sense and instead appear to be regulatory in nature. There is also no mention in the above description of a court being engaged in the Bank's liquidation process (other than in reference to the DGF or its authorised person being able to file property and non-property claims with the court pursuant to Article 37 of the DGF Law). Accordingly, prima facie, there may be doubt as to whether this criteria is satisfied.

However, as set out above, regulatory bodies can meet this criteria. The question is therefore whether the DGF (being the body that is responsible once the liquidation process has commenced) has control and the ability to supervise the liquidation and provides a sufficient court-like function.

Based on the extensive powers set out in this question and the apparent absence of a further supervisory body, the DGF appears to meet this requirement. This is further demonstrated by the residual power it retains over any authorised person it nominates to act as liquidator on its behalf pursuant to Article 35(1) of the DGF Law – this is plainly a supervisory function. The DGF is also independent from the NB, being the party that instigated the proceedings.

On balance, the above factors along with the case of *Ennia*, suggest this criterion appears to be met.

7. Based on the description provided, the purpose of the Bank's liquidation appears to be to wind up its affairs, sell its assets and pay its creditors. This is evidenced by the fact, on the appointment of DGF or its appointed representative as liquidator, the Bank stops trading, its liabilities crystallise, and the DGF/appointed representative have a power of sale of the Bank's assets. It is further evidenced by the extension on 14 December 2020 on the basis the sale of the Bank's assets and satisfaction of creditor claims is

no longer possible – which suggests such sale and satisfaction are the purpose of the liquidation process.

Based on the above, the Bank's liquidation appears to meet each of the required criteria and constitute a foreign proceeding under Article 2(a).

Great answer!

The Applicants status as a foreign representative

There are two applicants in this recognition application: Ms G and DGF.

To be a foreign representative, these applicants must satisfy the following requirements pursuant to Article 2(d):

- a. They/it must be a person or body;
- b. Who/which is authorised to act in a foreign proceeding – for the purposes of assessing this criterion, it will be assumed the Bank's liquidation constitutes a foreign proceeding (as concluded by the above analysis); and
- c. Who/which is authorised to administer the reorganisation or liquidation of the debtor's assets or affairs or to act as a representative of the foreign proceeding.

Applying these tests to Ms G:

- a. Ms G is clearly a person;
- b. She has been authorised to act in respect of the Bank's liquidation by DGF, the only other body with the ability conduct the liquidation. The fact the DFG's delegation of powers to Ms G is not absolute a does not defeat this; and
- c. Ms G has a number of the powers required to administer the liquidation of the Bank's estate. For example, Ms G has the power to take steps to find, identify and recover property belonging to the Bank. However, notably, the power to arrange the sale of the Bank's assets is excluded from the delegation to Ms G. That power remains with DGF, the entity which also keeps the formal title of liquidator.

An inability to sell the debtor's assets arguably goes to the core of whether Ms G is authorised to administer the Bank's liquidation. In the absence of this power, Ms G could not effectively administer the liquidation of the Bank's assets alone.

Because of the answer to c., it is arguable that Ms G alone is not an authorised representative of the Bank's liquidation. However, clearly collectively with DGF, both are authorised to administer the liquidation estate. The court may therefore wish to address this recognising Ms G's appointment on the condition it is contingent on DGF's appointment continuing and being recognised contemporaneously with her own.

Applying the same criteria to DG:

- a. DGF is a body;

- b. It is authorised to act in the foreign proceeding, having been automatically appointed by Article 77 of the LLBA, which in turn is triggered by the actions of NB. As confirmed in the New Zealand case of *Williams v Simpson (No.5)* [2010] NZHC, 1786, the MLCBI definition of a foreign representative is sufficiently broad to encompass persons and bodies appointed by special agencies instead of by the foreign court. The fact the appointment was triggered by a regulatory agency and not the court therefore does not undermine this criteria, which appears to be met.
- c. DGF retains the title of the Bank's formally appointed liquidator. However, this alone will not be sufficient to demonstrate that its is authorised to administer the liquidation of the debtor's assets and affairs. The court must again look at the specific powers it has.

DFG has retained certain powers, including 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. These are functions in the administration of the liquidation of the Bank's assets.

However, notably, the DGF has delegated a significant number of its powers as the Bank's initial liquidator to Ms G. Arguably, it no longer retains these core functions – many of which are investigative in nature, such as the power to adjudicate and deal with creditor claims. This could go to the core of whether the Bank is considered to authorised to administer the Bank's assets and affairs.

However, the Bank is able to recall these powers by revoking them from Ms G. It therefore retains ultimate control over the administration of the Bank's assets and affairs and is therefore the primary body authorised to conduct such matters. On balance, these limitations are unlikely to prevent DGF being considered a foreign representative.

DGF therefore appear to constitute a foreign representative in accordance with Article 2(c).

*** End of Assessment ***