



SUMMATIVE (FORMAL) ASSESSMENT: MODULE 2A

THE UNCITRAL MODEL LAWS RELATING TO INSOLVENCY

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

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

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

INSTRUCTIONS FOR COMPLETION AND SUBMISSION OF ASSESSMENT

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

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

ANSWER ALL THE QUESTIONS

Total marks: 17,5 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]

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]

Question 2.1 [maximum 3 marks] 1 mark

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

[A debtor’s centre of main interests (COMI) is important in the operation of the MLCBI. The importance is premised on the fact that a determination of the COMI in a proceeding determines the type of relief available. It is therefore the case that, the appropriate date for determining the COMI of a debtor or whether an establishment exists is the date on which the foreign proceeding in the foreign state was initiated.]

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

Question 2.2 [maximum 3 marks] 3 marks

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

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

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

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

[Statement 1- Chapter V of the MLCBI deals with concurrent proceedings and in particular, article 30 (c)

Statement 2- Chapter V of the MLCBI, article 32: Rule of payment in concurrent proceedings. The rule in article 32 is referred to as the “Hotchpot” rule. The rule is essentially based on a fair and equal treatment of creditors in the same class. This rule does not affect secured claims as secured claim will be catered for first.

Statement 3- This statement relates to the Centre of main interests (COMI) concept. Though the COMI concept is import to the operation of the MLCBI, the Law does not define this applicable concept. article 16 (3) of MLCBI contains a rebuttable presumption of the undefined concept. The referred Article states that “in the absence of proof to the contrary, the debtor’s registered office of a debtor, as it relates to a Company or the habitual residence of a debtor, as it relates to an individual are presumed to be the debtor’s COMI for the purpose of recognising the foreign proceeding in an enacting state. The MLCBI therefore establishes a presumption that the debtor’s place of registration/location is the debtor’s COMI. Where it is determined that the debtor’s place of registration or location is different from the COMI, the enacting state must first determine the COMI to enable it recognise the foreign proceeding]

Question 2.3 [2 marks] 0

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.**

[Type your answer here]

Question 2.4 [2 marks] 1,5 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**.

[Per Article 29 (b) of the MLCBI, after recognition of a foreign proceeding as a foreign main proceeding, the court in the enacting state shall review any relief granted under the said Article and modify or terminate a relief granted if the Court in the enacting state finds same to be inconsistent with the proceeding of the enacting state.

Art. 29 a because the domestic proceeding was already opened

Article 18 of the MLCBI requires that a foreign representative has a duty to promptly inform the Court in the enacting state of “any substantial change in the status of the recognised foreign proceeding or the status of the foreign representative’s appointment” and “any other foreign proceeding regarding the same debtor that becomes known to the foreign representative.]

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

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] 3,5

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

[The provisions relating to access and co-ordination rights in the MLCBI allows for, in this case, a foreign representative to access the courts of an enacting state (State A) without the usual formalities.

The access rights accorded a Foreign representative (herein the representative) in article 9 firstly gives the said representative standing before the courts of the enacting state, in this case State A. By this right, the representative is given direct access to the Courts without having to comply with the formal requirements that may be usual of cross-border actions. Article 11 also ensures that the representative has standing to request that an insolvency proceeding be commenced in the enacting state. This request can be made without modifying any of the conditions for the opening of such a proceeding in the enacting state. The proviso is that, an insolvency proceeding may be initiated “if the conditions for commencing such a proceeding are otherwise met”.

Article 12 permits the participation of a foreign representative in a proceeding involving the debtor in the enacting state. The representative thus has standing, following the recognition of the foreign proceeding to among others, make petitions and make submissions relating to protection of assets belonging to the debtor.

From the access rights of the representative, a representative has standing (access to) before the courts of the enacting state without the formal requirement of an application.

With the coordination of the courts, State A and State B as permitted under articles 25, 26 and 27 of the MLCBI, allow for co-ordination and corporation between the courts. The rights granted per these articles are not conditional on obtaining recognition of the foreign proceeding in the enacting state. The rights to co-ordinate may therefore be accessed before the recognition application is made in the enacting state.

Considering the above, the Court in the enacting state must determine whether the debtor’s COMI is actually in the state in which the foreign proceeding was initiated.

Should it be determined by the court that the foreign proceeding was actually commenced in the COMI of the debtor, the foreign proceeding will be recognised as a foreign main

proceeding. On the other hand, where it is determined by the Court in the enacting state that the debtor has an establishment (as defined in article 2 (f) of the MLCBI) in the foreign state where the foreign proceeding was initiated, then, the foreign proceeding will be determined to be a foreign non main proceeding.]

It should be mentioned here also, that access and coordination rights are time and cost preserving

Question 3.2 [maximum 5 marks] 2 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 success or failure of a recognition application is premised on certain requirements and presumptions that the court in the enacting state (state A) will consider.

Under article 15 (1) of the MLCBI, a foreign representative may apply for a recognition of a foreign proceeding in which the foreign representative has been appointed.

Article 15 (2) sets out the evidence required to be adduced when making a recognition application in an enacting state, in this case state A.

Should these requirements in article 15 be met, the court in state A can grant the application under article 17 of the MLCBI. Article 16 of the MLCBI establishes some presumptions which unless rebutted will be presumed by the court of the enacting state to be the case.

From the facts, having met the presumption of “foreign proceeding” and “foreign representative” within the meaning of article 2 of the MLCBI, the court can presume that all accompanying documents in support of the application for recognition are genuine without a requirement for legalisation.

Another recognition presumption outlined in article 16 is the presumption that, “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”.

It is therefore necessary for the enacting state to determine whether the foreign proceeding is a main foreign proceeding or non-main foreign proceeding. An establishment of this issue will influence the type of relief accorded by the enacting state which can be automatic or non-automatic.

The court seized with jurisdiction in state A must determine the debtor’s centre of main interests (COMI) flowing from which, it will also be determined whether the debtor’s COMI is in State B. In this case the foreign proceeding will be recognised by the court in the enacting state as a foreign main proceeding. Conversely, the foreign proceeding can be recognised as a foreign non-main proceeding.

It is noted that the Debtor identified in this instance is a corporate body.

Although the COMI concept is vital in the operation of the MLCBI, the Model Law does not define the term COMI in article 2. However, under article 16 (3), it provides for a rebuttable

presumption of the undefined COMI concept. The presumption in article 16 (3) is to the effect that, “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”.

This therefore implies that, as it relates to a debtor company, there is a presumption that the registered office of a debtor is presumed to be the debtor’s COMI for the purpose of recognising the foreign proceeding in the enacting state.

Where it is determined by the court in State A that the COMI is in State B, the foreign proceedings on the application of the representative can be recognised as a foreign main proceeding. Where the foreign proceedings is recognised as a foreign main proceeding under Article 20, the main foreign proceeding triggers automatic mandatory reliefs. These reliefs are; the “continuation or continuation of individual actions or individual proceedings concerning the debtor’s assets, rights , obligations or liabilities are stayed”; , the “execution against the debtor’s assets is stayed” and “ the right to transfer, encumber or otherwise dispose of any assets of the debtor is suspended” .

On the other hand, if the court determines that the debtor has an establishment in the foreign state the, the foreign proceeding can be recognised as a foreign non-main proceeding without the automatic mandatory reliefs. This non-main foreign proceeding rather comes with discretionary post recognition reliefs. It must be added that there is no reciprocity requirement hence the fact that there is none will not affect the reliefs granted.

As earlier indicated the presumption that the debtor’s registered address is the COMI for the purpose of recognition is rebuttable. Should it be the case the registered address is not the debtor’s COMI, several factors must be considered to determine the COMI. One such factor is the determination of location. Location is determined by considering the where the central administration of the debtor takes place and which location is readily “ascertainable” by creditors.

The date on which the foreign proceeding was opened is of importance in determine the COMI. The ML does not specifically provide an indication as to the date for determining the COMI of the debtor. Having regards to the evidence required for a recognition application under article 15 of the Model Law, the date on which the foreign proceeding was commenced is the date of the foreign proceeding.

In all, a foreign proceeding will not be recognised as a foreign proceeding under the Model Law if it is determined by the enacting state that the foreign proceeding was opened in a state that is not the COMI of the debtor and does not have an establishment.]

The following should also be included in your answer:

1. **Exclusions:** If the debtor is an entity that is subject to a special insolvency regime in State B, the foreign representative should first of all check if the foreign proceedings regarding that type of a debtor are excluded in State A based on Article 1(2) of the implemented Model Law in State A.
2. **Restrictions;- Existing international obligations of State A:** Based on Article 3 of the Model Law, the court in State A should also check if there are no existing international obligations of State A (under a treaty or otherwise) that may conflict with granting the recognition application under the implemented Model Law in State A.
3. **Public policy exception:** Finally, the court in State A should also ensure based on Article 6 of the Model Law that the recognition application is not manifestly contrary to public policy of State A.

Question 3.3 [maximum 5 marks] 2 marks

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

[Per Article 19 of the MLCBI, a foreign representative, from the time of filing the application for recognition, may be granted some urgent reliefs post recognition. These reliefs will be granted if it is required to protect the assets of the debtors or protect the interest of the creditors. The reliefs available include; “stay of execution against debtor’s assets; entrusting the administration of realization 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;” and any of the post-recognition reliefs provided in article 21 of the MLCBI.

Unless the reliefs granted under article 21 are extended, same will be terminated when the application for the recognition of a foreign proceeding is considered.

Also the Court in the enacting state may refuse to grant any pre-recognition reliefs under article 19 “if such relief would interfere with the administration of a foreign main proceeding.”(Article 19 (4)).

The interim reliefs available under article 19 applies to foreign proceedings determined to be foreign main proceeding or foreign non main proceeding.

Regarding post-recognition reliefs under the MLCBI, article 21 of the MLCBI details the reliefs available. Essentially, the reliefs available on recognition of a foreign proceeding and on the request of the foreign representative may be granted as follows;

- a. Stay the “commencement or continuation of individual actions or individual proceedings concerning the debtor’s assets...” Article 21 (a);
- b. Stay the “execution against the debtor’s assets...” Article 21 (b)
- c. Suspend the “right to transfer, encumber or otherwise dispose of any assets of the debtor...” Article 21 (c)
- d. Provide for the “examination of witnesses, the taking of evidence of the delivery of information...” Article 21 (d)
- e. Entrust the “administration or realisation of all or part of the debtor’s assets located in the “enacting state to the foreign representative or court appointed person. Article 21 (e)
- f. Extend the relief granted as per Article 19 (1) of the MLCBI;
- g. Grant any other relief permissible under the laws of the enacting state.

As regards the court entrusting the assets of the debtor to the foreign representative or any other person appointed for the purpose, the court in the enacting state must be satisfied that the interest of the creditors (whether the foreign proceeding is a foreign main proceeding or a foreign non main foreign proceeding) in the enacting state are sufficiently protected.

Where the foreign proceeding is determined to a foreign non-main proceeding, the court in the enacting state must be satisfied that the reliefs is connected to assets in the enacting state and “should be administered in the foreign non-main proceeding or concerns information required in that proceeding”.

It must be added that generally, the Court in the enacting state has the discretion to refuse any request for reliefs, modify or terminate any relief granted pre or post recognition of foreign proceeding if the court finds that the relief granted will not be or is not in the interest of creditors and other interested parties including the debtor.

Also, and as relates to Article 21 of the MLCBI, thought the court in the enacting state has a lot of discretion in granting pre-post recognition reliefs, these discretionary powers must be applied within limited. These limits are evident in the Rubin v Eurofinance SA (Eurofinance case), the Fibria Celulose S/A v Pan Ocean Co. Ltd (Pan Ocean case) and Anthony Gibbs & Sons v La Societe Industrielle et Commerciale des Metaux (Gibbs case).

In short, the Eurofinance case for instance, it was held that a judgement obtained in default was not enforceable against a person. This was because, default judgements were not contemplated in the MLCBI. It therefore means, if the court in the enacting state determines that the judgement obtained for which recognition is sought was obtained in default, will not be enforced against the debtor unless under specified condition.

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?

[The worldwide freezing order granted under Article 19 of the MLCBI is unlikely to continue post recognition of a foreign proceeding if the court determines that the freezing order is not in the best interest of the creditors and other interested parties including the debtor.]

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]

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]**; 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]**.

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.

[Type your answer here]

*** End of Assessment ***

