



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

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] 9 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]

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

The date for determining the existence of a COMI and/or establishment of a debtor is not expressly stated in the UNCITRAL Model Law on Cross-Border Insolvency (henceforth: MLCBI). This is also confirmed by the MLCBI Guide to Enactment and Interpretation of 2013 (henceforth: GEI) in paragraph 157 and the Judicial Perspective of 2011 (henceforth: JP) in paragraph 143.

However, both the GEI and the JP that the appropriate date to make this assessment is at the **date of the commencement of the foreign proceeding**, see paragraphs 159 GEI and 134 JP for the date for determining the location of the COMI, and paragraphs 160 GEI and 143 JP for the date for determining the existence of an establishment. This conclusion is based on the weight that is given to (1) the evidence that should be submitted along with the application for recognition of the foreign proceeding and to (2) the decision commencing the foreign proceeding. In the same paragraph, the GEI also mentions that the foreign proceeding may be the only indication of the location of the debtor’s COMI as the debtor’s activities may cease completely after the

commencement of the foreign proceeding. As such the date on which the foreign insolvency proceeding commenced is the appropriate date to determine the location of the COMI and/or establishment of the debtor.

Nevertheless, one should also consider the different approaches taken in depending of the jurisdiction in question. For example, in United States of America (“US”) Bankruptcy Court caselaw, the court assessed the COMI or establishment from the date of filing of Chapter 15 petition (*sidenote: chapter 15 is the US implementation of the MLCBI*), see *Morning Mist Holdings Ltd. v. Krys (In re Fairfield Sentry Ltd.)*, 714 F.3d 127, 134-137 (2d Cir. 2013) which makes reference to *In re British Am. Ins. Co.*, 425 B.R. 884, 909-10 (Bankr.S.D.Fla.2010) and *In re Betcorp Ltd.*, 400 B.R. 266, 290-92 (BankrD.Nev.2009). The Court in *Fairfield* held that the debtor’s COMI should be determined on the basis of its activities around the time of the Chapter 15 (recognition) petition of the foreign insolvency proceeding. It mentioned that the Court may opt for a broader temporal assessment to offset the risks of a debtor manipulating its COMI. As such, the Court may include the time period between the commencement of the foreign insolvency proceeding and the recognition proceeding.

Question 2.2 [maximum 3 marks]

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

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

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

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

Statement 1 relates to **Article 30(c)** of the MLCBI regarding the “coordination of more than one foreign proceeding”, or more specifically, regarding the coordination of two foreign non-main proceedings.

Statement 2 relates to **Article 32** of the MLCBI regarding the rule of payment in concurrent proceedings, or better known as the “**hotchpot rule**”.

Statement 3 relates to **Article 16(3)** of the MLCBI regarding presumptions concerning recognition, and more specifically, regarding the (rebuttable) presumption of the location of a debtor’s COMI.

Question 2.3 [2 marks]

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

It should be noted that the issue of jurisdiction in the *IBA* case did not concern having the power to deal with and/or decide on the matter. It is about whether or not the court should exercise its power to decide on the matter and to grant indefinite moratorium continuation.

The Court of Appeal stated that in granting the moratorium, it would prevent the local (English) creditors from enforcing their rights provided by national law. Therefore, the court may only grant such moratorium if it is an appropriate measure and necessary for the protection of the interests of *IBA*’s creditors.

It also stated that granting the moratorium would lead to a prolonged stay, even after the foreign restructuring is completed.

In assessing whether the English court should grant the indefinite moratorium continuation, the Court of Appeal first applied the two conditions of *necessity* and *appropriateness* to the case and considered the implications of a prolonged stay after completion of the restructuring. Following the challenging creditors' opinion, it found that the IBA creditors did not need more protection for the proceeding to achieve its objectives. Moreover, it discussed IBA's choice not to opt for the English (super-)scheme of arrangement was an important factor in deciding not to grant this moratorium. After all, one of the "weapons" under the scheme is the cross-class cram-down, which empowers the debtor-in-possession to still impose and bind the restructuring plan on dissenting creditors when there is a majority vote.

Regarding the prolonged stay upon completion of the restructuring, the court considered the implications due to the foreign proceeding having ended and the representative would completing its tasks. This would lead to the obvious consequence that no court orders can be made in the future to modify or terminate the moratorium, because there is no proceeding in existence in the first place; it is completed. It ruled that the MLCBI would have given the necessary guidance and tools – in an explicit – way had it aimed at the continuance of the stay after the end of the foreign proceeding.

For these reasons, the English Court of Appeal decided to follow the decision of the court of first instance and ruled not to exercise its power to grant the indefinite moratorium continuation.

Question 2.4 [2 marks]

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

For the first part of the question, the most relevant provision is **Article 29(a) of the MLCBI**. According to this Article, automatic relief granted upon recognition of a foreign main proceeding under Article 20 MLCBI does not apply. Instead, the court of the enacting State should ensure that any post-recognition relief granted under Article 21 of the MLCBI (and also any interim relief prior-recognition under Article 19 of the MLCBI) is consistent with the domestic insolvency proceedings.

For the second part of the question, the most relevant provision is **Article 18 of the MLCBI**. According to this Article, from the date of the filing for recognition of the foreign proceeding, the foreign representative has an ongoing duty to update and inform the court of the enacting state on any developments that may substantially change the status of the foreign proceeding or of the representative, and of any other foreign proceeding commenced against the same debtor that came to the knowledge of the representative.

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

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

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

Question 3.1 [maximum 4 marks] 3 marks

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

Access and coordination rights of the foreign representative from foreign State (B) in the court of the enacting State (A) provides the representative with **legal standing** in court prior to making any recognition application of the foreign proceeding, which benefits the representative in many ways. These access rights are listed under **Chapter II of the MLCBI**.

Firstly, the representative has standing without the need to satisfy legal formalities such as licenses or consular actions, see **paragraph 108 GEI**. This **locus standi** concept is stipulated in **Article 9** of the MLCBI, in which it is stated that a foreign representative is entitled to apply *directly* to the court of the enacting State.

Secondly, **Article 11** of the MLCBI provides the foreign representative access rights to court to **apply for the commencement** of a domestic insolvency proceeding prior to any recognition, on the condition that all domestic criteria for opening such proceedings are met, see **paragraph 114 GEI**.

Thirdly, the legal standing gives the foreign representative the opportunity to seek the needed **breathing space** for temporary period of time.

Lastly, the courts in the enacting State may also make use of the breathing space to **determine what coordination** (or relief) is necessary for administering the debtor's insolvency in the best way. Several MLCBI provisions concern the coordination of concurrent proceedings, which aim to foster court decisions that would best achieve the aims of all proceedings, see **paragraph 42 GEI**.

You should also discuss art. 25-27

Question 3.2 [maximum 5 marks] 3 marks

For a recognition application in State A to be successful, the foreign proceeding opened in State B must qualify as a "foreign proceeding" within the meaning of article 2(a) of the MLCBI and the "foreign representative" must qualify as a foreign representative within the meaning of article 2(d) of the MLCBI. Assuming both qualify as such, list and briefly explain (with reference to the relevant MLCBI articles) any other evidence, restrictions, exclusions and limitations that must be considered, as well as the judicial scrutiny that must be overcome for a recognition application to be successful.

For the successful application for the recognition of a foreign proceeding, the criteria listed in **Article 17** of the MLCBI must be satisfied. Article 17(1)(a) and (b) states that the foreign proceeding is a proceeding as stipulated under Article 2(a) and the foreign representative is a representative under the meaning of Article 2(d) of the MLCBI. The question above mentions that these criteria should be assumed to have been met.

The Court of the enacting State should also scrutinize whether it is prevented from recognizing the foreign proceeding under the **public policy exception** under **Article 6** of the MLCBI, as the recognition would be *manifestly contrary* to the public policy of the enacting State.

Article 17(1)(c) of the MLCBI states that the application should meet the requirements of **Article 15(2)** of the MLCBI, which lists the **necessary evidentiary documents** that should be accompanied with the application. The alternative options are (1) a certified copy of the decision commencing the foreign proceeding and the appointment of the representative, (2) a certificate from the foreign court attesting to the existence of the proceeding and appointment of the foreign representative, or (3) any other acceptable evidence in case the first to alternatives are absent.

Interestingly, Article 17 specifically mentions Article 15(2) without mentioning **Article 15(3)** of the MLCBI. This Article should not be overlooked as it imposes the duty on the foreign representative to include a statement which identifies all foreign proceedings against the debtor that are known to him/her. *(as a side note: this is an ongoing duty under Article 18 of the MLCBI).*

Article 16(1) and (2) of the MLCBI provides the Court with a set of presumptions, including that the Court may presume that the provided documents are authentic.

As a final legal formality under Article 17(1), paragraph (d) states that the application must be **submitted to the designated Court**.

Looking at the next set of criteria, which is listed under Article 17(2) of the MLCBI, the foreign proceeding shall be recognized on the condition that it is either a **foreign main proceeding under Article 17(2)(a)** or a **foreign non-main proceeding under Article 17(2)(b)** of the MLCBI. This distinction is important for the implementation of the type of relief, see **paragraph 154 of the GEI**.

A foreign proceeding only qualifies as a foreign main proceeding if the debtor's centre of main interests (**COMI**) is located in that State, see **Article 2(b)**. The proceeding is a foreign non-main proceeding if the debtor has an establishment within the meaning of **Article 2(f)** of the MLCBI located in that State.

To assist with the assessment of the type of proceeding, the MLCBI provides the Court with **presumptions under Article 16(3)** of the MLCBI. Unless proven otherwise, the Court may presume that the debtor's COMI is located where the debtor has its registered office (or in case of an individual, the habitual residence).

You need to discuss art. 1(2) and art. 3.

Question 3.3 [maximum 5 marks] 3 marks

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

The types of relief that are mentioned in the MLCBI are listed in **Articles 19-21**.

With regard to the discretionary relief, **Article 19** of the MLCBI states that a relief may be upon application for recognition of a foreign proceeding – ie **pre-recognition relief**. The relief can be granted from the time of the filing for recognition until the application is decided upon. The foreign representative may request the Court, which will assess the **urgency and necessity** of the provisional relief for protecting the assets of the debtor or the creditors' interests, see **paragraph 172 GEI**. Article 19(1) lists the following: (1) staying execution against the debtor's assets, (2) entrusting the foreign representative with the administration of the debtor's local assets for the sake of preserving their value, (3) the reliefs mentioned in Article 21(1)(c), (d), and (g).

As mentioned above, the relief terminates as soon as the application is decided upon under Article 19(3) of the MLCBI. However, according to **paragraph 174 GEI**, the Court has the opportunity to extend the measure to eg avoid an interruption between the provisional measure issued before recognition and the measure issued after recognition under Article 21 (more below).

According to Article 19(4), the Court may also refuse to grant relief if it would interfere with the administration of a foreign main proceeding. **Paragraph 175 GEI** clarifies that this Article pursues the same objectives as Article 30(a) MLCBI as the relief granted to the foreign proceeding should not interfere with the pending foreign main proceeding. This is why the representative is also required, under Article 15(3) MLCBI, to include a statement of all foreign proceedings against the debtor that are known to him/her in the application for recognition.

Post-recognition automatic relief, under **Article 20** of the MLCBI, is only granted on the condition that the foreign proceeding in question is recognized as a **foreign main proceeding**, ie the debtor's COMI is located in the foreign state where the insolvency proceedings are taking place. As such, the direct effects of recognizing a foreign main proceeding are (1) staying the commencement or the continuation of individual actions and proceedings (according to **paragraph 179 GEI**, this includes interim proceedings as these should not be distinguished from other insolvency proceedings, and according to **paragraph 180 GEI**, includes arbitral proceedings) against the debtor's assets or liabilities, (2) staying execution against the debtor's assets (**paragraph 181 GEI** stipulates that the relief includes out-of-court processes), and (3) suspending the right to transfer, encumber or dispose of the debtor's assets.

This automatic relief does not affect individual actions or proceedings if they are necessary to preserve a claim, as stipulated under Article 20(3), or does not affect the right to request the commencement of a proceeding as specified under the insolvency laws of the enacting States, under Article 20(4) of the MLCBI. According to **paragraph 188 GEI**, this means that anyone, including the foreign representative may request the commencement of, or participate in, local insolvency proceedings. In that case, the coordination of concurrent proceedings is dealt with under Article 29, which states that automatic relief does not apply. However, as stated in the question above, concurrent proceedings are left out of the scope in this answer.

Furthermore, the scope of effects of the automatic relief **depend on the law of the enacting State**. According to **paragraph 183 GEI**, the limits and exceptions are stated by the law and may include, among others, the enforcement of secured claims.

Lastly, **Article 21** MLCBI provides for the option to grant **post-recognition discretionary relief** upon recognizing a **foreign main or non-main proceeding**. Under Article 21(1) MLCBI, if it is necessary to protect the assets of the debtor or the interests of the creditors, the court may grant such relief upon request of the representative. These include the following: (1) stay the commencement or continuation of individual actions or proceedings concerning the debtor's assets, rights, obligations or liabilities, (2) stay the execution against the debtor's assets, (3) suspend the right to transfer, encumber or dispose of the debtor's assets, (4) provide for examination of witnesses, taking information, or providing information regarding the debtor's assets, (5) entrust the administration of local assets – ie turnover of assets – to the foreign representative, (6) extend the relief granted under Article 19 MLCBI, or (7) grant any additional relief. It is clear from the above that the relief is really tailored to the case at hand. It is in the nature of discretionary relief that the court may tailor it to the case at hand. This tailor-made relief is once more confirmed in Article 22 MLCBI, which states that the court may subject the relief to the conditions it deems appropriate.

A limit to the turnover of assets as stipulated in Article 21(1)(e) is stated in Article 21(2) MLCBI. The safeguard regarding the protections of local interests need to be satisfied, before the Court authorizes the turnover of assets.

According to **paragraph 193 GEI** the interests and foreign representative of a non-main proceeding are narrower than in a main proceeding. As such, Article 21(3) MLCBI provides that a relief granted to a non-main proceeding should be limited to the assets that need to be administered in that proceeding and that if the representative seeks information, it should be limited to the information required for that proceeding.

For full marks you should also address art. 3 and 6.

Question 3.4 [maximum 1 mark] 1 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 reason for a worldwide freezing order under Article 19 MLCBI as a the pre-recognition interim relief not to continue under the post-recognition relief granted on the basis of Article 21 MLCBI is due to the **safeguard clauses**.

These safeguard clauses are codified under **Article 21(2) and 22 MLCBI**. When granting tailored made relief, a **balance of interests** should be ensured, namely a balance between the relief granted to the foreign representative and the interests of the persons that may be affected it, see **paragraph 196 GEI**. The court should assess whether the (local) interests of creditors and other interested persons are sufficiently protected when granting the relief, see **paragraph 198-199 GEI**. The court may subject the relief granted under Article 19 and 21 to conditions it deems appropriate, see Article 22(2) MLCBI.

Furthermore, under Article 22(3) MLCBI, the court may at its own motion or upon the request of (the foreign representative or) the person affected by the granted relief, modify or terminate the relief.

A worldwide freezing order is a serious relief with a potentially large impact on creditors and hence it is highly unlikely that such a balance of interests can be achieved. In any case, an affected creditor may always request the court to modify or terminate such a freezing order. As such, for the sake of protecting and balancing interested of all stakeholders, the worldwide freezing order is unlikely to continue post-recognition.

QUESTION 4 (fact-based application-type question) [15 marks in total] 13 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**]; 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.

This essay will take the following structure: (1) identify the relevant provisions of the MLCBI, list the clarifications in the Guide to Enactment and Interpretation ("GEI") and the Judicial Perspective ("JP") for further guidance, and use examples from caselaw, (2) per criterium, apply this knowledge to the facts of the case, (3) present conclusion on whether the conditions are satisfied.

General scope: To decide whether this particular case falls within the ambit of the MLCBI, one must begin by assessing the scope of application provided for in **Article 1(1) MLCBI**. Under subparagraph (a) of that Article, it is stated that the MLCBI applies where assistance is sought by a foreign court or representative in connection with a foreign proceeding in the enacting State. Subparagraph (b) of the same Article states that the MLCBI also applies to a situation where a foreign proceeding and a domestic proceeding against the same debtor are taking place concurrently. According to **paragraph 54 GEI**, Article 1(1) outlines the types of issue for which the Model Law provides solutions, and describes the situation described in subparagraph (a) as an inward-bound requests for recognition of a foreign proceeding.

Article 1(2) MLCBI will be ignored as the question above indicates that the Bank is not excluded from the scope.

Criteria for "foreign proceeding": As a next step, it should be assessed whether the Bank's liquidation procedure in Country A concerns a foreign proceeding under **Article 2(a) MLCBI**. **Paragraph 63-64 GEI** mentions that the foreign proceeding is only fit for recognition or cooperation under the MLCBI if it possesses the cumulative characteristics listed under this Article, as proceedings that do not have those attributes are not eligible for recognition. This Article explains a foreign proceeding as (1) a judicial or administrative proceeding, including an interim proceeding, having a collective nature, (2) pursuant to an insolvency-related law, (3) in which the debtor's assets and affairs are subjected to control or supervision by the foreign court, (4) with the aim of reorganization or liquidation.

According to **paragraph 66 GEI**, the appropriate time to examine whether a foreign proceeding possesses or possessed these attributes is at the time when the application for recognition is considered. **Paragraphs 50 and 65 GEI** explain that the term "insolvency proceedings" is intended in Article 2(a) MLCBI to refer *broadly* to proceedings involving insolvent debtors or debtors in severe financial distress. The MLCBI is designed to be

applicable to proceedings involving natural or a legal persons as the debtor and draws no distinction in between the two processes.

Collective Judicial or Administrative Proceeding: The MLCBI has, as its purpose, to provide a tool for achieving a coordinated solution for all stakeholders across the globe to an insolvency proceeding. Under **paragraph 70-71 GEI**, an important factor in assessing whether the proceeding is collective is whether substantially all of the assets and liabilities are involved in the proceeding. A variety of collective proceedings would be eligible for recognition, including compulsory corporate winding-up processes. In order to assist the court of the enacting State in determining whether this condition is satisfied, the JP provides some caselaw. For example, **paragraph 75 JP** mentions that *British American Ins. Co. Ltd (In re) 425 B.R. 884 (Bankr. S.D. Fla. 2010) [CLOUT case no. 1005]* case, the court referred to the decisions in *In re Betcorp 400 B.R. 266 (in liquidation) (Bankr. D. Nev. 2009) [CLOUT case no. 927]* and *In re Gold & Honey, Ltd 410 B.R. 357 (Bankr. E.D.N.Y. 2009) [CLOUT case no. 1008]* and reiterated that the “collective” nature can be derived from the consideration, the eventual treatment of claims of various types of creditors, and the possibility that creditors partake in the foreign action. An interesting point is highlighted in **paragraph 76 JP**, which explains that in *Stanford International Bank Ltd [2009] EWHC 1441 (Ch); on appeal [2010] EWCA Civ. 137, [CLOUT case no. 1003]*, the procedure in question was not collective as it commenced upon an intervention by the US Securities Exchange Commission in order to avoid fraud and prevent detriment to investors, rather than to reorganize the business. Most importantly, in *In the matter of Agrokor DD [2017] EWHC 2791 (Ch)* (henceforth “*Agrokor*”) the Court ruled in paragraphs [97-98] that in single group proceedings – which is not excluded by the MLCBI – the creditors are obliged to share the assets with the creditors of other debtors (members of the group) as it concerns a relationship about the debtor, its creditors, the other group companies and the creditors of those other companies. Therefore, the Court ruled that, rather than that the proceeding is not sufficiently collective, it is “too” collective.

Looking at our case, the Bank is, by definition and because of the nature of the business, an institution with multiple stakeholders. It is also owned through various corporate entities located in other Nations. As soon as the liquidation proceedings commence upon the NB’s decision to revoke the Bank’s license, the DGF, as the liquidator, has extensive powers to manage the Bank, its assets and liabilities as a whole and involve these in the liquidation proceeding. Moreover, the DGF has the power to “consider and treat” the creditor’s claims by compiling a register and seeking to satisfy these claims per Article 77 of the LBBA. Similar to the *Agrokor* case, considering that the debtor in question is a bank and that the DGF has full powers to consider the assets and liabilities of the Bank in its entirety, the proceeding might even possess a nature that is “too” collective. The allegations regarding the Bank’s involvement in fraudulent actions in the UK does not negate the fact that the proceedings commenced due to the financial difficulties and insolvent state of the Bank and by the decision of the NB. Therefore, the exception in the *Stanford International Bank* case does not apply. The first condition is satisfied.

Insolvency-Related Law: The MLCBI does not oblige the liquidation procedure to be conducted under a law labelled as “insolvency law”. In order to provide for a broad interpretation and encompass many insolvency rules, it is sufficient that the law deals with or addresses insolvency and severe financial distress situations, see **paragraph 73 GEI**. According to the *Agrokor* case, the question of foreign law is a question of fact which needs to mainly be decided on the basis of expert evidence, see paragraph [34]. Moreover, in paragraph [63] *Agrokor* case, this criterium is satisfied if insolvency is one of the reasons for opening the proceeding. As such, the evidence of serious financial distress or an insolvency situation is sufficient.

In casu, the law in question is the Law of Country A on Banks and Banking Activity (LBBA). It is clear that it is not labelled as “insolvency law” but it deals with insolvency and severe financial distress situations. The Affidavit provided in the case is the expert evidence to explain the procedure. Article 75 LBBA deals with “troubled” and Articles 76-77 LBBA with “insolvent” banks as well as tasking authorities with the classification, administration, and liquidation of such banks. Moreover, the liquidation procedure commenced on the grounds

that the Bank was classified as insolvent under the meaning of Article 76 LBBA by the NB based on its resolution detecting further deterioration in the already distressed situation. The second condition is satisfied.

Court Supervision: The level of control required over the assets and affairs of the debtor is not provided for in the MLCBI. Moreover, the control or supervision does not need to be conducted directly by the court but may be exercised by eg the insolvency representative who is under control of the court. One should note that **paragraph 75 GEI** includes expedited proceedings in which the court exercises control at a late stage. However, what is more important, the supervision of the insolvency representative by a licensing authority would not be sufficient to meet the criteria set out in the MLCBI, see **paragraph 74 GEI**. According to the *In re ABC Learning Centres 445 B.R. 318 (Bankr. D. Del. 2010) [CLOUT case no. 1210]*, the Australian courts do not direct the day-to-day operations of the debtor, and most liquidators conduct their tasks largely without court involvement, yet the relevant law gave the courts various control and supervisory roles, which was sufficient for satisfying Article 2(a) MLCBI, see **paragraph 90 JP**. Furthermore, in *Agrokor*, the court decided in paragraph [79] that the supervision can be potential rather than actual, and emphasized that the fact that the government retains some control does not necessarily negate court supervision.

The case at hand does not mention any court involvement (neither direct or indirect). The whole procedure is conducted under the auspices of the NB and the DGF – both are different institutions than the court and exercise their powers without court control. It is true that the court supervision or control may merely be potential, however, even the LBBA fully empowers the NB and the DGF in handling the process without explaining the court's (potential) role. So even on paper, there seems to be a lack of court supervision or control. As such, despite the flexibility the MLCBI and caselaw precedence has shown, it is still insufficient to prove a degree of court involvement in this case.

The third condition is not satisfied.

You should describe the possibility to have an administrative body to control

Liquidation (or reorganization) Purposes: The purposes of the proceedings should be reorganization or liquidation, if not, they may be ineligible for the application of the MLCBI. Proceedings that may fall outside the scope of the MLCBI may be eg proceedings in which the powers and duties of the foreign representative are more limited than in a typical liquidation procedure. The court in *Agrokor* deliberated on this criterium by looking into the purpose of the (foreign) law in question, see paragraph [101].

According to the Affidavit, the purpose of the proceeding is to withdraw insolvent banks from the market and to wind down their operations via liquidation. The DGF, a governmental body of Country A, is tasked with this and several other duties and has the power to act in the Bank's ultimate liquidation. Looking at the purpose of Article 76 LBBA and the duties of the DGF, it is clear that the purpose of the proceeding is liquidation. The fact that Ms. G, an authorized officer, lacks the power to eg arrange for the sale of the Bank's assets is irrelevant as she only acts as the delegated liquidator. The power still remains at the DGF as the main liquidator. Therefore, the exception in the MLCBI does not apply as the foreign representative (being DGF, via Ms. G) is not limited in its powers compared to a typical liquidation procedure. The fourth and final criteria is met.

However, the MLCBI sets *cumulative* criteria. The third condition, namely the court supervision or control criterium, is not met *in casu*. As such, the liquidation procedure against the Bank in Country A fails to satisfy the conditions for being classified as a "foreign proceeding" and hence does not fall under the ambit of MLCBI.

The conditions for the "foreign proceeding" are not satisfied which renders the MLCBI inapplicable to our case without having to assess whether the "foreign representative" condition is met. Nevertheless, this essay will briefly discuss the concept and apply it to our case.

Criteria for “Foreign Representative”: The question is whether the “Applicants” – ie Ms. G on behalf of Deposit Guarantee Fund (“DGF”) – can qualify as “foreign representative” under **Article 2(d) MLCBI**. According to **paragraph 63 GEI**, to draw the scope of the applicability of the MLCBI, a proceeding will only be susceptible to recognition under the MLCBI and the foreign representative will only be granted access to or legal standing in local courts if it has the attributes specified in Article 2(d) MLCBI. According to the Article, a foreign representative means a (1) person or body (regardless of whether it is appointed on interim basis), (2) that is authorized to administer the liquidation (or reorganization) of the debtor’s assets or affairs, or to be the representative of that foreign proceeding in the enacting State. The GEI is rather brief on the explanation of this expression. In **paragraph 86 GEI**, it explains that the representative is a person authorized to administer the foreign proceedings. Administration could include seeking recognition. The concept of authorization is broad to include appointments made by a special agency other than the court.

In casu, the DGF is the body that is tasked by law (Article 77 LBBA) to become the liquidator – and hence, to administer the liquidation of the Bank’s assets – and to be the representative of the proceeding in another state, see subparagraph (iv) “[the DGF has] the power to exercise such powers as are necessary to complete the liquidation of the bank”. As a person conducting “administration” is considered a foreign representative under the GEI, and considering that the LBBA allocates an extensive powers to complete the liquidation, which may include seeking recognition, it seems to have met the conditions. In its internal regulations, ie DGF Law, the DGF may delegate these powers to an authorized person, which in this case is Ms. G., this does not change anything for two reasons. Firstly, as discussed above, the concept of authorization is broadly interpreted under the MLCBI to include appointments made by a special agency. Secondly, Ms. G. is exercising her tasks insofar it is delegated by the DGF and remains accountable to its employer. As such, the Applicants fall within the description of foreign representative under the MLCBI.

In conclusion: The liquidation proceeding conducted in Country A, and for which applicants filed for recognition in the English court, does not fall within the scope of the MLCBI because it does not satisfy the description “foreign proceeding” due to the lack of court supervision or control, despite the fact that the expression “foreign representative” is fulfilled.

For full marks on this question, a bit more elaboration on the facts of the case. Otherwise great assessment.

*** End of Assessment ***

Total marks: 42 out of 50