



SUMMATIVE (FORMAL) ASSESSMENT (RESIT SEPTEMBER 2022): MODULE 2A

THE UNCITRAL MODEL LAWS RELATING TO INSOLVENCY

This is the **summative (formal) re-sit assessment** for **Module 2A** of this course. Please read the instructions 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. This assessment 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.assessment2Aresit]**. An example would be something along the following lines: 202223-336.assessment2Aresit. **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. This assessment must be returned to David.Burdette@insol.org by e-mail no later than **23:00 (11 pm) BST (GMT +1) on Monday 26 September 2022**. When returning the assessment by e-mail, your e-mail must 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. Prior to being populated with your answers, this assessment consists of **14 pages**.

ANSWER ALL THE QUESTIONS

Commented [DB1]: 37/50 = 74%

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]

Commented [DB2]: 9/10

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 **does not** reflect the purpose of the Model Law?

- (a) The purpose of the Model Law is to provide greater legal certainty for trade and investment.
- (b) The purpose of the Model Law is to provide protection and maximization of the value of the debtor's assets.
- (c) The purpose of the Model Law is to facilitate the rescue of a financially troubled business, by providing a substantive unification of insolvency law. 1 mark
- (d) The purpose of the Model Law is to provide a fair and efficient administration of cross-border insolvencies that protects all creditors and the debtor

Question 1.2

Which of the following statements are reasons for the development of the Model Law?

- (a) The increased risk of fraud due to the interconnected world.
- (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) All of the above. 1 Mark

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. **1 mark**
- (d) The debtor has neither its COMI nor an establishment in the jurisdiction of the enacting State.

Question 1.4

Which of the following rules or concepts set forth in the Model Law ensures that fundamental principles of law are upheld?

- (a) The *locus standi* access rules.
- (b) The public policy exception. **1 mark**
- (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 Argentina, foreign main proceedings are opened in South Africa and foreign non-main proceedings are opened in Argentina. Both the South African foreign representative and the Argentinian 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), Argentina 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 Argentina will be recognised in the UK despite Argentina not having implemented the Model Law.

(b) Both the foreign main proceedings in South Africa and the foreign non-main proceedings in Argentina will not be recognised in the UK because the UK has no principle of reciprocity and Argentina has not implemented the Model Law.

(c) Both the foreign main proceedings in South Africa and the foreign non-main proceedings in Argentina will be recognised in the UK. 1 mark

(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.

1 mark

- (c) The court should be satisfied that the foreign proceeding is a main proceeding.
- (d) All of the above.

Question 1.8

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

- (a) COMI is not 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) For an individual debtor, the Model Law does contain a rebuttable presumption that the debtor's habitual residence is its COMI.

(d) All of the above. 1 mark

Question 1.9

An automatic stay of execution according to article 20 in the Model Law covers:

- (a) Court proceedings.
- (b) Arbitral Tribunals.

(c) Both (a) and (b). 1 mark

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

Question 1.10

Article 13 grants access to the creditors in a foreign proceeding. Which of the following statements correctly describes the protection granted in Article 13?

- (a) A foreign creditor has the same rights regarding the commencement of, and participation in, a proceeding as creditors in this State. 1 mark**
- (b) A foreign creditor has the same rights as it has in its home state.
- (c) All foreign creditors' claims are, as a minimum, considered to be unsecured claims.
- (d) Article 13 contains a uniform ranking system to avoid discrimination.

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

Commented [DB3]: 7/10

Question 2.1 [maximum 3 marks] 1 mark

Under the MLCBI, **explain and discuss** what the appropriate date is for determining the COMI of a debtor?

[Answer: The Model Law does not provide for express definition of what COMI is. Article 16(3), however, provides 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. **The question asks only that you explain and discuss the appropriate date for determining COMI.**

As COMI can be moved, and as determination of COMI is essential to consider whether the proceeding is main or non-main, the appropriate date for determining COMI is essential. It is settled that the appropriate date for determining the COMI, or whether an establishment exists, is the date of commencement of the foreign proceeding **yes**. While the COMI of a debtor can move, if such a move is in close proximity (timing-wise) to the commencement of the foreign proceedings, the appropriate evidence for this will be a challenge. Recognizing that this is susceptible to abuse, the procedural aspect of determining COMI can be provided to enacting State. For example, under the Recast EIR 2015, in the Whereas Clause 31, it is provided that the presumption is rebutted the debtor has relocated its registered office or principal place of business to another Member State within the 3-month period prior to the request for opening insolvency proceedings, or, in the case of an individual not exercising an independent business or professional activity, the debtor has relocated his habitual residence to another Member State within the 6-month period prior to the request for opening insolvency proceeding.]

The right, complete answer:

1. The MLCBI does not expressly indicate the relevant date for determining the COMI of the debtor. The same is true with respect to determining the existence of an establishment. However, the UNCITRAL Guide to Enactment suggests that the date of commencement of the foreign proceedings is the appropriate date for determining the existence of the COMI or an establishment of the debtor (see paragraph 143 of The Judicial Perspective).
2. The UNCITRAL Guide to Enactment explains (see paragraphs 159 and 160) that the date of commencement of the foreign proceeding is the appropriate date for determining the existence of the COMI of the debtor as well as an establishment of the debtor. Where the business activity of the debtor ceases after the commencement of the foreign proceeding, all that may exist at the time of the application for recognition to indicate the debtor's COMI or establishment is that foreign proceeding and the activity of the foreign representative in administering the insolvency estate. In such a case, determination of the COMI or an establishment by reference to the date of the commencement of those proceedings would produce a clear result. The same

reasoning may also apply in the case of reorganisation where, under some laws, it is not the debtor that continues to have a COMI, but rather the reorganised entity. In such a case, the requirement for a foreign proceeding that is taking place in accordance with article 17(2)(a) is clearly satisfied and the foreign proceeding should be entitled to recognition. Moreover, taking the date of commencement to determine COMI provides a test that can be applied with certainty to all insolvency proceedings. [see also pages 28/29 of the Guidance Text]

3. However, US courts may take a slightly different approach based on the *Morning Mist Holdings Ltd v. Krys (Matter of Fairfield Sentry Ltd)* (2nd Cir Appeals April 16, 2013) (which was recently followed in the UK in *Re Toisa Limited* - see footnote 94 on page 28 of the Guidance Text). The US court will most likely consider the date of the recognition application pursuant to the US Chapter 15 as the appropriate date for determining the COMI or the existence of an establishment.

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 lays down the requirements of notification of creditors."

Statement 2 "This Article is referred to as the 'Safe Conduct Rule'".

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

[Answer:

(a) Statement 1 - Article 14 **Yes**

(b) Statement 2 - Article 10 **Yes**

(c) Statement 3 - Article 16] **Yes**

Question 2.3 [2 marks] 2 marks

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

[Answer: It was settled that the real issue in the *IBA* case appeal was whether as a matter of settled practice the court should not exercise its power to grant indefinite Moratorium Continuation where to do so would: (a) in substance prevent the English creditors (that is, the Challenging Creditors) from enforcing their English law rights in accordance with the Gibbs Rule; and / or (b) prolong the stay after the Azeri

reconstruction has come to an end **Yes (but wording very close to the exact wording used in the Guidance Text!)**. The Court of Appeal ruled that an English court could only properly grant the indefinite Moratorium Continuation if it were satisfied of two (2) things, namely: (1) the stay would have to be necessary to protect the interests of IBA's creditors **yes**, and (2) the stay would have to be an appropriate way of achieving such protection. The Court of Appeals ruled that neither of these conditions were satisfied.] **Yes**

Question 2.4 [2 marks] 1 mark

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

[Answer: Pursuant to paragraph 45 of the UNCITRAL Guide to Enactment of the UNCITRAL Model Law on Cross-Border Insolvency, where the local insolvency proceeding is already under way at the time that recognition of a foreign proceeding is requested, the Model Law requires that any relief granted for the benefit of the foreign proceeding must be consistent with the local proceeding **yes - what article of the MLCBI?** Furthermore, the existence of the local proceeding at the time of the foreign main proceeding is recognized prevents the operation of Article 20 of the Model Law. When there is no local proceeding pending, Article 20 mandates the stay of individual actions or enforcement proceedings against the debtor and a suspension of the debtor's right to transfer or encumber its assets.] **Article 18? See correct answer below.**

- **Article 29(a) MLCBI ("(i) any relief granted under article 19 or 21 must be consistent with the domestic proceeding in the enacting State and (ii) if the foreign proceeding is recognised in the enacting State as a foreign main proceeding, article 20 does not apply")**
- **Article 18 MLCBI (Subsequent Information) - The foreign representative has an ongoing information duty towards the court in the enacting State about (a) substantial changes to the status of the recognized foreign proceeding or the status of the foreign representative's appointment and (ii) any other foreign proceeding regarding the same debtor that becomes known to the foreign representative.**

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

Commented [DB4]: 9/15

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] 1 mark

The foreign representative is considering his options to secure the value of the debtor's assets located in State A. With reference to the Model Law's provisions on access and cooperation, explain how these rights in State A can benefit the foreign representative.

[Answer: Article 9 on right of direct access provides that a foreign representative is entitled to apply directly to a court in this State **Is this all?** Pursuant to this Article, the foreign representative is freed from having to meet formal requirements such as licences or consular action.]

Question 3.2 [maximum 5 marks] 4 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 that 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.

[Answer: Articles 15 and 16 of the Model Law provides for the procedural requirements that the foreign representative has to consider in order to achieve a simple, expeditious recognition application.

Article 15 **yes** provides that a foreign representative may apply to the court for recognition of the foreign proceeding in which the foreign representative has been appointed. On the procedural requirements, the application for recognition shall be accompanied by: (a) a certified copy of the decision commencing the foreign proceeding and appointing the foreign representative; or (b) a certificate from the foreign court affirming the existence of the foreign proceeding and of the appointment of the foreign representative; or (c) in the absence of evidence referred to in (a) and (b), any other evidence acceptable to the court of the existence of the foreign proceeding and of the appointment of the foreign representative. In addition, the application shall also be accompanied by a statement identifying all foreign proceedings **yes** in respect of the debtor that are known to the foreign representative. Notwithstanding these listed requirements, the court may require a translation of documents supplied in support of the application for recognition into an official language of the relevant State.

Article 17 provides that, subject to Article 6 on public policy exception **Yes**, a foreign proceeding shall be recognized if: (a) the foreign proceeding is a proceeding within the meaning of subparagraph (a) of Article 2; (b) the foreign representative applying for recognition is a person or body within the meaning of subparagraph (d) of Article 2; (c) the application meets the requirements of paragraph 2 of Article 15; and (d) the application has been submitted to the court referred to in Article 4. In addition, the foreign proceeding shall be recognized: (i) as a foreign main proceeding if it is taking place in the State where the debtor has the centre of its main interests; or (ii) as a foreign non-main proceeding if the debtor has an establishment within the meaning of subparagraph (f) of the Article 2 in the foreign State. It is mandated that an application for recognition of a foreign proceeding shall be decided upon at the earliest possible time, but such decision is, however, subject to review or rescission, as any other court decision.]

Full 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. **Sufficient evidence:** Article 15 of the Model Law sets forth in paragraph 2 what evidence in respect of the commencement of the foreign proceedings and the appointment of the foreign representative must accompany the recognition application. A statement identifying all foreign proceedings in respect of the debtor that are known to the foreign representative must also accompany the recognition application (Article 15(3) of the Model Law).
4. **Judicial scrutiny:** While the court in State A is able to rely on the rebuttable presumptions set forth in Article 16 of the Model Law, in the context of Article 17 of the Model Law the court will have to assess whether either the COMI or at least an establishment of the debtor is located in State B where the foreign proceedings were opened. If the COMI of the debtor is in State B the foreign proceedings should be recognised as foreign main proceedings and if only an establishment of the debtor is in State B the foreign proceedings should be recognised as foreign non-main proceedings. Without a COMI or at least an establishment of the debtor in State B, recognition cannot be granted by the court in State A.
5. **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] 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. Also address which restrictions, limitations or conditions should be considered in this context. For the purposes of this question, it can be assumed that there is no concurrence of proceedings.

[Answer: Article 19 of the Model Law provides for urgent relief that may be granted upon application for recognition of a foreign proceeding, therefore deals with pre-recognition relief. The granting of the relief sought for is discretionary on the part of the court. It provides that from the time of filing an application for recognition until the application is decided upon, the court may, at the request of the foreign representative, where relief is urgently needed to protect the assets of the debtor or the interests of the creditors, grant relief of a provisional nature, including: (a) stay of execution against the debtor's assets, (b) entrusting the administration or realization of all or part of the debtor's assets located in this State to the foreign representative or another person designated by the court, in order to protect and preserve the value of assets that, by their nature or because of other circumstance, are perishable, susceptible to devaluation or otherwise in jeopardy, (c) any relief mentioned in paragraph 1(c), (d) and (g) of Article 21.

As explained in the Guide to Enactment of the UNCITRAL Model Law on Cross-Border Insolvency (the "Guide"), Article 19 deals with "urgently needed" relief that may be ordered at the discretion of the court and is available as of the moment of the application for recognition (unlike the relief under Article 21, which is also discretionary but which is available only upon recognition). Article 19 is the bases for which the court may grant the type of relief that is usually available only in collective insolvency proceedings (ie the same type of relief available under Article 21), as opposed to individual type of relief that may be granted before the commencement of the insolvency proceedings under rules of civil procedures, and this is all because of the urgency nature of the relief being sought for. **Yes** Article 20 covers the effects of recognition of a foreign main proceeding which provides that upon recognition of a foreign proceeding that is a foreign main proceeding, (a) commencement or continuation of individual actions or individual proceedings concerning the debtor's assets, rights, obligations or liabilities is stayed, (b) execution against the debtor's assets is stayed, and (c) the right to transfer, encumber or otherwise dispose of any assets of the debtor is suspended. Paragraph 2 of Article 20 provides that the scope, and the modification or termination, of the stay and suspension referred to in paragraph 1 are subject to any provisions of law of the enacting State relating to insolvency that apply to exceptions, limitations, modification or termination in respect of the stay and suspension. In addition, the automatic stay afforded under paragraph 1 of Article 20 does not affect the right to commence individual actions or proceedings to the extent necessary to preserve a claim against the debtor, and that it does not affect the right to request the commencement of a proceeding under the laws of the

enacting State or the right to file claims in such proceeding. It is noteworthy that the effects provided under Article 20 are not discretionary on the part of the court, but rather flow **automatically from recognition** of the foreign main proceeding. The difference between Articles 19 and 21, is that Article 20's automatic flow of reliefs is that the latter applies only to foreign proceeding that is a main proceeding. **Yes**

Article 21 provides for the relief that may be granted upon recognition of a foreign proceeding, and as aforementioned, it is discretionary on the part of the court whether to grant or not. Paragraph 2 of Article 21 provides that upon recognition of a foreign judgment, whether main or non-main, the court may, at the request of the foreign representative, entrust the distribution of all or part of the debtor's assets located in the relevant State to the foreign representative or another person designated by the court, provided that the court is satisfied that the interests of creditors in the relevant State are adequately protected. Paragraph 3 provides that in granting the relieve under Article 21 to a foreign representative of a foreign non-main proceeding, the court must be satisfied that the relief relates to assets that, under the law of the relevant State, should be administered in the foreign non-main proceeding or concerns information required in that proceeding. **Part of previous paragraph**

As explained in the Guide, the provision "under the law of this State" reflects the principle underlying the Model Law that recognition of a foreign proceeding does not mean extending the effects of the foreign proceeding as they may be prescribed by the law of the foreign State. Instead, recognition of a foreign proceeding entails attaching to the foreign proceeding consequences envisaged by the law of the enacting State.

Full answer:

1. **Pre-recognition interim relief:** From the time of filing the recognition application until the recognition decision has been made certain interim relief as set forth in Article 19(1)(a), (b) and (c) of the Model Law can be requested. The foreign representative will have to demonstrate to the court that such relief is urgently needed to protect the assets of the debtor or the interests of the creditors. If the foreign proceedings are non-main proceedings, the court may refuse to grant interim relief if it would interfere with the administration of a foreign main proceeding (Article 19(4) of the Model Law).
2. **Post-recognition relief (automatic or discretionary):** In case of a foreign main proceeding, there will be automatic relief as set forth in Article 20 of the Model Law. For both foreign main and non-main proceedings, article 21 of the Model Law set forth what post-recognition relief can be requested by the foreign representative. Appropriate relief under Article 21(1) of the Model Law must be necessary to protect the assets of the debtor or the interests of the creditors. The relief set forth in Article 21(2) of the Model Law requires the court to be satisfied that the interests of the creditors in State A are adequately protected. In case of a foreign non-main proceeding there is an additional requirement that

needs to be met before relief can be granted. According to Article 21(3) of the Model Law the court in such a case must also be satisfied that the relief relates to assets that, under the law of State A, should be administered in the foreign non-main proceeding or concerns information required in that proceeding.

[In this context of relief, the foreign representative of State B could also think about the need to exercise any anti-avoidance powers in State A based on article 23 of the MLCBI]

3. 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.
4. 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.
5. 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] 1 mark

Briefly explain - with reference to case law - 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?

[Answer: Article 21 sets out reliefs that may be granted upon recognition of a foreign proceeding. Paragraph 1 of Article 21 provides that upon recognition of a foreign proceeding, whether main or non-main, where necessary to protect the assets of the debtor or the interests of the creditors, the court may, at the request of the foreign representative, grant any appropriate relief, including (briefly), amongst others: (a) staying the commencement or continuation of individual actions or individual proceedings, (b) staying execution against the debtor's assets, (c) suspending the right to transfer, encumber or otherwise dispose of any assets, (f) extending relief granted under paragraph 1 of Article 19.

Article 19(3) provides that unless extended under paragraph 1(f) of Article 21, the relief granted under this article terminates when the application for recognition is decided upon.

In the English case of Igor Vitalievich Protasov and Khadzhi-Murat Derev, Mr Khadzhi-Murat Derev ("Derev") was declared bankrupt in Russia. As he has been living and owns properties in London, Mr Protasov, as foreign representative, made

an application to the English Court seeking recognition of the Russian bankruptcy. As the applicant feared for dissipation of assets pending recognition application resolution, the foreign representative applied for a worldwide freezing order as interim relief, to which the English Court has ordered "Until the Return Date or further order of the Court, the Debtor's right to transfer, encumber or otherwise dispose of any of his assets worldwide is suspended in accordance with the interim relief available under Article 19(1)(c) and Article 21(1)(c) of the Model Law." (the "Worldwide Freezing Order"). The "Return Date" was intended to be the date of the intended application for recognition of the Russian bankruptcy proceedings as foreign main proceeding. The Recognition Order was made effective from 5:30pm on 1 December 2020 by another judge, Deputy Judge Karet. Following the Recognition Order by Judge Karet, the foreign representative made an application seeking to extend/continue the Worldwide Freezing Order on the basis of a continuing risk of dissipation of the assets. Mr Derev, however, argued that there is no need for the Worldwide Freezing Order to be continued and possibly no jurisdiction enabling the Court to continue it. It was further argued that as the Recognition Order has already been made, and that has the effect of suspending his rights in relation to his assets in just the same was as if he had been subject to an English bankruptcy order. The Court denied the application and ruled that the scheme of the Model Law is intended to put the foreign trustee or bankruptcy manager in the same position, as far as practicable, as an officeholder appointed under domestic law, and consistent with that, the effect of recognition of a foreign main proceeding is to bring into play the same wide infrastructure of the insolvency legislation; absent some exceptional reason, a freezing order or other similar order will not in the court's view be required or justified; in this case, the Court was not persuaded that any special or exceptional reasons exist.] **Good (if long) discussion of the case.**

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 commenced 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 by 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]

Commented [DB5]: 12/15

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] 9 marks**; and

[Answer: Article 2(a) defines "foreign proceeding" to refer to a collective judicial or administrative proceeding in a foreign State, including an interim proceeding, pursuant to a law relating to insolvency in which proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganization or liquidation **yes**. The key elements, and whether present or not, therefore are as follows:-

- (a) a proceeding (including an interim proceeding) - yes, there is a liquidation proceeding pending in Country A;
- (b) that is judicial or administrative - yes, there is a liquidation that is administrative in nature;
- (c) that is collective in nature - yes, it is collective in nature as it substantially covers all of the assets and liabilities of the debtor;
- (d) that is in foreign State - yes, the proceeding is in Country A;
- (e) that is authorised or conducted under the law relating to insolvency - yes, it is conducted pursuant to the insolvency law of Country A on Bank and Banking Activities; and
- (f) which proceeding is for the purpose of reorganization or liquidation - yes, the facts provide that the Bank is under liquidation in Country A. **Yes, 3 marks**

In the case of Agrokor **Yes**, similar fact pattern was provided dealing with issues on whether the application should be granted as a foreign proceeding. In the Agrokor case, the following jurisprudence were settled: (a) on foreign law, the characteristics of the foreign law is a matter of the relevant foreign country and questions of foreign law are questions of fact to be decided by the English Court on the basis of expert evidence; (b) on single group proceedings, none of the Model Law materials state that it is impossible to recognise a single group proceeding; (c) on law relating to

insolvency, the Model Law does not require “insolvency law” as a label; it is sufficient if the law deals with or addresses insolvency or severe financial distress; (d) on court supervision, the level of court supervision required by the Model Law is relatively low.

It is noteworthy that as explained in the Guide, paragraph 74 thereof, a foreign proceeding that meets the requisites of Article 2, subparagraph (a), should receive the same treatment irrespective of whether it have been commenced and supervised by a judicial body or an administrative body.

Premises considered, I submit that the Bank’s liquidation is a foreign proceeding and it is a foreign main proceeding because it is a proceeding taking place in Country A, where the Bank has its registered office.]

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]. **3 marks**

[Answer: Article 2(d) defines “foreign representative” as a person or body, including one appointed on an interim basis, authorized in a foreign proceeding to administer the reorganization or the liquidation of the debtor’s assets or affairs or to act as a representative of the foreign proceeding **yes**. The key elements, and whether present or not based on the facts are as follows:-

(a) a person or body, including one appointed on interim basis – *yes, Article 77 of the LLBA 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 license. On 17 September 2015, NB had classified the Bank as insolvent pursuant to Article 76 of the LLBA. Therefore, from that date on, DGF becomes the official liquidator. In addition, Article 48(3) of the DGF Law empowers the DGF to delegate its powers to an “authorised office” or “authorised person” subject to compliance of qualifications set out by the law. It is on this basis that Ms G was appointed pursuant to a Decision of the Executive Board of the Directors of DGF, No 1513.*

(b) authorised in a foreign proceeding – *yes, as mentioned above;*

(c) to administer the reorganisation or liquidation of the debtor’s assets or affairs or to act as representative of the foreign proceeding – *yes, pursuant to the LLBA .*

It is note worthy that the Model Law does not specific that the foreign representative must be authorised by the foreign court.

Premises considered, I submit that the Applicants are foreign representative within the meaning of the Model Law.]

Answer not complete, but a good effort. Full answer as follows:

1. "Foreign representative" is defined by article 2(d) of the MLCBI to mean:

'a person or body, including one appointed on an interim basis, authorised in a foreign proceeding to administer the reorganisation or the liquidation of the debtor's assets or affairs or to act as a representative of the foreign proceeding'

2. Article 16(1) of the MLCBI provides:

'If the decision or certificate referred to in paragraph 2 of article 15 indicates that the foreign proceeding is a proceeding within the meaning of sub-paragraph (i) of article 2 and that the foreign representative is a body or person within the meaning of sub-paragraph (j) of article 2, the court is entitled to so presume.'

3. This application is brought jointly by the DGF and Ms G. The DGF's role as liquidator arises under statute and article 77 of the LBBA provides that the DGF is automatically appointed as liquidator on the day it receives the NB's decision pursuant to article 77 revoking a bank's licence and commencing its liquidation.

4. 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"*.

5. 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.

6. 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.

As a result of the sharing of some, but not all of the liquidator's powers and the division of responsibility between Ms G and the DGF, it seems likely that depending on the nature and timing of relief sought from this Court pursuant to the CBIR (if any), the appropriate applicant may, in the future, be either or both of Ms G and the DGF. I am satisfied that subject to the express limitations on Ms G's powers, they are both authorised to administer the liquidation and as such both meet the definition of "*foreign representative*". In my judgment they both had the necessary standing to apply in that capacity, for recognition of the Bank's liquidation.

While not all facts provided in the fact pattern given for this 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.

*** End of Assessment ***