



**SUMMATIVE (FORMAL) ASSESSMENT: MODULE 2A**

**THE UNCITRAL MODEL LAWS RELATING TO INSOLVENCY**

Commented [SL1]: TOTAL = 35

70%

*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]**

Commented [SL2]: SUBTOTAL = 9 MARKS

Questions 1.1 - 1.10. are multiple-choice questions designed to assess your ability to think critically about the subject. Please read each question carefully before reading the answer options. Be aware that some questions may seem to have more than one right answer, but you are to look for the one that makes the most sense and is the most correct. When you have a clear idea of the question, find your answer and **mark your selection on the answer sheet by highlighting the relevant paragraph in yellow**. Select only ONE answer. Candidates who select more than one answer will receive no mark for that specific question.

Question 1.1

Which of the following statements 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

Commented [SL3]: Correct answer is (c).

**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?*

*(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.**

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]

Commented [SL4]: SUBTOTAL = 8 MARKS

Question 2.1 [maximum 3 marks]

Commented [SL5]: 2 marks

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

Date of commencement is used

*The suitable date of the COMI would be the date that the foreign proceeding has been initiated. But*

*If the COMI has been moved and it is closed to the start date of the foreign proceeding, it will be harder*

*to establish in view that third parties like creditors will have to determine the COMI.*

*In "Morning Mist Holdings Ltd v Krys (Matter of Fairfield Sentry Ltd) (2nd Cir Appeals Apr. 16, 2013)" the appeal to some degree set a different establishment of the date of the COMI. The US Court provides that the COMI should be based on the activities at or around the time the petition (Chapter 15) was lodged as per the statute prevailing in US. Although the EIR and international institution focal point are on the regularity and determinability of the COMI, a court may also take in consideration the time between the start of the foreign proceeding and the date of lodging the petition under Chapter 15 to ensure that the defaulter has not dishonestly manipulate the COMI. Also, any business which is relevant including the winding up or administration of the company may also be factored when considering the COMI. This approach has been used in "Re Toisa Limited judgment by ICC Judge Catherine Burton of 29 March 2019."*

Question 2.2 [maximum 3 marks]

Commented [SL6]: 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."*

1. Statement is in relation to Timely Notice as per Article 14 and requires that foreign creditors are entitled to receive individual notification as well as the concept of equal treatment principle which require that foreign creditors should be notified by expeditious means on timely manners as the local creditors. Hence to avoid the traditional so-called diplomatic channels where letters rogatory or any other similar channel were used which cumbersome and takes time to be delivered.
2. Statement 2 relates to safe Conduct Rule as provided in Article 10 where court of from the enacting country does not provide jurisdiction upon application of the foreign representative for recognition of the external proceeding over the all of the asset and the same article has been confirmed in orders by some courts. Any misconduct or tort by the foreign representative may lead to consequences.
3. Statement 3 relates to the presumption of insolvency as per Article 31 where the rebuttable presumption is that recognising of foreign main proceeding prove that the defaulter is insolvent. Another rebuttable presumption is the place of the COMI as per Article 16(3) is that the registered office of the defaulter is the COMI.

**Question 2.3** [2 marks]

Commented [SL7]: 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.**

The Court of Appeal agree with the first decision of Mr. Justice Hildyard and concentrate on the jurisdictional question which has been raised by the foreign representative in respect of the indefinite Moratorium Continuation. The question was about if the UK court lacked jurisdiction to provide the indefinite Moratorium Continuation. The court of appeal stated that the question was not about the jurisdiction but as per the settled practice, the court should not give an order for the indefinite Moratorium Continuation if the following would happen:

1. *It will deprive the challenging creditors to benefit from their English law rights as per Gibbs Rule; and/or*
2. *Providing the stay in respect of the indefinite Moratorium Continuation where the reconstruction process of Azeri has terminated.*

*In respect of point A, the court held that the order would have been granted if the indefinite Moratorium Continuation would be a key factor in the protection of the IBA's creditors and the stay would be effective way which will result to such protection.*

*From the above point 2, the Court of Appeal stated that a foreign proceeding when terminated and the foreign representative is no more in office, there is no requirement for further order as any relief which has been granted before under the Model Law should come to an end. The court held that no relief under the Model Law shall continue after the end of the relevant foreign proceeding.*

*The court of appeal verdict was in favour of the challenging creditors as per the above point mentioned and state that the English court would have order the indefinite Moratorium Continuation if the stay would protect the interest of IBA's creditors and it would be suitable for achieving this protection but these conditions are not been satisfied.*

*in respect to evidence provided, the court recognise that the creditors no more need protection to enable the foreign proceeding to achieve its goal. It was argued that the creditors who form part of the restricting process would not benefit from the order if the English creditors are able to enforce their stayed claims but the court stated that this argument is far too indirect and enigmatic to adhere with the test of necessity.*

*The court also found that IBA would have benefited from a parallel scheme of arrangement but do not initiate such process under the CIGA which was adopted in June 2020. IBA would benefit from so-called the "cross-class cram down"*

*But if these same cases had been held in another jurisdiction, like in the United States, the outcomes would not have been the same.*

**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***

**Commented [SL8]:** 1 marks

Art 18

**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.**

*As per the scenario, it is concurrence of foreign domestic proceedings, and the start of a domestic proceeding does not fend off or stop the foreign proceeding, but primacy is given to the local proceedings. But as the foreign one is considered as the main proceeding, the primacy may not be appropriate in all circumstances, where the domestic proceeding limit the interest for the local one only. Article 28 and Article 29 recognise that a foreign proceeding does not prevent a local proceeding to start if the defaulter has asset in the local state. The local proceeding may be limited to local asset, but it may also include some assets which are abroad. There are 2 limitations:*

*To be able to access the foreign assets, there is a need for cooperation and coordination as per Articles 25-27 and the assets located in the foreign state must be under the administration of the enacting state.*

*As the COMI is where the foreign proceeding starts, there would be an automatic mandatory relief and the foreign representative is duty bound to update the court on any new developments.*

*But a court has provided that the jurisdiction is not extended to the debtors itself. The local proceeding can exist even if there is a foreign main proceeding so as relief in respect of the recognition of the local creditors' claim and the foreign proceeding cannot substantively alter the creditors' claim. The recognition in respect of relief may go beyond the scope of the MLCBI as if the local claims have not been settled by the foreign discharge order, the local creditors may start/ continue the local proceeding.*

*Any relief as per Article 19, or as per Article 21 must be in accordance with the law which regulates local insolvency proceedings. Automatic relief in respect to Article 20 would not also apply*

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

Commented [SL9]: SUBTOTAL = 9 MARKS

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

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

Question 3.1 [maximum 4 marks] [2.5 out of 4]

**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.**

Co-operation is very important when dealing with cross-border insolvency. Cross-Border co-operation is dealt under articles 25-27 of the Model Law. [1] In view that there is a lack of legislative framework in many countries in respect of co-operation and co-ordination. The model law helps judges and empowered the court to make decision in respect of co-operation between different countries on cross-border insolvency. The aim is to enable courts and the insolvency representatives to be more effective and attains the optimal results. A very important aspect of cross-border insolvency aim is the equal treatment of stakeholders across the different countries and co-operation between courts and insolvency representatives with facilitate this process. it will less time consuming and avoid cost ineffective procedures [1/2] like letters rogatory and assistance from consular. Co-operation does not rely on recognition and may start at early stage before the insolvency representative request for recognition. We may also say to an extent that cross-border judicial co-operation rely on the principle of comity and it will help the foreign representative of State B to secured the asset value found in state A.

As per article 25 (1) of the model law and covered by Article 1, it is mandatory for domestic courts to co-operate and have direct communication with the foreign court or with the foreign representative. The domestic court must co-operate with the foreign representatives or the foreign courts to the maximum capabilities. Article 25(2) enables enacting state's court to communicate, request for information and any assistance directly from the foreign courts and the foreign representatives. Hence the court in state A will deal directly with the foreign court upon request of the insolvency representative of state A [1]. The court may also request for assistance elsewhere and the co-operation is not only applicable for recognition under Article 17 but also for proceeding that is not a foreign main or non-main proceeding depending on the presence of the assets of the debtors.

*The domestic insolvency practitioner has a mandatory duty to co-operate and communicate with the foreign courts or foreign representative (if any) to the maximum possible way as per Article 26. The practitioner under the supervision of the local court and he may also directly communicate with the foreign court or representative for his benefit under Article 26(2). Co-operation may be by way as stipulated in Article 27 and same is illustrative and not exhaustive.*

***You should have included a discussion on legal standing (Article 9 MLCBI) and that the foreign representative has automatic standing before the courts in State A without having to meet any formal requirements such as a license or any consular action. This allows the foreign representative to safeguard and pursue assets of the debtor estate in State A before its courts.***

***A discussion on the key benefits of both the access provisions and the cooperation provisions - they save time and therefore also costs, as a result of which value destruction can be avoided, and value enhancement promoted.***

Question 3.2 [maximum 5 marks] [2.5 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.***

*The COMI shall be a very important aspect in determining the foreign main proceedings or a foreign non-main proceeding and same may affect the recognition order. The COMI is define the place the defaulter operates and conducts their non-transitory economic activity by way of human means and conducting his activities of goods or services.*

*Hence for a foreign proceeding to be valid, it must be opened in the state where the COMI has been established or at most an establishment must be found in the enacting state. [1] - Article 17*

*An enacting state may refuse to some application under the Model law as discuss below:*

- *Application in respect to Banks and insurance companies are excluded from the Model Law, as there may be a need for these financial institutions to be administered under a special regulatory regime. [½] - Article 1(2) - exclusions based on Article 1(2) of the implemented Model Law in State A*
- *Application of insolvency proceeding against public utility companies or consumers/non traders may also be prevented for public interest and shall require special administration to avoid systemic risk. This procedure should not limit a proceeding because it required special regulatory regime. It should be rendered more transparent for foreign users by communicating this exclusion in the national law.*
- *The public policy exception as per Article 6 of the Model law provide comfort to an enacting state that its sovereignty will be protected. hence the court of an enacting state has the discretion to rebut any application which manifestly is not in the interest of the public policy of the enacting state. [1]*

*Any conflict between the Model law and treaty or multi state agreement which has been adopted by the enacting state may prevent the application of a foreign proceeding.*

- *As per the Agrokor case, the English Court established the following in respect of recognition of a foreign proceeding and provide recognition:*
- *Foreign law: the Lex Agrokor is in respect of the Croatian law and questions related to foreign law are questions of fact which has to be determined on expert proof by the English Court.*
- *Single Group Proceedings: Nothing is to be found in the Model Law materials which will prevent a single group proceeding, in respect of the Agrokor EAP because the foreign proceeding is for a single debtor*
- *Law relating to insolvency: There is no need under The Model Law whereby insolvency law should be a characteristic of the foreign proceeding If any insolvency matter or severe financial difficulties are addressed as per the case of Lex Agrokor. The obligation for the law to be in respect of insolvency is met even if insolvency has not been illustrated and there was other reason to initiate the proceeding. At the start of the proceeding, no one challenge the evidence that Agrokor and the group were facing serious financial difficulties.*
- *Court supervision: The supervision of the court is quite low. As per the CBIR, the supervision can be potential instead of actual and should be direct instead of indirect. Lex Agrokor has provided some control to the Croatian government would not mean that the court supervision should be negated.*

- *Collective nature of the proceedings: The defendant stated that the proceeding "collective" would relate to the creditors of Lex Agrokor but the court stated that the proceeding is more collective than not, based on the consolidated nature of the EAP.*
- *For the purpose of reorganisation or liquidation - The court affirm that the restructuring and liquidation as per the CBIR is met and the proceeding is valid.*

*Also, reciprocity in respect to recognition is not required under the Model law and hence no recognition can be denied only on the ground that no reciprocity exists in State A. As many designated countries do not have the reciprocity requirement, South Africa has made the reciprocity requirement as dormant.*

**Your answer must also include the following:**

1. **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.
2. **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).
3. **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.

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.***

*Even before a recognition order is given, the court is able to provide an urgent interim relief once an application for recognition is made as per Article 19. Article 21 stipulates that the court has discretionary power to grant a post-recognition relief. In considering the pre- and the post- recognition relief, the court will take into consideration that the interest of all stakeholders (creditors and other parties which has interest in respect of the recognition) are suitably protected. The court may apply conditions to the relief if required. The court may also alter or ceased a relief at the request of the foreign insolvency practitioner. As per Article 23, a foreign representative be able to start actions as per the law of the enacting state to prevent or make some non-appropriate legal act invalid in the interest of the creditors. Inappropriate act would be in term of claw-back rights and antecedent transactions.*

*The enacting state court power is not unlimited in respect of the appropriate relief that it can provide.*

*Below are limitations under the Model law where relief can be provided by the court.*

- *No provision is made under the Model Law in respect of enforcing an insolvency-related in personam request.*
- *Adopting a foreign insolvency regulation to a contract which is governed by the English law is not adequate relief which the English can provide.*
- *The English court established that no jurisdiction is available to provide the Azeri foreign representative with a non-definite continuation with respect to the automatic moratorium relief for the foreign main proceeding opened in the state of Azerbaijan. The non-definite continuation of the automatic moratorium was provided at a previous recognition order.*

*However, if the above cases were judged in other states like in the United States, may be the orders in respect of relief would not be the same as in the English court.*

*The Model Law enable alignment of relief in respect of application for recognition of a foreign proceeding to available relief which exist in similar proceeding under the local law.*

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?**

*In "Igor Vitalievich Protasov and Khadzhi-Murat Derev" the judge stated that the court as per Article 21 has jurisdiction to continue with the worldwide freezing order under Article 19 but established that there are relevant constraints and limitation which is prohibited the proper exercise of the jurisdiction. The court established that the English bankruptcy law provide some other kind of protection which will not enable the court to provide the freezing order or any related injunction. The Court further stated that the Model law intention is to bring the foreign trustee or bankruptcy in similar position as far as possible as the officeholder under the domestic law. Hence, the effect of recognition is to be consistent and put into the same wide framework of the insolvency legislation. In the absence of exceptional rational, the court stated that the freezing or any similar order is not necessary and justified.*

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] {9 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 [6 out of 10]**

**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 out of 5]**

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 whether the Bank's liquidation comprises a "foreign proceeding" within the meaning of article 2(a) of the MLCBI [maximum 10 marks]; and**

**To form part of a foreign proceeding, the following conditions must be met:**

- **There should be a proceeding which may include an interim proceeding. Proceeding can either be established by statute or a judicial order and only one of the conditions has to be met. As the bank was in administration and afterward in liquidation, hence there is insolvency proceeding against the bank. NB under**

*the statute can decide where the bank is insolvent and when to revoke the licence of the bank. Once NB has declared a bank insolvent, DGF can start the administration process to remove bank from the market. DGF is duty bound to start liquidation process against the bank on the licenceis revoked.*

- *The proceeding must be either judicial or administrative and, in the scenario, the bank is under administrative proceeding as discuss above.*
- *The proceeding must be collective in nature. As majority shareholder (shareholding of 95% ) is held by Mr Z through many other entities where some are incorporated in England and it seems to have a multi-million-dollar fraud where monies were transferred overseas and even in England make the proceeding as collective in nature. Collective insolvency may be based on the willingness to attain a coordinated and a global solution in the interest of all stakeholders. In "Aero Inventory (UK) Limited", the court ordered that the proceeding was a foreign one as the proceeding affect the creditors collectively and not solely the private rights and the immediate parties right.*

**For full marks, your response should also have addressed the following regarding the "collective nature" element:**

- 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."*

- 3. Based on the facts provided the understanding is that *all* of the Bank's creditors are entitled to claim in the liquidation and that their claims are met from available assets, according to the statutory order of priorities. Consequently, the conclusion can be reached that the Bank's liquidation is a "collective proceeding".**

- *The proceeding has to be in foreign country and from the scenario, the initial proceeding is in country A and the applicants are willing to initiate a foreign proceeding in England.*
- *It has to be about insolvency law and the proceeding which is opened by the applicants relates to law of insolvency as much as the applicants are liquidator of the bank and are applying for recognition under the CBIR.*

**For full marks, your response should also have addressed the following regarding the "pursuant to the law relating to insolvency" element:**

**1. The Guide to Enactment provides at paragraph 48:**

"Acknowledging that different jurisdictions might have different notions of what falls within the term "insolvency proceedings", the Model Law does not define the term "insolvency". However, as used in the Model Law, the word "insolvency" refers to various types of collective proceedings commenced with respect to debtors that are in severe financial distress or insolvent."

Further explanation is provided at paragraph 73:

"This formulation is used in the Model Law to acknowledge the fact that liquidation and reorganization might be conducted under law that is not labelled as insolvency law (e.g. company law), but which nevertheless deals with or addresses insolvency or severe financial distress. The purpose was to find a description that was sufficiently broad to encompass a range of insolvency rules irrespective of the type of statute or law in which they might be contained and irrespective of whether the law that contained the rules related exclusively to insolvency."

**2. Article 76 of the LBBA clearly set out Country A's specific insolvency procedures for insolvent banks. The Bank's liquidation was commenced pursuant to those provisions and in my judgment should be considered by this Court as being "pursuant to a law relating to insolvency".**

- *As per the requirement of Article 2, the assets and the affairs of the bank has to be under the authority and conduct of a foreign court. The GEI takes note that the MLCBI states that neither control nor supervision has to be met for this aspect nor the time that the control or supervision will arise. The conditions could also be potential and not necessarily actual. Court has also provided that the control and supervision should not be exerted by the court directly but could be through an insolvency representative duly mandate by the law. The GEI [para. 75] observe that proceedings where the court control or supervise at a later point in time the insolvency procedure should not be ignored, and it form part of the condition. Hence, we can say that the assets and affairs of the bank is under the foreign court control and supervision.*
- *The proceeding needs to relate to reorganisation or liquidation and the Commercial Bank for Business Corporation was in administration and now in liquidation.*

**From the above, we can state that the court may conclude that the foreign proceeding is valid even if Country A has not included the MLCBI in the local law. The**



*proceeding seems to be a main foreign proceeding as the COMI is in country A and there may be an automatic recognition. But we also have to consider the fact that:*

- *The Commercial Bank for Business Corporation is a commercial bank which is under investigation of multi-million dollar fraud;*
- *The bank is insolvent as per article 76 of the LBBA and has been involved in risky operations (48% of the liabilities is toward individuals and adverse asset where the repayments of this debts is questionable); and*
- *The licence of the bank has been revoked and now the bank is in liquidation;*
- *Claims toward creditors' amount to approximately USD 1.113 billion. whereas the estimated deficiency is more than USD 823 million.*

**[This part of the answer does not address the Q in 4.1.1]**

*These above issues may create a systemic risk for the economy of Country A and hence the public policy exception as per Article 6 may apply. It may be different in different countries and is only use in exceptional cases based on consistent basis globally in respect of fundamental importance for Country A. The English court would have to take consideration of the public policy exception as per Article 6 before providing his ruling.*

*Article 1 (2) of the Model law may also exclude the foreign proceeding as the bank as the financial institution need to be administrated by a special regulatory regime and need to have special solutions when it relates to cross border insolvency. This process would not limit the recognition of the foreign proceeding merely on the fact that it required a special regulatory regime. It is advisable that the local law based on the Model Law be rendered more transparent in the best interest of foreign users, and this exclusion should be communicated in the national law.*

*To qualify as a foreign representative, the applicants have to meet the following criteria:*

*They should be either a person or a body appointed as insolvency representative which may include on an interim basis. The applicants are a person represented by Ms G in her capacity as authorised officer of DGF and the body will be DGF which is empowered by the local law of country A.*

*A foreign representative will be the one who is authorised to either administrate the proceedings which as per GEI include to seek recognition, cooperation, and relief in another state or to be the representative in the foreign proceeding. The MLCBI has not define whether the representative must have the authorisation of the foreign court. Hence the applicants will be authorised to act as foreign representative. The foreign representative has to provide the court with a certified copy of his appointment and the documents relating to the decision of the winding up. In the absence of the said document, any evidence which will be acceptable to the court proving the existence of foreign winding up proceeding and his appointment. As per Article 16, if the document is valid, the court is empowered to presume that the*

appointment is valid. The court is also required that the document is authentic even if not legalised.

**For full marks your answer should also address the following:**

- 1. 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.**
- 2. 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".**
- 3. 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.**
- 4. 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.**
- 5. 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.***

*From the above, we may conclude that the Applicants are the foreign representatives as per Article 2 (d).*

\* End of Assessment \*