



SUMMATIVE (FORMAL) ASSESSMENT: MODULE 2A
THE UNCITRAL MODEL LAWS RELATING TO INSOLVENCY

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73%

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: 202223-336.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 2023**. The assessment submission portal will close at 23:00 (11 pm) GMT on 1 March 2023. 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 2023** or by **23:00 (11 pm) BST (GMT +1) on 31 July 2023**. If you elect to submit by 1 March 2023, you **may not** submit the assessment again by 31 July 2023 (for example, in order to achieve a higher mark).
7. Prior to being populated with your answers, this assessment consists of **14 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]

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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.
- (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.

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

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.

(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.

(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?**

Commented [SL3]: Correct answer is option (b).

- (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 be satisfied that the foreign proceeding is a main proceeding.
- (d) All of the above. **I did find that both (a) and (b) should be considered (as Justice Hildyard also discussed the adequate protection of creditors in his IBA case analysis, but I'm not sure it's accurate to say that a foreign proceeding must be the main proceeding, since Article 21 encompasses both main and non-main proceedings).*

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.

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).
- (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.
- (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]

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Question 2.1 [maximum 3 marks]

Commented [SL5]: 3 marks

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

In general, the appropriate date for determining the COMI of a debtor is the date that the foreign proceedings commenced. However, different courts have different views: for example, some courts may utilize the date of the application for recognition, or the date the court is called upon to decide on the application. Some courts may also look at a date which is determined by reference to the operational history of the debtor or consider the time between commencement of the foreign insolvency proceedings and a recognition proceeding (in the event a debtor may be manipulating its COMI in a bad faith manner. For example, in the US, courts will look at the activities of the debtor "on or around the time" that recognition was sought under Chapter 15 and making a COMI analysis could include considerations such as liquidation actions or administrative functions (see *Morning Mist Holdings Ltd v. Krys (Matter of Fairfield Sentry)*).

Question 2.2 [maximum 3 marks]

Commented [SL6]: 2.5 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.”

Statement 1:

This statement likely refers to **Article 14 (Notification to foreign creditors of a proceeding under [identify laws of the enacting State relating to insolvency])** which deals with the Timely Notice requirement. Under this requirement, a foreign creditor is entitled to notice, and the rules set forth for ensuring they receive such notification are provided in Article 14.

Statement 2:

This statement likely refers to **Article 10 (Limited jurisdiction)**, also referred to as the “safe conduct” rule. This rule ensures that an enacting State’s court does not assume blanket jurisdiction of the debtor’s asset simply on the grounds that a foreign representative filed for recognition.

Statement 3:

This statement likely refers to **Article 16 (Presumptions concerning recognition)** and deals with subsection (1), which pertains to a **debtor’s centre of main interests (COMI)**. The COMI concept is not defined under Model Law and contains a rebuttable presumption that the place of the registered office of the debtor is the place of a COMI (for a corporate debtor), or that the place of an individual’s habitual residence is their COMI.

Commented [SL7]: Reference to art 16(3) for full marks.

Question 2.3 [2 marks]

Commented [SL8]: 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.**

This case predominantly dealt with the interaction between the Gibbs Rule and a court’s abilities to grant certain reliefs under Article 21 of the MLCBI. In the *IBA* case Appeal, the English Court of Appeal focused on whether a court, as a matter of settled practice, should exercise its power to grant an indefinite moratorium when certain consequences were present — specifically, whether doing so would substantively prevent English creditors from enforcing their rights in line with the Gibbs rule. The takeaway from this case is primarily that once a foreign proceeding wraps up (and as a result once the foreign representative is no longer in office), there is no “scope” for any additional relief in a foreign proceeding to be made and the proceedings should terminate.

Prior to the appeal itself, the original case (in the English courts) dealt with an Azeri foreign representative seeking an indefinite continuation of an automatic moratorium, which was challenged by two creditors whose instruments were governed under English law, but who chose not to participate in a separate Azerbaijan-based restructuring that bound all creditors. Justice Hildyard, in the original *IBA* case, found that the Gibbs Rule (which holds that only English courts may discharge debts governed by English law, even if that debt has first been discharged in a foreign insolvency proceeding) holds: as a result, the court found a permanent stay as sought by the Azeri foreign representative would have circumvented the Gibbs Rule, and this result was also reached by the court balancing the interests and ensuring creditors are adequately protected.

The English Court of Appeal upheld the lower court’s decision. The Court of Appeal’s reasoning for not granting an indefinite moratorium continuation was based on the fact that a stay was not necessary to protect the interests of *IBA*’s creditors. The court also noted that *IBA* could have pursued a parallel UK-based scheme of arrangement (but chose not to do so) and that prolonging the stay makes little sense when the original foreign proceedings have themselves closed. Interestingly, this outcome may have been different if the same issue was posed in a different court — for example, in the United States.

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**.

This situation likely implicates **Article 29** of the MLCBI. Assuming this question refers to the fact that the prevailing domestic proceeding is itself recognized as the foreign main proceeding, then — with respect to relief — the court in said enacting State must only grant reliefs under Article 19 or Article 21 in a manner that is consistent with that of the ongoing proceedings in the state (as article 20 is not applicable). In the alternate situation, where a different jurisdiction is found to be the foreign main proceeding, then relief granted must be consistent with the local proceedings, and if relief has been granted in the foreign proceeding, this has to be reviewed (or modified/terminated) if inconsistencies are found. **Article 18 pertains to the duties a foreign representative has in providing information to an enacting State**. Under this Article a foreign representative must promptly alert an enacting State court of substantial changes in the status of either their appointment or the status of a recognized foreign proceeding. The representative also has a duty to inform the enacting state's court of any other foreign proceeding for the same debtor if they learn about such proceedings. Notably, a court may also request information or assistance directly from foreign representatives under **Article 25**.

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

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

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

Question 3.1 [maximum 4 marks] [1 out of 4 marks]

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 co-operation, explain how these rights in State A can benefit the foreign representative.

In order for a foreign representative to secure the value of the debtor's assets located in State A, obtaining access to court in that jurisdiction is critical, in order to eventually request recognition and ultimately protect the value of assets in State A through cooperation between that state and State B. **No recognition is required, this is automatic. State A's model law does not contain any reciprocity provisions) - see comments below.**

The provisions of the MLCBI that pertain to access for foreign representatives and creditors fall between **Article 9 to Article 14**. Through **Articles 9, 10, and 11**, the foreign representative is able to access the courts of State B. However, **Article 12** empowers the foreign representative (assuming recognition has occurred) to interact with the courts of State B — including, in particular, making petitions or requests that might concern the protection of value of the debtor's assets with regards to the proceedings in State B. In essence, these Articles enable the foreign creditor to facilitate a foreign representative's ability to actually

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Commented [SL10]: Art 29(a) for full marks

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approach courts and ask for the commencement of recognition, and ultimately obtain the types of protections that would be needed to secure the value of the debtor's assets in State A. **Article 14** is also useful, since it accords the foreign representative the ability to notify creditors in State A as well as State B. Where, for example, a particular jurisdiction might impose a worldwide automatic stay, Article 14 enables the foreign representative to adequately and promptly notify creditors who may be otherwise planning to enforce rights on the debtor's assets or collateral. Notice of such a stay, however, would theoretically preclude creditors from taking enforcement actions, and ultimately assist the foreign representative's goal of securing value in the debtor's assets.

Cooperation and direct communication between the courts of States A and B is critical in ensuring the foreign representative is able to secure value of the assets.^[1] **Article 27** enables a foreign representative to ensure that coordination is in place with regards to the administration and supervision of the debtor's assets and creates a line of communication between the courts of both states. From a practical standpoint, a provision like this would empower the foreign representative in managing the debtor's assets without worry that conflicting rulings in both states would ultimately erode potential value maximization and hinder a speedy resolution process. However, most important is **Article 25**, which ensures that the court of State A will cooperate "to the maximum extent possible" with the foreign representative, and also leaves open the ability for courts of States A and B to communicate between themselves. These provisions become especially important when enforcement actions by creditors take place, or if certain judicial orders or litigations impact the debtor's assets and prevent a just and speedy restructuring process. Courts are able to facilitate settlements and resolve claims or concerns between parties across jurisdictions, which would ultimately protect the value of the debtor's assets.

Your answer should have included the following discussions:

- **Legal standing (Article 9 MLCBI): The key access for the foreign representative is set forth in Article 9 MLCBI. In the capacity of foreign representative, the foreign representative has automatically standing before the courts in State A without having to meet any formal requirements such as a license or any consular action. In other words, the "status" in State B of the foreign representative is automatically recognised in State A for the purpose of granting the foreign representative standing before the courts in State A. This allows the foreign representative to safeguard and pursue assets of the debtor estate in State A before its courts.**
- **Opening domestic insolvency proceedings (Article 11 MLCBI): The foreign representative is further specifically entitled to apply for the opening of domestic insolvency proceedings in State A, as reflected in Article 11 of the MLCBI. Whether or not the foreign representative would wish to do this will depend on what the requirements are for opening such domestic proceedings. Can these requirements be met? On the other hand, it will depend on what the foreign representative believes he/she can get in terms of (interim) relief for the foreign proceedings in State B. In other words, are domestic insolvency proceedings really needed, or just additional time and costs that should be avoided?**
- **Cooperation: Similar to access rights, the cooperation provisions in the MLCBI (articles 25-27) also operate independently of recognition and it is not a prerequisite to the use of the cooperation provisions that recognition of the foreign proceedings is obtained in advance. Courts in State A can freely cooperate with the foreign representative without having to worry whether the status in State B of the foreign representative can be recognised in State A.**

- **Save Time & Costs: The key benefits of both the access provisions and the cooperation provisions are that they save time and therefore also costs, as a result of which value destruction can be avoided and value enhancement is being promoted.**

Question 3.2 [maximum 5 marks] [3 out of 5 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.

We are told that both the foreign proceeding and foreign representative qualify under the definitional criteria under **Article 2**. However, after a foreign proceeding or a foreign representative meet the requirements, an extra layer of judicial scrutiny must be overcome for a recognition application to be successful.

At the application stage, certain documents and certified copies must be included in the foreign representative’s application. **Article 15** governs here: this provision requires that a recognition application includes some proof of a foreign proceeding, which can be presented in the form of “a certified copy of the decision commencing the foreign proceeding and appointing the foreign representative” [1] or “certificate from the foreign court affirming the existence of the foreign proceeding and of the appointment of the foreign representative.” While the State A Court need not itself decide the validity of the foreign proceeding, these documents — along with the application itself — must collectively identify the foreign proceedings in State A. Finally, a translation may be required, which the State A court may provide. **Article 16** will likely be read with Article 15 for the documents and certificates to be presumed as authentic.

Next, in perhaps one of the most critical Articles outlining the kind of judicial scrutiny required for the approval of a recognition application, **Article 17** [½] outlines the circumstances under which a foreign proceeding can be recognized. Under this Article, in addition to the threshold definitions under Article 2 being met, Article 17 will allow the foreign proceeding to be recognized either as a foreign main proceeding (if State A is where the COMI is) or as a foreign non-main proceeding (if State A is where the debtor has an establishment). [½] **Article 18** enables a foreign representative to inform the court of any changed circumstances, and permits the court to then review its decision and change its mind if needed. A foreign representative is also obligated to inform the court of any other foreign proceedings regarding the debtor if the foreign representative is made aware of these proceedings. Article 18 presents a continuing obligation.

Some courts, in rare circumstances, may choose to impose the “public policy” exception under **Article 6**. Under this exception, a court can choose to deny recognition if doing so is manifestly contrary to public policy. [1] If a court in State A found that the foreign representative’s application in some ways was manifestly contrary to State A’s public policies, then it is highly likely that the recognition application would be restricted and denied. Similarly, while the MLCBI does not have an explicit “abuse of process” disclosure, any statement or piece of evidence provided by the foreign representative is presumed to be a “full and frank” disclosure. If it is later discovered that, for example, the foreign representative

falsely identified a debtor's COMI or if the foreign representatives had some false or improper motive for recognition, these scenarios might constitute an abuse of process and recognition could be denied. This makes sense, for no foreign representative should misuse MLCBI to mislead the court or act in a manner that constitutes bad faith.

Your answer must also include a discussion on the following:

- **Exclusions:** *If the debtor is an entity that is subject to a special insolvency regime in State B, the foreign representative should first 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.*
- **Restrictions:** *Existing international obligations of State A: Based on Article 3 of the Model Law, the court in State A should also check if there are no existing international obligations of State A (under a treaty or otherwise) that may conflict with granting the recognition application under the implemented Model Law in State A.*

Question 3.3 [maximum 5 marks] [3 marks]

As far as relief is concerned, briefly explain (with reference to the relevant MLCBI articles) what pre- and post-recognition relief can be considered in the context of the MLCBI. 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.

Pre-Recognition Relief: Primarily, **Article 19** addresses pre-recognition interim relief. From a timeline perspective, this relief is granted at the time an application is filed but before its approval. Broadly, reliefs under Article 19 enable a foreign representative to maintain the "status quo" for stakeholders, without concern that creditors or other stakeholders would enforce their claims on the debtor's assets or try to take them out of the debtor's bankruptcy estate. As part of the Article 19 reliefs, a foreign representative can secure a stay on any executions against the debtor's assets and enable the foreign representative to protect and preserve the value of a debtor's assets. Other types of relief may include suspending the rights of the debtor to transfer or dispose of any assets or taking evidence and examining witnesses. In terms of conditions and limitations, this pre-recognition relief will end once the court decides to recognize the application or deny recognition, and a court might also deny reliefs under Article 19 if doing so would disrupt or conflict with the "administration of a foreign main proceeding." Moreover, a court may decide whether a foreign representative's requests for relief are "urgent" as a matter of the court's own discretion.

Post-Recognition Relief: Possibly the most crucial and immediate kind of relief that is granted at the time of recognition is found in **Article 20**, which imposes an immediate stay on the commencement or continuation of individual actions or individual proceedings concerning the debtor's assets, rights, obligations, or liabilities. The stay also prevents any execution on the debtor's assets (taking forward the stay from Article 19 prior to recognition) and prevents any transfer or encumbrance or disposal of the debtor's assets. Article 20, interestingly, is still going to be subject to State A's laws, since under Article 20(c)(2), the scope, and the modification or termination, of the stay and suspension as provided under this Article are tempered based on the local laws of the enacting State (which in this case, is State A).

Next, **Article 21** provides the court an opportunity to extend certain reliefs that that court's discretion. Examples of certain reliefs include the staying of any commencement or continuation on enforcement or individual actions, entrusting the administration of the debtor's assets to the foreign representative, granting broader additional reliefs that may have

otherwise been extended to a state domestic liquidator, examining witnesses and taking evidence or the delivery of information concerning the debtor's assets, affairs, rights, obligations or liabilities. Article 21 comes with its limitations as well. The reliefs a court can grant are not so widespread, and the State A court may choose to evaluate the granting of such reliefs based on the state's own policies and laws.

Courts in this scenario are also required to consider whether the interests of the debtor and local/foreign creditors are balanced based on the reliefs being requested: for example, if the court is not satisfied that the interests of those affected by the relief are not severely hampered, then the court may choose to grant such a relief. Under **Article 22**, the court must be satisfied that the interests of the creditors and other interested persons, including the debtor, are adequately protected. In some scenarios, a court might even be authorized to require a bond or security to be posted in relevant circumstances or impose certain conditions before granting relief.

Lastly, **Article 23** also enables a court to focus on the scope of what a local insolvency representative is able to do. Though this provision is narrowly drafted, it accords courts the right to make sure a foreign representative isn't prevented from initiating actions where needed and provides some protection to creditors from acts that might be detrimental to creditors.

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

Question 3.4 [maximum 1 mark] [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?

A worldwide freezing order granted as pre- pre-recognition interim relief ex article 19 MLCBI, is unlikely to continue post-recognition ex article 21 MLCBI because relief accorded in Article 19 is superseded by reliefs in Articles 20-21, and that continuing a worldwide freezing order is not justified because these subsequent Articles (20-21) may be sufficient in putting a foreign representative in the same position as they would have been, had they been a local insolvency practitioner instead. Continuing a worldwide freezing order post-recognition will likely be seen as unwarranted and unjustifiable. The English case that deals with this issue is that of in the *Igor Vitalievich Protasov and Khadzhi-Murat Derev case (Protasov v Derev)*.

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. held approximately 95% of the Bank's shares through various corporate 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 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] [10.5 out of 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]**; 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 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.

[4.1.1] "FOREIGN PROCEEDINGS" ANALYSIS: [6 out of 10]

The Bank's liquidation likely does comprise a foreign proceeding for the purposes of the MLCBI's Article 2 definition. To identify whether the Bank's liquidation comprises a "foreign proceeding" within the meaning of Article 2(a) of the MLCBI, we must first break down the elements of what a foreign proceeding: (1) a proceeding; (2) that is either judicial or administrative; (3) and collective in nature; (4) in a foreign state; (5) that is authorized or conducted under a law relating to insolvency; (6) in which the assets and affairs of the debtor are subject to control or supervision by a foreign court; (7) for the purpose of reorganization or liquidation.

In analysing whether the Bank's liquidation is a **(1) proceeding (2) that is either judicial or administrative**, our answer is likely yes. First, the amount of case law on what constitutes an "insolvency" proceeding is limited, but one court has suggested that a "proceeding" includes any kind of statutory framework that would manage the final distribution of a company's assets while constraining the company's actions. In this regard, the liquidation proceedings — which constrain the bank's ability to function and include a list of creditor claims with the goal to repay creditors — constitute "proceedings." Next, the question of whether the proceedings are judicial or administrative is also satisfied, since the liquidation process with Ms. G appointed as a liquidator is at least administrative in nature, especially given the fact that she is also formally appointed. Moreover, even though our facts do not indicate that a court is necessarily overseeing the process in an explicit manner, we are told that under Article 37, the DGF — either directly or through Ms. G — is required to file the bank's property and non-property claims with a court, meaning the proceedings include some "judicial" elements as well.

As to the question of whether the proceedings are **(3) "collective" in nature**, we can refer to the fact that there is some desire on the DGF's part to achieve a "coordinated, global solution" for the involved stakeholders. In this case, the act of seeking English recognition is sufficient to indicate at least some degree of collectiveness. The fact that Country A's liquidation process affects the rights and creditors and given that the DGF as liquidator entity has power to compile a register of creditor claims and to seek to satisfy those claims, is a strong indication that collectively is present. However, we don't know whether other factors are met, like enabling creditors to appeal the proceeding or whether adequate notice is provided to creditors. If an English court finds these factors to be incredibly important, it is possible that the liquidation proceedings may not be seen as collective in the requisite manner. If, instead, the English court finds that the liquidation proceedings in Country A are "more collective" than "not collective" enough, then this element will be satisfied.

For full marks your answer should also address the following:

1. UNCITRAL's guide for judiciary, "The Model Law on Insolvency: The Judicial Perspective" (2013) explains the requirement for proceedings to be "*collective*":

"The UNCITRAL Model Law was intended to apply only to particular types of insolvency proceedings. The Guide to Enactment and Interpretation indicates that the notion of a "*collective*" insolvency proceeding is based on the desirability of achieving a coordinated, global solution for all stakeholders of an insolvency proceeding. It is not intended that the Model Law be used merely as a collection device for a particular creditor or group of creditors who might have initiated a collection proceeding in another State, or as a tool for gathering up assets in a winding up or conservation proceeding that does not also include provision for addressing the claims of creditors. The Model Law may be an appropriate tool for certain kinds of actions that serve a regulatory purpose, such as receiverships for such publicly regulated entities as insurance companies or brokerage firms, provided the proceeding is collective as that term is used in the Model Law."

2. The Guide to Enactment and Interpretation of the UNCITRAL Model Law (2014) explains that when:

"evaluating whether a given proceeding is *collective* for the purpose of the Model Law, a key consideration is whether substantially all of the assets and liabilities of the debtor are dealt with in the proceeding, subject to local priorities and statutory exceptions, and to local exclusions relating to

the rights of secured creditors. A proceeding should not be considered to fail the test of collectivity purely because a class of creditors' rights is unaffected by it."

It also goes without saying that Bank's liquidation is taking place in **(4) a foreign state** — i.e., Country A.

At this stage, a case under English law worth referring to is that of *Lex Agrokor* case. The *Lex Agrokor* case also sheds light on the next element, which is whether the **(5) proceedings are pursuant to a law relating to insolvency**. In that case, the English court had to decide whether a Croatian company's Croatian Extraordinary Proceeding should be recognized. There, the court found that a law need not have the words "insolvency law" in it to satisfy requirement: even if the law is aimed at dealing with severe financial distress, this could be sufficient to show there were grounds to commence the proceeding. In this case, the liquidation process seems to fit this criteria: its aim to so resolve financial distress and fits the nature of what insolvency rules generally entail, such as enabling the liquidator to take over the company, to compile creditor claims, to seek and identify the bank's property to manage contracts, and to dispose of the bank's assets. Without using the word "insolvency," the liquidation laws very much meet the assumption of what proceedings pursuant to a law relating to insolvency would be.

On the next element, which requires the proceedings **(6) in which the assets and affairs of the debtor are subject to control or supervision by a foreign court** to be satisfied, the explicitness of "court control" is not absolute. The *Lex Agrokor* case showed that court-supervision need not be paramount for a foreign proceeding to be recognized as a foreign proceeding: in fact, in *Lex Agrokor*, the Croatian government also had some control over the debtor – just like in our facts, where the Law of Country A on Banks and Banking Activity (LBBA) applies, the controlling authority to determine Bank's path towards liquidation is the National Bank, and that ultimately, a national regulatory (the DGF) manages Bank's liquidation process.

[For full marks your answer should also address:

1. The term "*foreign court*" is defined at article 2(e) of the MLCBI and means: "*a judicial or other authority competent to control or supervise a foreign proceeding*".
2. The Guide to Enactment notes: "*87) A foreign proceeding that meets the requisites of article 2, subparagraph (a), should receive the same treatment irrespective of whether it has been commenced and supervised by a judicial body or an administrative body. Therefore, in order to obviate the need to refer to a foreign non-judicial authority whenever reference is made to a foreign court, the definition of "foreign court" in subparagraph (e) includes also non-judicial authorities.*"
3. In this case the DGF has control of all of the Bank's assets and overall control of the liquidation.
4. 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.
5. 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.
6. Taking these factors into account, the Bank's liquidation is *administrative*. The assets and affairs of the Bank are subject to the control of the DGF, an official body which exercises its powers in the liquidation free from intervention by government or the NB and which should be considered, for the purposes of the definition set out in article 2(e) of the MLCBI, as a "*foreign court*".

Finally, the proceedings must be conducted **(7) for the purpose of reorganization or liquidation**. In this scenario, the restructuring is one of liquidation.

Other questions have arisen in the recognition context, especially pertaining to the issue of whether foreign proceeding exists. [Q only relates to “foreign proceeding” not recognition more generally] Two important such questions arose in the *Lex Agrokor* case: (1) would recognition be contrary to English public policy and; (2) does it matter that *Lex Agrokor* proceedings for the purpose of reorganization? In other words, will the answer to these two questions change the outcome of whether the liquidation proceedings in Country A may or may not be recognized under English law? I posit the answer to both these questions is no. First, a liquidation process in Country A is very much in line (under the facts that we have been given) with the types of proceedings that are recognized under English law. There seems to be no bad faith or manifestly contrary purpose to recognition, and so there is likely no public policy issue. Second, it does not matter that the proceedings are not “reorganization” proceedings. The definition under Article 2 accounts for liquidation proceedings as well, and so in totality, it is likely that the proceedings will be recognized as foreign proceedings under the MLCBI. **And, if the English courts accept the liquidation in Country A as foreign proceedings, these will most likely also be deemed foreign main proceedings, as the evidence that the Bank’s centre of main interests is in Country A is overwhelming.**

[4.1.2] “FOREIGN REPRESENTATIVES” ANALYSIS: [4.5 out 5]

Collectively, Ms. G and DGF — the Applicants — are likely to be deemed a foreign representative for the purposes of the English recognition application. If the English court finds that the body must be able to arrange for the sale of the Bank’s assets, then DGF will likely be appointed the foreign representative. The elements for a foreign representative are as follows: the representative must be (1) a person or body (whether appointed on an interim basis or not); (2) who is authorized in a foreign proceeding; (3) administer the reorganization or the liquidation of the debtor’s assets or affairs or to act as a representative of the foreign proceeding.

The MLCBI does not require either DGF or Ms. G to be authorized by a foreign court, and validates agencies that make appointments — such as NB. The definition of a foreign representative includes both a body and a person, which DGF and MS. G respectively are — with both Applicants holding the authority to administer the liquidation. Moreover, given that the Applicants are acting “in the context of” the liquidation proceedings and have all the powers to administer the liquidation (listed in the paragraph above), the first two elements are satisfied.

The third element, which ensures the body or person has the power to administer the liquidation — is also met. Under our facts, Ms G is the authorised officer of the DGF of Country A in respect of the liquidation of the Bank, and DGF is the formal “liquidator” entity. Ms. G’s liquidation powers allow her to act as the authorized person of the DGF (under Article 48) and empowers her 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. She is also authorized to *sign all agreements* related to the sale of the bank’s assets. However, she to claim damages from a related party of the Bank, make a claim against a non-banking financial institution that raised money as loans or deposits from individuals, or — most critically — arrange for the sale of the Bank’s assets; these excluded powers remain vested with DGF as the formally appointed liquidating entity. DGF is also an independent, conflict-of-interest free entity (and is even independent from NB itself) that has powers of sale, distribution and the power to bring claims for compensation against persons for harm inflicted on the Bank. Between the two of them — DGF and Ms. G — the Applicants have all the powers that are akin to a receiver/trustee/liquidator in any other jurisdiction.

One potential hiccup is that Article 2(d) defines the foreign representative as **person OR body** — not “and”. If the English courts choose to emphasize the “or” language and order that only one such entity — either Ms. G or DGF — is permitted to be the foreign representative, then the likelihood of the Applicants collectively succeeding is low. In fact, only DGF as the formally appointed liquidator would likely be deemed foreign representative; this is because Ms. G is NOT empowered to arrange for the sale of assets (this power lies solely with DGF. However, if the English court chooses to see the Applicants as a collective, where Ms. G is acts as the representative of DGF in the English proceedings (if recognition is granted), then there will be no hiccup of this nature. This is the likelier outcome, as the GEI has indicated that a foreign representative like Ms. G can act in both capacities: whether as an individual or on behalf of an entity.

For full marks your answer should also have addressed the following:

1. 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.’

*** End of Assessment ***