



SUMMATIVE (FORMAL) ASSESSMENT: MODULE 2A

THE UNCITRAL MODEL LAWS RELATING TO INSOLVENCY

Commented [SL1]: TOTAL = 42

84%

This is the summative (formal) re-sit 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

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

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

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]

Question 2.1 [maximum 3 marks]

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

The center of main interests (COMI) is a concept not defined in Article 2 of the MLCBI. Though not defined, a determination of a debtor's COMI is necessary for deciding whether or not a proceeding is main or non-main. A determination of this has a bearing on the reliefs available to a foreign representative on request.

For an understanding of a debtor's COMI, Article 16 (3) of the MLCBI establishes two presumptions these are; an individual's COMI is the habitual residence and that of a company is the registered office. These presumptions are rebuttable.

Since the date on which a debtor's COMI is decided is not explicitly addressed in the MLCBI, the courts have applied different approaches and factors, consulted the UNCITRAL Guide to Enactment and the European Insolvency Regulation (EIR) (which contains a related interpretation of the concept) in determining this all important concept.

In summary, the courts have decided on the COMI of a debtor either by considering the;

- a. *the date on which the recognition application was heard;*
- b. *the date on which the recognition application was filed and*
- c. *the date on which the foreign proceeding was initiated.*

Whether the court applies the approach in points a, b or c as above requires an all-inclusive exercise engaged in by the court which may even include looking at the activities the debtor is engaged in to arrive at the appropriate date on which a debtor's COMI is determined..

Question 2.2 [maximum 3 marks]

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

Commented [SL4]: SUBTOTAL = 7 MARKS

Commented [SL5]: 1 mark

MLCBI does not expressly indicate the relevant date for determining the COMI of the debtor. However, the UNCITRAL Guide to Enactment suggests that the date of commencement of the foreign proceedings is the appropriate date for determining the existence of the COMI or an establishment of the debtor. Discussion of the US courts and *Morning Mist Holdings Ltd v. Krys (Matter of Fairfield Sentry Ltd)* also required.

Commented [SL6]: 3 marks

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: Article 14 of the MLCBI requires that notification be given to all creditors. The referenced article emphasises the point that the notification should be given to creditors in the enacting state and all known creditors who have addresses outside the enacting state.

Article 14 ensures that creditors are not denied notice simply because a creditor does not have an address in the enacting state. The Article further ensures all known creditors are given equal treatment when it comes to the notification as the referenced article makes it a requirement.

Statement 2: Article 10 of the MLCBI deals with the "Safe Conduct Rule".

This rule ensures that the court does not, only on the ground that there is an application before it "subject the foreign representative or the foreign assets and affairs of the debtor to the jurisdiction of the" enacting state.

Where the court must subject the foreign assets and affairs of the debtor to the jurisdiction of the court in the enacting state it should be done to determine the application.

Statement 3: The statement refers to the center of main interests (COMI) concept. Although this concept is not explicitly defined in the MLCBI, Article 16 (3) of the MLCBI provides two rebuttable presumptions to help define the concept. Thus, unless contrary evidence is adduced, it is presumed that an individual's COMI is the habitual residence while the COMI of a company is presumed to be where it has the registered office.

Question 2.3 [2 marks]

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

Generally, the court is not restricted in granting the foreign representative any relief under the MLCBI. However, in granting the relief, the court may subject the grant of the order to any conditions it deems fit.

The court of appeal in the IBA made it clear that an indefinite stay may be granted if the court is satisfied that;

- a. the continuous stay was essential to safeguard the interest of creditors and
- b. the continuous stay was the appropriate way to achieve the protection envisaged.

Commented [SL7]: 1 mark

Also to be discussed: Gibbs rule, Azeri reconstruction, art 18 MLCBI

Should an applicant fail to satisfy the stated conditions then, the court would refuse to grant the application to grant an infinite stay. In any case, there was no indication under Article 21 that the reliefs envisaged were permanent. Further, there were other reliefs available to the court.

Question 2.4 [2 marks]

Commented [SL8]: 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.

Before an application for recognition is decided, the court in the enacting state may and on the request of a foreign representative, grant reliefs essentially to protect the interests of third parties which includes the debtor and the debtor's assets. Where a domestic proceeding has already been opened in respect of a debtor under Article 29 (a), the court in the enacting state after recognition of a proceeding as a main shall, under Article 29 (b) review any relief granted before recognition and modify or terminate any relief granted if the court finds that a relief granted was inconsistent with the proceeding in the enacting state.

After a recognition order has been made, some changes may arise in the foreign main proceeding. These changes may affect the reliefs that were granted before the recognition order was made. It is the duty of the foreign representative to, under Article 18 of the MLCBI, promptly inform the court in the enacting state of "any substantial change" in the appointment of the foreign representative and or the recognised foreign proceeding.

It is also the duty of the foreign representative to bring to the attention of the court, any other foreign proceeding that the foreign representative has come into the know.

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

Commented [SL9]: SUBTOTAL = 14.5 MARKS

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

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

Question 3.1 [maximum 4 marks] [3.5 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.

Article 9 of the MLCBI entitles a foreign representative the right of direct access or standing in the courts of the enacting state in this case State A. This implies that the foreign representative is permitted to apply directly to a court in State A without the usual formal requirements such as licenses or consular action that is required in such instances. It is noted that there is no requirement for prior recognition of the foreign proceeding before this right can be exercised. [1]

In addition to Article 9, Article 11 of the MLCBI also ensures a foreign representative has access to the courts in the enacting state. In respect of Article 11, however, this access entitles the foreign representative to apply to the court to commence a domestic insolvency proceeding against the debtor in the enacting state. Though prior recognition of the foreign proceeding is not required under this Article, for purposes of opening the domestic insolvency proceeding under the laws of State A, the foreign representative needs to show that the debtor is insolvent. [1]

The request to commence domestic proceedings can be made without modifying any of the conditions for opening the proceeding in the enacting state. The condition is that the insolvency proceeding may be initiated subject to the conditions for initiating the insolvency proceeding being met.

The MLCBI also allows the foreign representative to have standing in the court of the enacting state and to participate in a proceeding involving the debtor in the enacting state. Therefore, upon recognition of the foreign proceeding in the enacting state, the foreign representative can, among other rights, make petitions and submissions relating to the protection, realisation or distribution of assets belonging to the debtor. This right is as per Article 12 of the MLCBI.

The standing and access provided under the MLCBI are beneficial to a foreign representative in the sense that it allows for access to courts in foreign states without the usual formalities.

In respect of coordination and cooperation with foreign courts and foreign representative, Articles 25, 26 and 27 of the MLCBI permits such coordination and cooperation. It is added that the rights permitted under these articles are not conditional on a recognition order. These rights can be accessed before a recognition application is heard in the enacting state. [1]

Article 25 emphasises direct communication and the courts in this case, State A and B, to cooperate to the maximum extent possible with the foreign court or foreign representative. The court is enabled to request for assistance or information directly

from the foreign court or representative. This opens a direct communication channel between the court in the enacting state and with a foreign court or foreign representative.

Article 27 outlines the forms of cooperation anticipated under the MLCBI. Article 27 states that the cooperation envisaged in Articles 25 and 26 may be realised by any suitable means which may include;

- a. the appointment of a body or person to act at the direction of the court;*
- b. the dissemination of information by any means considered suitable by the court*
- c. the coordination of the administration and supervision of the debtor's assets and affairs;*
- d. the approval or implementation by the courts of agreements concerning the coordination proceedings;*
- e. coordination of concurrent proceedings as it relates to the same debtor.*

Cooperation does not require recognition of the foreign proceeding in the enacting state. This right can therefore be exercised before the recognition application is made in the enacting state.

*Generally, these rights granted under the MLCBI are intended to, among other benefits, bring some certainty in the process by spelling out the framework for the process, extend cooperation among the courts, save time [1/2] by clearing the usual time-consuming steps that normally impede cross-boarder issues and avoid the multiplicity of suits which may be quite costly and detrimental to the realisation of assets. **One of the key benefits of both the access provisions and the cooperation provisions are that they save time and costs and as a result value destruction can be avoided and value enhancement gained.***

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

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.

In addition to the qualifications under Articles 2(a) and (b) of the MLCBI, there are other requirements that a foreign representative must comply with for a recognition application in the enacting state (State A) to be successful.

First, it must be noted that in the context of recognition, the MLCBI does not insist on reciprocity. Thus, whether a recognition application is successful or not will not be

based solely on the ground that the foreign court in which the foreign proceeding was commenced would not extend the same rights under a recognition application to a foreign representative from the enacting state.

An application for recognition of a foreign proceeding maybe applied under Article 15 (1) of the MLCBI. This Article allows a duly appointed foreign representative to apply to a court in the enacting to recognise the foreign proceeding in which the representative was appointed.

Article 15 (2) lists the documents required to be submitted in addition to the application for recognition. Article 15 (2) requires that an application for recognition should be supported by any of the following documents; a certified copy of the decision appointing the foreign representative and commencing the foreign proceeding in the foreign state or a certificate from the foreign court affirming the existence of the foreign proceeding and the appointment of the foreign representative or where the foreign representative is unable to produce the documents listed in Articles 2 (a) and (b), the representative shall support the recognition application with any other evidence agreeable to the court in the enacting state. The evidence to be adduced should still confirm the existence of the foreign proceeding in the foreign state and the appointment of the representative. [1]

Article 15 (2) (a) and (b) offer flexibility on the type of document a foreign representative must produce to satisfy the court of the existence of the foreign proceeding and appointment of the foreign representative.

If a foreign representative is unable to produce any of the documents provided under Article 15 (2) a and b, Article 15 (2) c, allows for the foreign representative to support the application with any other document or evidence suitable to the court. The importance of Article 15 (2) is that, the application must necessarily be supported with evidence to show the existence of the foreign proceeding and the appointment of the foreign representative.

Article 15 (3) also makes it mandatory for the foreign representative to provide a statement in addition to the application for recognition, indicating all known foreign proceedings against the debtor.

On submission of the documents or evidence under Articles 15 (2) and (3), the court may request that any document be translated into the official language of the enacting state.

It must be stated that Article 15 does not require the court in the enacting state to enquire whether or not the foreign proceeding was properly initiated in the foreign state. The important requirement under the referenced Article is that the foreign representative must produce some documents or evidence to satisfy the court in the

enacting state that the foreign proceeding indeed took place and the foreign representative was appointed.

Thus the initial hurdle to surmount as a foreign representative before a recognition application can be considered by a court in the enacting state is for the foreign representative to fulfil the evidentiary requirement under Article 15.

Should the evidential requirement be met, the order for recognition of the foreign proceeding would be made under Article 17 of the MLCBI.

Further to the requirements under Article 15, the court can make the following presumptions under Article 16 of the MLCBI;

- a. That the documents or evidence submitted to the court were obtained within the applicable law of the foreign court without enquiring into whether or not the foreign proceeding was properly commenced under the laws of the foreign state. Thus the court can presume that the proceeding is a proceeding under Article 2 (a) and that the foreign representative was duly appointed.*
- b. That all documents submitted in support of the application for recognition are genuine without any further requirement of proof of its authenticity.*
- c. That for a corporate debtor, COMI is the registered address and for an individual his/her habitual residential address is the COMI. [½]*

Once these presumptions and requirements have been considered by the court, to determine the type of relief to afford the court will need to determine whether the foreign proceeding is a main foreign proceeding or a non-main foreign proceeding. A determination of this will affect the nature of the relief accorded the representative under Articles 20 and 21 of the MLCBI.

The debtor in this case is a corporate debtor. The applicable presumption per Article 16(3) is that the debtor's registered address is its COMI. As indicated, these are presumptions that a court is entitled to make. The presumption can therefore be rebutted on the submission of contrary evidence. Thus, should a foreign representative wish to show otherwise, the burden is on the representative to produce enough evidence to successfully rebut the presumptions under Article 16 (3). [½]

Although the MLCBI applies to a "foreign proceeding" as defined in Article 2 (a) the MLCBI excludes proceedings on some specialised entities such as banks or insurance companies. These specialised entities are regulated differently in states and are subject to special insolvency rules. Thus, the court must find out whether or not the debtor falls within excluded entities within the meaning of Article 1(2). [1]

Article 6 of the MLCBI contains a public policy exception and gives a court the discretion to refuse to determine an issue before it if it is found that a determination of the matter would contravene the public policy of the enacting state (State A). [1]

Article 3 of the MLCBI emphasises the importance of international obligations of the enacting state as against local law. Therefore, to the extent that a local law conflicts with the state's international obligations which may arise from any treaty or other form of agreement, the terms of the treaty or international agreement shall supersede Local laws are thus, subject to the terms of any treaty and international obligation to which the enacting state is a party. [1]

In considering a recognition application, the court in the enacting state must consider whether there are any subsisting treaties or international agreements that would be breached should the application be granted. Should the court decide that the recognition of a foreign proceeding would conflict with the state's international obligations, then the application would be refused.

Question 3.3 [maximum 5 marks] [5 out of 5 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.

Article 19 of the MLCBI, lists the reliefs that may be granted on request by a foreign representative pending a determination of a recognition application. These reliefs are granted where it is apparent that the reliefs are urgently needed to protect the assets of the debtor or the interests of creditors. The court can, if urgently required, stay an execution against the assets of the debtor and or entrust the administration of all or part of the debtor's assets located in the enacting state to the foreign representative or any authorised person. [1]

In addition to this, the court may provide for the "examination of witnesses" as per Article 21 (d), cease the debtor's right to transfer its assets per Article 21 (c) or grant any existing relief permitted under the laws of the enacting state as per Article 21 (g). [1]

The court in entrusting the assets of the debtor to a foreign representative must satisfy itself that the interests of the creditors is adequately protected. In the case where the foreign proceeding is determined by the court in the enacting state as a foreign non-main proceeding, the court must satisfy itself that the reliefs granted are linked to the debtor's assets in the enacting state.

Generally, the court has the discretion to refuse to grant any pre-recognition relief if it is determined by the court that the grant of the relief will not be in the best interest of creditors and or other interested parties including the debtor.

The provisional reliefs granted under Article 19(3) unless otherwise extended by the court, ceases when the application for recognition is determined. To exercise the rights

under Article 19, the Article requires that the request must be made by a foreign representative and an application for recognition should have been made to the court before the court can consider granting the reliefs. [1]

It must be noted that these reliefs are not exhaustive. Where the court deems it fit to grant any relief to preserve and protect the assets of the debtor or the interest of creditors, the court may grant the needed reliefs following the request.

In addition to this, Articles 3 [1] and 6 [1] of the MLCBI imposes on a court enquire on whether or not the grant of the relief would conflict with any international obligation of the enacting state. Further, the court is required to confirm whether or not the grant will go contrary to the public policy of the enacting state.

Article 21 of the MLCBI establishes discretionary reliefs that the court may grant following recognition of a foreign proceeding. Again, the reliefs envisaged in this Article are not exhaustive. The court has the discretion to grant additional reliefs which are available under the local laws of the enacting state. [1]

The test here is that the court must be convinced that the interest of the creditors and other interested parties are amply protected. This article applies to main and non-main foreign proceedings. However, in granting the reliefs, where the proceeding is non-main, the court must satisfy itself that the relief would concern assets that per the laws of the enacting state should be administered in the foreign main proceeding or relates to information necessary in the proceeding.

Again, the emphasis is placed on the protection and or preservation of the assets of the debtor and interests of creditors and other interested parties.

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 world freezing order granted according to Article 19 of the MLCBI is unlikely to subsist post recognition of the foreign proceeding under Article 21 if it is determined by the court that there are other forms of protection available .

The court in the case of Igor Vitalievich Protasov and Khhadzi-Murat Derev confirmed this position. Thus, where the applicant in the case requested the court to continue the freezing order made pre-recognition the court was of the opinion that though the court had jurisdiction to hear the matter, without contrary reasons, the court was not persuaded that any "special or exceptional reasons" had been given for the extension of the freezing order.

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] [11.5 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 [7 out of 10]

A “foreign proceeding” under Article 2 (a) of the MLCBI is “a collective judicial or administrative proceeding in a foreign State including an interim proceeding, pursuant to a law relating to insolvency in which proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganisation or liquidation”

For a “foreign proceeding” to qualify as such, the proceeding must satisfy the following conditions;

- a. the nature of the proceeding should be judicial or administrative within the insolvency laws of the foreign state;**
- b. the creditors must be involved in the proceeding (“collective nature” element);**
- c. the assets and affairs of the debtor must be under the control of the court in the foreign state;**
- d. the purpose of the proceeding must have been the reorganisation or liquidation of the debtor.**

First, it is observed that Country A has not adopted the terms of the MLCBI. This fact does not affect the issue at hand as there is no requirement for Country A to have adopted the MLCBI before the applicant can find a remedy before the court.

The facts presented to the court must support the cited requirements for the Bank’s liquidation to satisfy the conditions of Article 2 (a) of the MLCBI.

Now the application of the facts against the conditions.

Requirement 1

Is the proceeding before the court judicial or administrative within the insolvency laws of the foreign state (Country A)?

Article 2(a) of the MLCBI requires that a foreign proceeding must be judicial or administrative in nature. The referenced Article does not demand that the proceeding must be judicial and administrative. The test is that it must be one and not both.

From the affidavit the procedure required under the insolvency laws of Country A are as follows;

- 1. Under article 75 of Banks and Banking Activity (hereinafter referred to as BBA) the National Bank (hereinafter referred to as NB) must first identify the Bank as troubled.**
- 2. Pursuant to article 76 of the BBA, the Bank must be classified as insolvent. It is noted that though this article sets out the process by which the Bank can be classified as insolvent, article 77 empowers the NB to liquidate the Bank without necessarily going through the steps enumerated under article 75.**
- 3. Once the Bank is declared insolvent, the Deposit Guarantee Fund (hereinafter DGF) (the institution responsible for taking steps to wind up a bank and remove it from the market) would, per article 34 of the Deposit**

Guarantee Fund Law, commence the process of winding up the Bank and remove it from the market.

- 4. Once NB decided to withdraw the Bank's license, DGF is mandated to start the liquidation process against the Bank.**

From the facts, the Bank was declared troubled by the NB on 19th January 2015. Without any improvement in the Bank's business position, the NB took steps to declare the Bank insolvent. DGF commenced the the process of winding up and withdrawing the Bank from the market.

NB subsequently withdrew the Bank's license and further decided that the Bank be liquidated. This triggered the mandatory obligation under the Deposit Guarantee Fund Law which permitted DGF to commence the liquidation process.

From the above, the process has met the requirement. From the facts, the process was carried out by the government body, DGF within a specified law of Country A.

I think that the proceeding has satisfied the condition that the proceeding was administrative. [Very well addressed]

Requirement 2

Was the proceeding collective in character?

To satisfy the test of collectivity, the proceeding must satisfy the most important question under this requirement which is; whether or not, all the assets and liabilities of the Bank were significantly considered during the proceeding for the benefit of all creditors. This consideration is done subject to any restrictions imposed by the laws of Country A on the rights of any class of creditors.

Also, for the the proceeding to be collective in nature it must be for the proceeding should be for the purpose of liquidation or reorganization.

The steps taken by NB and DGF were for the purpose of liquidating the Bank and removing it from the market.

For full marks, your response regarding this element should also have addressed 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.”

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”.

Requirement 3

Are the assets and affairs of the debtor under the control or supervision of the court in Country A?

The MLCBI does not define the level of control or supervision the the court is required to have over the assets or affairs of the debtor in order to meet this element. The MLCBI does not also indicate the time frame within which this supervision or control should be exercised.

From the facts, DGF has overriding authority to manage all the assets and affairs of the Bank.

For full marks, your response should also have addressed the following regarding this requirement:

- 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 Re Sanko Steamship Co Ltd [2015] EWHC 1031 (Ch) Simon Barker QC, noted that a foreign proceeding may be recognised where the control or supervision of the proceeding is undertaken by a non-judicial administrative body.**
- 4. The Guide to Enactment states: “74) The Model Law specifies neither the level of control or supervision required to satisfy this aspect of the definition nor the time at which that control or supervision should arise. Although it is intended that the control or supervision required under subparagraph (a) should be formal in nature, it may be potential rather than actual. As noted in paragraph 71, a proceeding in which the debtor retains some measure of control over its assets, albeit under court supervision, such as a debtor-in-possession would**

satisfy this requirement. Control or supervision may be exercised not only directly by the court but also by an insolvency representative where, for example, the insolvency representative is subject to control or supervision by the court. Mere supervision of an insolvency representative by a licensing authority would not be sufficient."

5. *In this case the DGF has control of all of the Bank's assets and overall control of the liquidation.*
6. *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.*
7. *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.*

Requirement 4

Was the purpose of the proceeding to reorganise or liquidate the debtor?

From the facts, the whole exercise of NB declaring the Bank as troubled, insolvent going through a period of provisional administration before the commencement of the liquidation process was all for the purpose of liquidating the Bank.

From the above, I am of the opinion that the proceeding that took place in Country A was a foreign proceeding within the definition of MLCBI.

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]. [4.5 out of 5]

Article 2(d) of the MLCBI defines a foreign representative as a "person or body, including one appointed in a foreign proceeding to administer the reorganisation or the liquidation of the debtor's assets or affairs or to act as a representative of the foreign proceeding"

It is deduced from the definition that a "foreign representative" must be;

- a. **a natural or artificial person under law;**
- b. **appointed in a foreign proceeding;**
- c. **appointed to administer the reorganisation or liquidation of the debtor's assets or affairs.**

From the definition, there is no indication that the foreign representative must be appointed by a foreign court Country A. From the wording of the article, it is possible for a body mandated under the laws of Country A to appoint a representative to seek relief, recognition and cooperation in another state.

The Applicants in this matter are Mrs G and Deposit Guarantee Fund . The question then is; are these Applicants properly clothed under the laws of Country A to apply for the recognition of the foreign proceeding of liquidating the Bank?

To address this question, consideration is given to the above listed elements in a-c.

From the facts, Deposit Guarantee Fund is "a governmental body of Country A". This body is mandated to, among other mandates, act as liquidators upon the revocation of a bank's licence by NB. As liquidator, Deposit Guarantee Fund assumes all the authority under Country A's Deposit Guarantee Fund Law.

Article 48 (2) of the Deposit Guarantee Fund Law, permits the liquidator, that is Deposit Guarantee Fund to assign some of the powers given under the Deposit Guarantee Fund Law to an "authorised person" or "authorised officer".

An authorised person under Article 2 (1) (17) of the Deposit Guarantee Fund Law, requires the person to be an employee who acts on behalf of Deposit Guarantee Fund and who exercises the power given within the ambit of the laws of Country A or as authorised by Deposit Guarantee Fund . The acts performed by the authorised person must be towards the withdrawal of the Bank from the market after NB has declared the bank as insolvent and the liquidation process has commenced.

Article 35 (1) of the Deposit Guarantee Fund Law also requires the authorised person to meet the listed moral and professional qualities.

Is Ms G an "authorised person" and a "authorised person" within the meaning of article 48 (3)?

It is clear Deposit Guarantee Fund is empowered by its laws to appoint an authorised officer or authorised person. There appears to be a distinction between an "officer" and a "person" within the confines of the Deposit Guarantee Fund law.

I think, it is envisaged under the Deposit Guarantee Fund Law that, it is possible to appoint an individual who is an "officer" of DGF but not an employee of Deposit Guarantee Fund. Where powers are delegated to an authorised person of DGF, the said person must meet the criteria under article 2(1)(17) and article 35(1) of the Deposit Guarantee Fund Law.

Where the representative is an "officer" I surmise that the officer can be authorised by Deposit Guarantee Fund as per article 48(3) as this specific article "empowers the Deposit Guarantee Fund to delegate its powers to an authorised officer".

It is noted from the facts that the appointment of Ms G was supported by a decision of the Executive Board of Directors of Deposit Guarantee Fund as per Resolution 1513. So though Ms G is not an employee properly so called, her appointment is supported by Resolution 1513. It can therefore be presumed that once the decision to appoint Ms G was done by a resolution of the Board of Deposit Guarantee Fund , unless

contrary evidence is produced, it can be presumed that the appointment of Ms G was done within the laws of Country A. Her appointment is however restricted under Deposit Guarantee Fund Law.

At the time of the application, Deposit Guarantee Fund and Ms G fall within the definition of foreign representatives as they satisfy the test of a person and artificial person, they are both appointed and delegated under the Deposit Guarantee Fund laws of Country A .

Though the delegation granted Ms G excludes certain powers, the power to bring the recognition application was not taken away.

I, therefore, think both are appointed to take steps to wind up the activities of the Bank and to liquidate.

For full marks your response 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.'

While not all facts provided in the fact pattern given for this Question 4 are immediately relevant for your answer, please do use, where appropriate, those relevant facts that directly support your answer.

For the purpose of this question, you may further assume that the Bank is not excluded from the scope of the MLCBI by article 1(2) of the MLCBI.

* End of Assessment *