



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

**THE UNCITRAL MODEL LAWS RELATING TO INSOLVENCY**

Commented [SL1]: TOTAL = 37

74%

*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 = 8 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.**

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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

Commented [SL4]: 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?**

*I note that article 17(2) does not provide a relevant date to assess COMI. The following various options have been canvassed by Courts of different countries:<sup>1</sup>*

- (a) the date of commencement of the foreign main proceeding;<sup>2</sup>*
- (b) the date of filing the recognition application;<sup>3</sup>*
- (c) the date the court decides the application;<sup>4</sup> or*
- (d) a date decided by reference to the "operational history of the debtor."<sup>5</sup>*

*The Guide to Enactment and Interpretation (UNCITRAL Guide) argues that the preferred relevant date is at the date of commencement of the foreign proceedings.<sup>6, 7</sup>*

*However, not all countries adopt this approach and it depends on the jurisprudence of the enacting State that is deciding the recognition application.<sup>8</sup>*

*If the debtor changes their COMI between the periods described in (a) and (b) above, then the European Court of Justice has held that (a) is still the preferred relevant date.<sup>9</sup>*

**Question 2.2** [maximum 3 marks]

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

**Statement 1** *"This Article lays down the requirements of notification of creditors."*

<sup>1</sup> *Re: Zetta Jet Pte Ltd and Others (Asia Aviation Holdings Pte Ltd, intervener)* [2019] SGHC 53 [39-61], CLOUT 1816.

<sup>2</sup> The United States (see page 11 of *In re Paul Zeital Kemsley* [2013] Case No 12-13570 (JMP), U.S. Bankruptcy Court) and the United Kingdom (*Re Videology Ltd* [2018] EWHC 2186 (Ch)) positions appear to follow the UNCITRAL Guide on this issue. The Australian position on this issue is still not decided (see for instance *Kapila, in the matter of Edelsten* [2014] FCA 1112, 39 and *In the matter of Hydrodec Group Plc* [2021] NSWSC 755, 139).

<sup>3</sup> Some Courts in the United States of America and Australia have preferred this date. See for instance: *Gainsford, in the matter of Tannenbaum v Tannenbaum* [2012] FCA 904, 44; *Betcorp Limited* 400 B.R. 266, 290-291 (Bankr. D. Nev. 2009).

<sup>4</sup> *Morning Mist Holdings Ltd v Krys (In re Fairfield Sentry Ltd)*, 714 F.3d 127, 133 (2d Cir. Apr. 16, 2013).

<sup>5</sup> *British-American Insurance Co., Ltd.* 425 B.R. 884, 910 (Bankr. S.D.Fla. 2010).

<sup>6</sup> Guide to Enactment and Interpretation of the UNCITRAL Model Law on Cross-Border Insolvency, Part Two, paragraphs 31 and 157-160.

<sup>7</sup> *In re Kemsley*, 489 B.R. 346, 359-360 (Bankr. S.D.N.Y. 2013), CLOUT 1274 citing *Millennium Global Emerging Credit Master Fund Ltd*, 458 B.R. 63, 72 (Bankr. S.D.N.Y. 2011).

<sup>8</sup> Nicki Gunn, Hugh Raisin and Amelia Kelly, "A Saad compromise? Different interpretations of the model law promoting inconsistency in a law meant to remove it" <<https://www.dlapiper.com/ko/korea/insights/publications/2019/12/global-insight-issue-31/a-saad-compromise/>> (accessed 15/10/2022).

<sup>9</sup> *Susanne Staubitz-Schreiber Case C-1/04* [2006] ECR I-701.

Commented [SL5]: SUBTOTAL = 7.5 MARKS

Commented [SL6]: 3 marks

Also discussion of US court: *Morning Mist Holdings Ltd v. Krys (Matter of Fairfield Sentry Ltd)*.

Commented [SL7]: 2 marks

Statement 3 = Art 16(3) MLCBI

**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 relates to Article 14 of MLCBI, which provides for the requirements to notify foreign creditors of a proceeding under the enacting State's laws.

Statement 2 relates to Article 10 of MLCBI, which deals with ensuring that the enacting States' courts do not assume jurisdiction over the debtor's assets merely because the foreign representative made the recognition application.<sup>10</sup>

Statement 3 relates to Article 31 of the MLCBI, which creates a rebuttable presumption of insolvency proof for foreign main proceedings.

**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.**

The IBA case<sup>11</sup> involved the OJSC International Bank of Azerbaijan (IBA), which was the subject of a voluntary restructuring proceeding (VRP) under Azerbaijan law. Azerbaijan law provides that all creditors are bound by the VRP. The foreign restructuring representative had successfully applied for recognition of the VRP as a foreign main proceeding under the United Kingdom's Cross-Border Insolvency Regulations (2006), which had the effect of automatically staying specific enforcement actions in UK courts.

Two UK creditors applied for enforcement action in the UK and the foreign restructuring representative sought to enforce the automatic stays. The creditors relied on the Gibbs rule<sup>12</sup> - being: if a creditor does not submit to a foreign proceeding/jurisdiction, it is not bound by the binding nature of the foreign stay.

At first instance, and then on Appeal, the court in IBA found in favour of the two UK creditors in that the automatic stay (or moratorium) was not required and should not continue indefinitely. Although specific to the facts of the case, the Court found that the stay was not required, given (*inter alia*):

- a) the VRP was finalised and IBA had continued to trade in the ordinary course;
- b) the stay was not required to protect IBA;

<sup>10</sup> Guide to Enactment and Interpretation of the UNCITRAL Model Law on Cross-Border Insolvency, Part Two, paragraphs 109 to 111.

<sup>11</sup> *Bakhshiyeva v Sberbank of Russia* [2018] EWCA Civ 2802.

<sup>12</sup> *Antony Gibbs & Sons v La Société Industrielle et Commerciale des Métaux* (1890) LR 25 QBD 399.

Commented [SL8]: 1.5 marks

Also a discussion of Art 18 MLCBI

- c) *it was inconsistent with the MLCBI for a stay to continue beyond the foreign main proceedings;*
- d) *IBA chose not to conduct a parallel VRP in the UK; and*
- e) *Universalism was not a sufficient basis to disregard English law.*

**Question 2.4 [2 marks]**

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

*Article 21 of the MLCBI grants power to the foreign representative to apply to the court of the enacting State to seek an automatic stay and moratorium on the domestic proceedings (amongst other relief).*

*Article 18 of the MLCBI expresses that the foreign representative has a positive (ongoing) obligation to notify the court of the enacting State in the event that there is a substantial change in the foreign main proceeding or the foreign representatives appointment or where another foreign proceeding is commenced.*

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

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

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

**Question 3.1 [maximum 4 marks] [1.5 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.***

*The access rights granted to the foreign representative under the Model Law appear to be aimed at providing the foreign representative with the same rights as the enacting State's creditors. The rights available in State A that are preserved and can be benefitted from by the foreign representative are:*

Commented [SL9]: 1 mark

Art 29(a)

Commented [SL10]: SUBTOTAL = 7 MARKS

- *Article 9 of the MLCBI, which grants the foreign representative with *locus standi*; [½]*
- *Article 10 of the MLCBI, which protects foreign assets of the Debtor from the enacting State's court;*
- *Article 11 of the MLCBI, which grants the foreign representative with standing to commence domestic proceedings in the enacting State; and [½]*
- *Article 12 of the MLCBI, which grants the foreign representative standing to participate in an already commenced domestic proceeding in the enacting State, subject to first being granted recognition as a foreign proceeding.*

***Legal standing (Article 9 MLCBI):*** *The key access for the foreign representative is set forth in Article 9 MLCBI. In the capacity of foreign representative, the foreign representative has automatically standing before the courts in State A without having to meet any formal requirements such as a license or any consular action. In other words, the "status" in State B of the foreign representative is automatically recognised in State A for the purpose of granting the foreign representative standing before the courts in State A. This allows the foreign representative to safeguard and pursue assets of the debtor estate in State A before its courts.*

***Opening domestic insolvency proceedings (Article 11 MLCBI):*** *The foreign representative is further specifically entitled to apply for the opening of domestic insolvency proceedings in State A, as reflected in Article 11 of the MLCBI. Whether or not the foreign representative would wish to do this will depend on what the requirements are for opening such domestic proceedings. Can these requirements be met? On the other hand, it will depend on what the foreign representative believes he/she can get in terms of (interim) relief for the foreign proceedings in State B. In other words, are domestic insolvency proceedings really needed, or just additional time and costs that should be avoided?*

*According to Article 25 of the MLCBI, the courts of State A are mandatorily obligated to co-operate, and communicate, with the courts of the foreign representative (and the foreign representative themselves). Article 27 of the MLCBI also provides a non-prescriptive list of further types of co-operation expected. This list includes guidance on how to effectively, efficiently and safely communicate that co-operation.<sup>13</sup> [½]* ***Cooperation provisions are contained in articles 25 - 27. The Court in State A is able to freely cooperate with the foreign representative without having to worry whether the status in State B of the foreign representative can be recognised in State A.***

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

***Guidance note - this question asked for an essay, when writing an essay avoid listing information in your answer.***

<sup>13</sup> Guide to Enactment and Interpretation of the UNCITRAL Model Law on Cross-Border Insolvency, Part Two, paragraphs 192-193.

Question 3.2 [maximum 5 marks] [2 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.**

Pursuant to article 17(1) of the Model Law,<sup>14</sup> a foreign proceeding is to be recognised by a court of a signatory country, subject to the following conditions:

- 1.1. Public policy exceptions in article 6 do not apply, in that the recognition of the foreign proceeding is not “manifestly contrary to the public policy of this State.” The foreign representative would need to be satisfied that said exception does not apply (to their knowledge); [1]
- 1.2. The foreign proceedings is (*inter alia*) a judicial proceeding in a foreign country for the purpose of liquidating and controlling the assets and affairs of a debtor (pursuant to article 2(a)). The foreign representative would need to seek a copy of the winding-up order (or other insolvency-related paperwork) from State B; [1] - refer to Article 15 paragraph 2 and what evidence is required.
- 1.3. The person applying for recognition is a foreign representative within the meaning of article 2(d). The foreign representative would need to seek all relevant licensing paperwork available from State B, or, if no such paperwork is available, conduct investigations into State B’s regulatory and licensing obligations. I note that article 16(2) provides that the State A’s court is entitled to presume that any licensing paperwork is authentic;
- 1.4. The foreign representative is capable of providing (*inter alia*) a certified copy of the State A winding-up order (or similar) within the meaning of article 15(2). I note the presumptions available to State A’s court in relation to this requirement in article 16(1); and
- 1.5. The foreign representative has filed in the appropriate court in State A, within the meaning of article 4.

**Your answer must include a discussion on the following:**

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<sup>14</sup> United Nations Commission on International Trade Law (UNCITRAL): *Model Law on Cross-Border Insolvency* (1997).

1. **Exclusions:** If the debtor is an entity that is subject to a special insolvency regime in State B, the foreign representative should first check if the foreign proceedings regarding that type of a debtor are excluded in State A based on Article 1(2) of the implemented Model Law in State A.
2. **Restrictions: Existing international obligations of State A:** Based on Article 3 of the Model Law, the court in State A should also check if there are no existing international obligations of State A (under a treaty or otherwise) that may conflict with granting the recognition application under the implemented Model Law in State A.
3. **Sufficient evidence:** Article 15 of the Model Law sets forth in paragraph 2 what evidence in respect of the commencement of the foreign proceedings and the appointment of the foreign representative must accompany the recognition application. A statement identifying all foreign proceedings in respect of the debtor that are known to the foreign representative must also accompany the recognition application (Article 15(3) of the Model Law).
4. **Judicial scrutiny:** While the court in State A is able to rely on the rebuttable presumptions set forth in Article 16 of the Model Law, in the context of Article 17 of the Model Law the court will have to assess whether either the COMI or at least an establishment of the debtor is located in State B where the foreign proceedings were opened. If the COMI of the debtor is in State B the foreign proceedings should be recognised as foreign main proceedings and if only an establishment of the debtor is in State B the foreign proceedings should be recognised as foreign non-main proceedings. Without a COMI or at least an establishment of the debtor in State B, recognition cannot be granted by the court in State A.
5. **Public policy exception:** Finally, the court in State A should also ensure based on Article 6 of the Model Law that the recognition application is not manifestly contrary to public policy of State A.

Question 3.3 [maximum 5 marks] [3 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 21 of the MLCBI provides for the discretionary relief available to courts post-recognition, including the power to automatically stay proceedings or enforcement actions, protection of assets from transfer and the power to examine or take evidence. The list provided in article 21 is not to be read as an exhaustive or restrictive list,<sup>15</sup> however, the power to examine or take evidence has been limited to how said information may be used.<sup>16</sup> [½]*

<sup>15</sup> Guide to Enactment and Interpretation of the UNCITRAL Model Law on Cross-Border Insolvency, Part Two, paragraph 189.

<sup>16</sup> *Al Jaber and Ors v Mitchell and Ors* [2021] EWCA Civ 1190.

Article 21 also requires a request / application by the foreign representative and that the power be necessary to protect the assets of the debtor or a creditor's right/interest, subject to suitable protections for local creditors of the enacting State. [½]

Article 19 provides for a pre-recognised foreign representative's right to seek a granting of interim relief, upon application of the foreign representative. The court may only grant said relief to protect the Debtor's assets or creditors and same must not interfere with the administration of a foreign main proceeding.<sup>17</sup> The relief can include (but is not limited to): [1]

- Stay execution against assets;
- Vest assets in the foreign representative for the purpose of preserving or realising same;
- Suspension of transfer/encumbrance rights;
- examine or take evidence; and
- any other relief that may otherwise be available to a local representative. [1]

A further potential restriction on article 19 is an English court decision, which held that pre-recognition relief could not continue through post-recognition, in the context of a worldwide freezing order.<sup>18</sup>

Your answer must include a discussion on the following elements:

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] [½ 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?**

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<sup>17</sup> Article 19(4) of the MLCBI.

<sup>18</sup> *Igor Vitalievich Protasov v Khadzhi-Murat Derev* [2021] EWHC 392.



*The Protasov v Derev case<sup>19</sup> is authority for the proposition that pre-recognition relief (in the form of a worldwide freezing order) was not available to be continued post-recognition. This was due to the Court's view that the MLCBI was intended to put a foreign representative in the same shoes as a local representative (as far as possible). Given, the local bankruptcy regime offered other forms of protection, a worldwide freezing order was not required or justified.<sup>20</sup>*

Suggested answer

**A recent English case between Igor Vitalievich Protasov and Khadzhi-Murat Derev [Order of 24 February 2021 by Mr Justice Adam Johnson, [2021] EWHC 392 (CH)] exactly addressed the question.**

**While the English court held to have jurisdiction in the strict sense to grant such post-recognition discretionary relief, it found that relevant restrictions and limitations existed which served to inhibit the proper exercise of that jurisdiction. The English court found that the English bankruptcy regime offers other forms of protection which mean that relief in the form of a freezing order or similar injunction is simply not warranted. According to the court, "(...) the scheme of the Model Law is intended to put the foreign trustee or bankruptcy manager in the same position, as far as practicable, as an officeholder appointed under domestic law, and consistent with that, the effect of recognition of a foreign main proceeding is to bring into play the same wide infrastructure of the insolvency legislation. Absent some exceptional reason, a freezing order or other similar order will not in my view be required or 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).**

<sup>19</sup> Ibid.

<sup>20</sup> Ibid, 45-52.

**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:**

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- (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] [14.5 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 [9.5 out of 10]**

1. *Foreign proceeding is defined in Article 2(a) of MLCBI. According to the Guide, the relevant time to assess whether the Bank's liquidation comprises a foreign proceeding is at the time that the application for recognition is considered.<sup>21</sup> The factual matrix provides that "prior to any determination made in the English Proceedings ... Ms G<sup>22</sup> ... [and] the DGF applied for recognition" (which I assume means that the English Proceedings had already been filed by the time of Ms G's and DGF's application). The English Proceedings were commenced on 11 February 2021. I have, therefore, assumed in my answer that the relevant time to assess whether the Bank's liquidation comprises a foreign proceeding is after 11 February 2021.<sup>23</sup>*
2. *Foreign proceedings must have the following cumulative<sup>24</sup> threshold elements:*
  - 2.1. *a judicial or administrative<sup>25</sup> proceeding (which is not defined), or interim proceeding (which includes a situation where the foreign representative is appointed on an interim basis, like a provisional liquidator appointment in Australia).<sup>26</sup>*

*The relevant proceedings is the LBBA, in that it is "a statutory framework that constrains [the Bank's] actions and that regulates the final distribution of [the Bank's] assets;"<sup>27</sup>*

<sup>21</sup> Guide to Enactment and Interpretation of the UNCITRAL Model Law on Cross-Border Insolvency, Part Two, paragraph 66.

<sup>22</sup> The factual matrix appears to swap between Ms C and Ms G. I have assumed throughout my answer that Ms G was the correct reference.

<sup>23</sup> I note that my answer may materially change if this assumption is incorrect, as the relevant time could be any time prior to this date. This is because the factual matrix does not record a date of when the English Judge is determining this question.

<sup>24</sup> UNCITRAL Digest on Caselaw under the MLCBI – February 2021, page 5.

<sup>25</sup> UNCITRAL Digest on Caselaw under the MLCBI – February 2021, page 5 and the UNCITRAL Model Law on Cross-Border Insolvency: The Judicial Perspective (2022), paragraph 38.

<sup>26</sup> Guide to Enactment and Interpretation of the UNCITRAL Model Law on Cross-Border Insolvency, Part Two, paragraph 79.

<sup>27</sup> *Irish Bank Resolution Corporation (IBRC) Limited*, 538 B.R. 692, 697 (D. Del 2015).

- 2.2. *collective in nature, in that the assets and liabilities of the Bank ought to be substantially dealt with in the proceedings (subject to English priority laws).<sup>28</sup> I note that substantially does not mean all, however, the proceedings should not only deal with one class of creditors rights (like a receivership).<sup>29</sup>*

*The factual matrix provides that the relevant powers of DGF and Ms G include the powers to (inter alia): (i) satisfy creditor claims; (ii) sell and deal with the Bank's assets; (iii) distribute (presumably the assets to creditors); and (iv) such other powers as is necessary to finalise the liquidation of the Bank. I have presumed that these powers are sufficiently collective, given the assumed equal treatment of creditors, however, I note that the list of powers does not record the priority treatment.*

*I also note that on 14 December 2020 (which I assume is a date materially before the recognition consideration by the UK court), the Bank's liquidation was extended indefinitely due to the liquidator's problems with realising assets and paying creditors. An English Judge would look to the DGF and Ms G to put on further evidence as to what the legal and factual ramifications are of the so-called infinite liquidation and what steps they are undertaking to wind-up the affairs of the Bank.*

- 2.3. *in a foreign State - I have presumed that Country A is a foreign State of the United Kingdom;*
- 2.4. *authorised or conducted under a law relating to insolvency (and not a solvent winding-up).<sup>30</sup> I have presumed that LBBA is an enacted law relating to insolvency, because (inter alia):*

- *the Bank was automatically classified as insolvent under articles 76 or 77 of the LBBA;*
- *DGF is responsible for the winding-up of insolvent banks in Country A;*
- *the effect of the LBBA is to withdraw the Bank from the banking system in Country A, so as to collect and distribute a deficient pool of assets to the Bank's creditors;*
- *at the time of the recognition application DGF and Ms G were the appointed liquidators of the Bank; and*
- *liabilities of \$1.113 billion (USD) are greater than its assets of \$823 million (USD).*

<sup>28</sup> Guide to Enactment and Interpretation of the UNCITRAL Model Law on Cross-Border Insolvency, Part Two, paragraph 70.

<sup>29</sup> Gold & Honey, Ltd (In re) 410 B.R. 357 (Bankr. E.D.N.Y. 2009).

<sup>30</sup> Guide to Enactment and Interpretation of the UNCITRAL Model Law on Cross-Border Insolvency, Part Two, paragraph 73.

- 2.5. *where the assets and<sup>31</sup> affairs of the debtor are subject to control or supervision by a Foreign Court (whether potential<sup>32</sup> or actual). Foreign court is defined in article 2(e) of the MLCBI as "a judicial or other authority competent to control or supervise a foreign proceeding;"*

*The factual matrix is not clear as to whether Country A has a court capable of controlling or supervising DGF and/or Ms G. The facts suggest that article 37 of LBBA grants Ms G and DGF with the power to file property and non-property claims with a court (presumably in reference to a court in Country A, or any other court). An English Judge would look to the DGF and Ms G to put on further evidence as to what is the judicial system in Country A, along with any relevant courts supervisory powers over their appointment.*

*In the alternative, I note that DGF is an independent "institution," separate from any other government agency and the Bank.<sup>33</sup> As article 2(e) of MLCBI anticipates including non-judicial authorities in the definition of a Foreign Court. An English Judge would look to the DGF and Ms G to put on further evidence as to whether the DGF is a non-judicial authority capable of controlling/supervising the affairs of the Bank.*

- 2.6. *where the proceeding is for the purpose of reorganisation, liquidation or dealing with financial distress.<sup>34</sup> DGF and Ms G were automatically appointed liquidators of the Bank, pursuant to article 77 of the LBBA; and*
- 2.7. *where public policy exceptions in article 6 do not apply. I have assumed that the DGF Law or the foreign proceeding are not contrary to the English Laws public policy. An English Judge would look to the DGF and Ms G to put on further evidence about why an indefinite liquidation is not contrary to public policy. [This part of the response does not address Q 4.1.1. bur recognition more generally]*

3. *Assuming DGF and Ms G can satisfy the issues discussed above at paragraphs 2.2, 2.5 and 2.7, the Bank's liquidation is a foreign proceeding within the meaning of Article 2(a) of the MLCBI.*

***[Well reasoned and presented response which for full marks would needs some supporting source references as well]***

**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]. [5 out of 5]**

<sup>31</sup> In the context that 'and' is a key word – see: *Gold & Honey, Ltd (In re)* 410 B.R. 357 (Bankr. E.D.N.Y. 2009), p. 371.

<sup>32</sup> See *ABC Learning Centres Limited (in re)* 728 F.3d 301 (3d Cir. 2013). cert. denied, 571 U.S. 1198 (2014), pp 331-332, which acknowledged that day-to-day control by a foreign court is not required as long as the relevant foreign law (in this case, Australian law) gave the Australian courts a controlling and supervisory role/right.

<sup>33</sup> Articles 3(3) and 3(7) of DGF Law.

<sup>34</sup> *In the matter of Sturgeon Central Asia Balanced Fund Ltd* [2020] EWHC 123 (Ch), 6.



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.**

*Pursuant to Article 2(d) of MLCBI, Foreign Representative means:*

*(a) a person or body, including one appointed on an interim basis;<sup>35</sup>*

*Ms G is a person, and, on the facts, was appointed by DGF (equivalent to a special agency) presumably not on an interim basis.*

*DGF is a governmental body responsible for the process of winding-up insolvency banks via liquidation.*

*Accordingly, I believe that both applicants would meet element (a) of this definition.*

*(b) authorised in a foreign proceeding;*

*As outlined in my answer 4.1.1, assuming DGF and Ms G can satisfy the issues discussed above at paragraphs 2.2, 2.5 and 2.7 (in answer 4.1.1), the Bank's liquidation is a foreign proceeding within the meaning of Article 2(a) of the MLCBI.*

*Ms G and DGF are required to provide certified copies of their delegated authority (in the case of Ms G) and all other relevant licensing/statutory paperwork available from the DGF: Article 15 of MLCBI. I note that article 16(2) provides that the English court is entitled to presume that any licensing paperwork is authentic.*

*The factual matrix says that Ms G's delegated authority stems from article 48(3) of the DGF Law. Article 35(1) of the DGF Law specifies a number of indicia (like relevant higher-level education and sufficient professional experience) that Ms G must meet in order to be an authorised delegate of DGF. Resolution 1513 only notes that Ms G is a "leading bank liquidation professional," but does not address the other indicia of article 35(1) of the DGF Law. Article 15 of MLCBI requires that Ms G provide certified copies of their delegated authority or any other relevant licensing/statutory paperwork.*

*Accordingly, there is insufficient evidence to establish that Ms G is authorised by DGF, as Ms G's affidavit appears silent on this issue. If Ms G filed the relevant*

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<sup>35</sup> This part of the definition is said to be intentionally broad to include appointments through a special agency: Guide to Enactment and Interpretation of the UNCITRAL Model Law on Cross-Border Insolvency, Part Two, paragraph 86.

*paperwork required by article 15 of MLCBI, then article 16(2) provides that the English court is entitled to presume that any licensing paperwork is authentic.*

*Article 15 of MLCBI requires that DGF provide certified copies of their statutory authority or other certificate of appointment. No such information appears to have been provided on the facts, however, I note that article 77 of LBBA may come to the rescue in that DGF is automatically appointed liquidator to the Bank upon NB's decision to record the Bank's licence. The facts suggest that the NB's decision is in evidence. Accordingly, there is likely sufficient evidence to establish that DGF is authorised.*

*(c) to administer the reorganisation or the liquidation of the debtor's assets or affairs or to act as a representative of the foreign proceeding.*

*The powers of Ms G are set out in articles 37 and 48(3) of the DGF Law (save for Resolution 1513). Those powers include the power to administer the liquidation of the Bank, but does not include the power to sell the Bank's assets. As article 2(d) is intended to be broad and includes the phrase "or affairs", I believe that Ms G meets this element of the definition.*

*The powers of DGF are set out in articles 37, 38, 47-52, 521 and 53 of the DGF Law (at least). Those powers include the power to administer the liquidation of the Bank, deal with the Bank's assets or affairs and to act as a foreign representative. Therefore, I believe that DGF meets this element of the definition.*

*Accordingly, subject to Ms G coming up to proof on her delegated authority from the DGF (per element (b)), I believe that both Ms G and DGF meet the definition of a foreign representative under article 2(d) of the MLCBI.*

**[Great response]**

**\* End of Assessment \***