



SUMMATIVE (FORMAL) ASSESSMENT: MODULE 2A

THE UNCITRAL MODEL LAWS RELATING TO INSOLVENCY

Commented [SL1]: TOTAL = 38.5

77%

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.**
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- 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

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

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

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 COMI of an insolvent entity will determine whether originating insolvency proceedings brought in respect of it are "foreign main" or "foreign non-main" proceedings which in turn will determine the type of recognition which is available by a recognising court under the UNCITRAL Model Law on Cross-Border Insolvency (the "Model Law").

The Model Law does not expressly provide the relevant date for determining the COMI of an insolvent entity. However, its Guide to Enactment and Interpretation (the "Guide") notes that the appropriate date for determining COMI is the date of the commencement of the foreign proceeding (paras 31 and 157-160). In determining the location of the debtor's COMI, the recognising court will be required to ascertain whether the location of the foreign proceedings in fact corresponds to the debtor's actual COMI, as readily ascertainable by third parties (in particular, its creditors). In making such a determination, the recognising court will look to a body of evidence including, for example, the location of the debtor's books and records, the location of its employees, the location where financing was organised or authorised, and the location of the debtor's principal assets or operations. While the COMI of a debtor can move, it can accordingly be much harder to establish its proper COMI if the move is close to the commencement of proceedings because one of the requirements going to the proper determination of a debtor's COMI is whether it is readily ascertainable to its creditors.

*It is important to note however that a decision of the United States Second Circuit of Appeals took a slightly different approach and held that a debtor's COMI should be established on the basis of its activities at or around the time of the Chapter 15 petition (i.e. the US Model Law recognition application). However, having regard to the international interpretation of the appropriate date for determining COMI, the US courts may consider factors during the period from the commencement of the proceedings and the recognition application to ensure that there has not been an attempt to manipulate COMI in bad faith (*Morning Mist Holdings Ltd v Krys (Matter of Fairfield Sentry Ltd)* (2nd Cir Appeals April 16, 2013).*

Commented [SL4]: SUBTOTAL = 9.5 MARKS

Commented [SL5]: 3 marks

This approach was followed in the United Kingdom in a recent unpublished decision of Judge Catherine Burton, *Re Toisa Limited* of 29 March 2019, on the basis (amongst other things)

- **of the present tense of Article 17 of the Model Law that "*the foreign proceeding shall be recognised as a foreign main proceeding if it is taking place in the state where the debtor has the centre of its main interests*" (emphasis added) such that, as a matter of statutory interpretation, the relevant consideration is where the debtor's COMI is to be found at the time of the recognition application**
- **given Article 8 of the Model Law requires that "*regard is to be had to its international origin and to the need to promote uniformity in its application*" when it is being interpreted, the fact that there is previous US precedent suggesting the date of the recognition application is the relevant date, that should be considered a strong international precedent militating in favour of the appropriate date being the time of the recognition application**
- **it is not unusual for insolvency proceedings to be initiated in a country other than the COMI of the relevant debtor. This was said to be particularly the case in Chapter 11 proceedings where the US bankruptcy courts do not require a significant level of connection with the United States for the initiation of such proceedings. This being the case, there was a good argument that COMI shifted following the commencement of Chapter 11 proceedings because the debtor comes under the control of the US bankruptcy courts and key positions on the debtor's board are often taken by US bankruptcy professionals. As such, there were good arguments to say that the debtor had neither its COMI, nor an establishment in the jurisdiction at the time that Chapter 11 proceedings were initiated. If this were correct, and the English approach to COMI analysis under the CBIR was applied then the Chapter 11 proceedings would not be eligible for recognition at all, as arguably the court would not be able to class them as either foreign main proceedings or foreign non-main proceedings.¹**

The approach followed in *Re Toisa Limited* was not followed in a later decision of the High Court of England & Wales in *Trustees in bankruptcy of Li Shu Chung* [2021] EWHC 3346 (Ch) applying *Re Stanford International Bank Ltd* [2011] Ch 33 and *Re Videology Ltd* [2018] BPIR 1795 and noting that it was bound to follow *Stanford* given it was a Court of Appeal decision.

Question 2.2 [maximum 3 marks]

Commented [SL6]: 3 marks

¹ See "Clarity on cross-border conundrum (*Re Toisa Limited*)" (accessed from <https://www.lexisnexis.com/uk/lexispsl/bankingandfinance/document/412012/8VC1-RHH2-8T41-DOVS-00000-00>)

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.*"

Article 14. *Notification to foreign creditors of a proceeding under [identify laws of the enacting State relating to insolvency].*

This provision deals with the timely notice to be given to creditors both within the enacting state and to foreign creditors. The provision also provides that foreign creditors should be notified individually unless the court determines that some other form of notification may be more appropriate but that no letters rogatory or other formality is required. The article also sets out what needs to be included in the notification.

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

Article 10 *Limited Jurisdiction.*

This provision provides that the court in the enacting state does not assume jurisdiction over the foreign representative or the foreign assets on the sole ground that a recognition application for foreign proceedings has been made. This provision is intended to deal with concerns that the making of a recognition application under the Model Law could trigger an all-embracing jurisdiction over the foreign insolvency. The Digest of Case Law confirms that the limitation is not absolute and would not for example affect other possible grounds for jurisdiction which arise over the foreign representative or the debtor's affairs and assets in the enacting state.

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

This question unfortunately isn't very clear as there are arguably two Articles which provide a rebuttable presumption in connection with an undefined key concept under the Model Law.

Article 16(3) *Presumptions concerning recognition*

The concept, Centre of Main Interest ("COMI"), is not defined in the Model Law however Article 16(3) provides a rebuttable presumption that in the absence of evidence to the contrary, the debtor's registered office or habitual residence in the case of an individual is presumed to be the debtor's COMI.

Article 31 *Presumption of insolvency based on recognition of a foreign main proceeding*

Insolvency is also not defined in the Model Law. Article 31 provides that in the absence of evidence to the contrary, recognition of a foreign main proceeding is deemed to be proof that the debtor is insolvent in the absence of evidence to the contrary.

Question 2.3 [2 marks]

Commented [SL7]: 2 marks

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

The *IBA* Case at first instance dealt with, amongst other things, whether an indefinite moratorium that was granted in an earlier recognition application should be continued (the "Moratorium Continuation Application"). The Moratorium Continuation Application was contested by two creditors who had claims against the debtor which were governed by English law and had not submitted to the insolvency proceedings in Azerbaijan such the exception in the rule in *Gibbs* did not apply to them (the rule in *Gibbs* means that English law governed debt cannot be discharged or compromised by a foreign insolvency proceeding). The Moratorium Continuation Application was denied at first instance on the basis that it could not be used as a way to get around the rule in *Gibbs*.

The Court of Appeal upheld this decision on the basis that it wasn't strictly a question about jurisdiction but rather it was a question of whether the court should as a matter of settled practice not exercise its power to grant the indefinite moratorium where it would (i) prevent the English law creditors from enforcing their rights in accordance with the rule in *Gibbs* and/or (ii) prolong the stay after the restructuring has come to an end. Court of Appeal found that an English court could only properly grant the indefinite moratorium if the stay was necessary to protect the interests of the debtor's creditors and the stay was an appropriate way of achieving this protection. The Court of Appeal held that neither of these points were satisfied.

In connection with (i) the Court of Appeal concluded, amongst other things, that the debtor's creditors needed no further protection for the foreign proceeding to achieve its purpose. In connection with (ii) the Court of Appeal thought that after the end of the foreign proceeding, there is no scope for further orders in support of the foreign proceedings and that any relief granted under the Model Law should terminate.

Question 2.4 [2 marks]

Commented [SL8]: 1.5 marks

Art 29(a)

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 20 of the Model Law provides that following recognition of a foreign main proceeding, automatic relief is granted, being (i) Commencement or continuation of individual actions or individual proceedings concerning the debtor's assets, rights, obligations or liabilities is stayed; (ii) execution against the debtor's assets is stayed; and (iii) the right to transfer, encumber or otherwise dispose of any assets of the debtor is suspended. It is also granted the discretionary power to grant appropriate relief upon the request of the foreign representative where necessary to protect the debtor's assets or the interests of its creditors over and above the automatic relief granted by Articles 20, for example, the taking of evidence; extending any interim relief; and granting any additional relief that may be available to a domestic officeholder.

Pursuant to Article 18, the foreign representative comes under a duty to keep the court of the enacting State informed of (i) any substantial change in the status of the recognised foreign proceeding or representative's appointment; and (ii) any other foreign proceeding regarding the same debtor that comes to the attention of the foreign representative.

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

Commented [SL9]: SUBTOTAL = 10 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] [4 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 objective behind the Model Law's provisions dealing with access are, in large part, to save time and expense which in turn can avoid value destruction and can in some instances create value. [1] A foreign representative for example has direct access to the courts of an enacting State, meaning that no recognition application is required before that representative has standing to access the courts. Such access does not vest the foreign representative with any other powers (Article 9). [1] A foreign representative also has direct access to the courts of an enacting State (without the need for recognition) to commence a domestic insolvency if the conditions for commencing such proceedings are met (Article 11). [1] Article 12 gives a foreign representative the right to participate in domestic insolvency proceedings after

recognition and may, for example, petition for the realisation or distribution of the debtor's assets.

The foreign representative will be given comfort by Article 10 that the courts of the enacting State will not seize jurisdiction over the assets of the debtor simply because the foreign representative has made an application in the courts of the enacting State. They will also be able to give comfort to foreign creditors that they will have the same rights regarding the commencement of and participation in domestic proceedings involving the debtor as creditors domiciled in the enacting State. Further, the foreign creditor's ranking will not be effected except that a foreign creditor will not be given a lower priority only because it is a foreign creditor (Article 13).

As to cooperation between courts, the Model Law fills the gap where there is no legislative framework.

Where foreign insolvencies fall in Article 1 of the Model Law, the courts of the enacting state must cooperate to the maximum extent possible with the foreign representative and/or the foreign courts and the courts of the enacting State are entitled to communicate directly with the foreign representatives or the foreign courts (Article 25) [1]. Cooperation in this regard can be in support of both foreign main or non-main proceedings. Further, where a domestic office holder is appointed, he/she must cooperate to the maximum extent possible with foreign courts and foreign representatives and can communicate directly with them (Article 26). Article 27 also sets out a non-exhaustive list of the types of cooperation available, including as to appointments, the communication of information, the sanction of agreements dealing with cooperation, etc.

In short, these rights will assist with an automatic right to standing, they ensure that the debtor's assets are not at risk of falling under the jurisdiction of the enacting State's courts, they protect foreign creditor's rights (including as to priority) and they streamline communications between foreign representatives and courts with the courts of the enacting State and domestic officeholders.

Well answered!

Question 3.2 [maximum 5 marks] [3 out of 6 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.

Assuming the foreign proceeding falls within the definition of Article 2(a) and the foreign representative falls within the meaning of Article 2(d), he/she may apply for recognition but there are various evidential hurdles which need to be overcome to ensure a successful application.

The recognition application must include, per Article 15, (i) a certified copy of the decision commencing the foreign proceeding and appointing the foreign representative; or (ii) a certificate from the foreign court affirming the existence of the foreign proceeding and of the appointment of the foreign representative. In the absence of either (i) or (ii), the application must include any other evidence acceptable to the court of the enacting State of the existence of the foreign proceeding and of the appointment of the foreign representative. The application should also include a statement confirming all foreign proceedings relating to the debtor of which the foreign representative is aware. The court of the enacting State may require translations of the evidence outlined above. [1]

The recognition decision should be given at the earliest possible time and it can be modified or terminated if it is shown that the grounds were lacking or have ceased to exist (Article 17(3) and (4)).

Upon a recognition application, the court will have to consider whether the foreign proceedings are foreign main proceedings or foreign non-main proceedings as certain consequences flow from such a determination. The courts of the enacting State may have to consider evidence as to the COMI of the debtor to ensure that the proper designation as to the status of the foreign proceedings is given in the recognition order. [1]

The courts of the enacting State may refuse to grant recognition on public policy grounds in Article 6 however this is quite rare. More usually, public policy will be used as grounds for limiting the nature of the relief granted. [1]

Where considering a recognition application, the courts of the enacting State is not required to consider whether the foreign proceedings were correctly commenced under applicable law. It may rely on the presumptions set out in Article 16 (eg as to the authenticity of documents and as to the debtor's COMI).

The courts of the enacting State may refuse to grant recognition if it was convinced that the foreign decision was based on fraud. The courts of the enacting State may also consider whether there are any ulterior motives behind the recognition application. It has been said the recognition should not be used by a debtor to attempt evading its legitimate foreign creditors and that evidence of forum shopping may militate against recognition being granted. However, contrary views hold that where the statutory test is met, recognition should be granted.

With reference to the question, your answer must also include a discussion on the following:

- 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.*

Question 3.3 [maximum 5 marks] [2 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.

Urgent interim relief can be granted prior to a recognition decision but after a recognition application is filed, provided that the debtor's creditors and other interested parties are suitably protected. The application is made by the foreign representative upon the recognition application and is issued where assistance is needed urgently to protect the assets of the debtor or the interests of the creditors (Article 19(1)). [1] The courts of the enacting State can order (i) an interim stay of execution against the debtor's assets; (ii) entrusting the administration/realisation of the debtor's assets in the enacting State to the foreign representative (or another person) to protect and preserve the value of the assets; (iii) suspending the rights to deal with the debtor's assets (either by transfer, encumbrance, or disposal); (iv) providing for the examination of witnesses and the taking or evidence; and (v) granting any other relief that's available under domestic law (Article 19(1)).

Such relief is only available on an urgent and provisional basis pending determination of the recognition application. It will terminate upon the recognition application being decided unless it is extended post-recognition pursuant to Article 21. It must also be sought in support of a recognition application. An application which is not sought in support of recognition may be struck out if the court considers there is no jurisdiction to grant the relief.

Interim relief is typically needed where the assets of the debtor in the enacting State may be in jeopardy prior to the recognition application being granted. This could include e.g. creditors trying to take control or possession of the debtor's assets, requiring security deposits, tightening credit terms or other actions which are detrimental to the debtor's business and could undermine the orderly administration of the debtor's estate. It may also be granted to ensure that the relief accorded under

Article 20 once recognition is granted is not rendered ineffective. This is especially the case in relation to a pause on the transfer/disposal of the debtor's assets.

Your answer must include a brief discussion on the following elements:

1. Post-recognition relief (automatic or discretionary): In case of a foreign main proceeding, there will be automatic relief as set forth in Article 20 of the Model Law. For both foreign main and non-main proceedings, article 21 of the Model Law set forth what post-recognition relief can be requested by the foreign representative. Appropriate relief under Article 21(1) of the Model Law must be necessary to protect the assets of the debtor or the interests of the creditors. The relief set forth in Article 21(2) of the Model Law requires the court to be satisfied that the interests of the creditors in State A are adequately protected. In case of a foreign non-main proceeding there is an additional requirement that needs to be met before relief can be granted. According to Article 21(3) of the Model Law the court in such a case must also be satisfied that the relief relates to assets that, under the law of State A, should be administered in the foreign non-main proceeding or concerns information required in that proceeding.

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

2. 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.

3. 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.

4. Public policy exception: The court in State A should, based on Article 6 of the Model Law, also again verify that the relief application is not manifestly contrary to public policy of State A.

Question 3.4 [maximum 1 mark] [1 mark]

Briefly explain - with reference to case law - why a worldwide freezing order granted as pre-recognition interim relief ex article 19 MLCBI, is unlikely to continue post-recognition ex article 21 MLCBI?

A recent decision of the English courts, *Igor Vitalievich Protasov and Khadzhi- Murat Derev* [2021] EWHC 392 (CH), found that while the court had discretionary powers to grant discretionary post-recognition relief, it did not consider that the relief was warranted given that the domestic bankruptcy regime in the United Kingdom offered protection which rendered a worldwide freezing order otiose. The court found that the

Model Law is intended to put a foreign office holder in the same position, as far as practicable, as an office holder appointed under domestic law and recognition brought into effect the same wide infrastructure of domestic insolvency legislation (which affords similar protection to the interim relief sought in this case. This meant that absent exceptional reasons, a freezing order or similar relief was not required or justified on the facts before the court.

Following recognition, the courts of the enacting State has a discretionary power to grant post-recognition relief. The discretionary relief includes (i) staying actions against the debtor (to the extent they aren't stayed under Article 20); (ii) staying execution against the assets of the debtor (to the extent not stayed under Article 20); (iii) suspending the right to transfer/encumber/dispose of the debtor's assets; (iv) providing for the examination of witnesses and taking of evidence; (v) entrusting the administration/realisation of the debtor's assets; (vi) the continuation of any interim relief; and (vii) granting any additional relief that's available under domestic law (Article 21(1)).

Upon recognising a foreign proceeding (whether main or non-main), the Courts of the enacting State may entrust the distribution of all or part of the debtor's assets to the foreign representative (or other person), provided that the court is satisfied that the interests of domestic creditors are adequately protected.

The courts of the enacting State must also ensure that where granting relief in support of foreign non-main proceedings, that any relief which relates to assets should be administered in the foreign non-main proceeding or concerns information required in those proceedings (ie the relief should not interfere with another insolvency proceeding (in particular the main proceeding).

However, the right to relief is not unlimited - where, for example, similar relief exists under domestic law, the courts may find that the relief sought is not necessary 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).

An affidavit (the Affidavit) sets out a detailed summary of the legislation of Country A's specific insolvency procedure for Banks. The procedure involves initial input from the National Bank (the NB) and at the time that the Bank entered liquidation, followed by a number of stages:

Classification of the bank as troubled

The NB may classify a bank as "troubled" if it meets at least one of the criteria set down by article 75 of the Law of Country A on Banks and Banking Activity (LBBA) or for any of the reasons specified in its regulations.

Once declared "troubled", the relevant bank has 180 days within which to bring its activities in line with the NB's requirements. At the end of that period, the NB must either recognise the Bank as compliant, or must classify it as insolvent.

Classification of the bank as insolvent

The NB is obliged to classify a bank as insolvent if it meets the criteria set out in article 76 of the LBBA, which includes:

- (i) the bank's regulatory capital amount or standard capital ratios have reduced to one-third of the minimum level specified by law;**
- (ii) within five consecutive working days, the bank has failed to meet 2% or more of its obligations to depositors or creditors; and**
- (iii) the bank, having been declared as troubled, then fails to comply with an order or decision of the NB and / or a request by the NB to remedy violations of the banking law.**

The NB has the ability to classify a bank as insolvent without necessarily needing to first go through the troubled stage. Article 77 of the LBBA accordingly provides that a bank can be liquidated by the NB directly, revoking its licence.

Provisional administration

The Deposit Guarantee Fund (DGF) is a governmental body of Country A tasked principally with providing deposit insurance to bank depositors in Country A. However, the Affidavit explained that the DGF is also responsible for the process of withdrawing insolvent banks from the market and winding down their operations via liquidation. Its powers include those related to early detection and intervention, and the power to act in a bank's interim or provisional administration and its ultimate liquidation.

Pursuant to article 34 of the DGF Law, once a bank has been classified as insolvent, the DGF will begin the process of removing it from the market. This is often achieved with an initial period of provisional administration. During this period:

- (i) the DGF (acting via an authorised officer) begins the process of directly administering the bank's affairs. Articles 35(5) and 36(1) of the DGF Law provide that during provisional administration, the DGF shall have full and exclusive rights to manage the bank and all powers of the bank's management.**
- (ii) Article 36(5) establishes a moratorium which prevents, *inter alia*: the claims of depositors or creditors being satisfied; execution or enforcement against the bank's assets; encumbrances and restrictions being created over the bank's property; and interest being charged.**

Liquidation

Liquidation follows provisional administration. The DGF is obliged to commence liquidation proceedings against a bank on or before the next working day after the NB's decision to revoke the bank's licence.

Article 77 of the LBBA provides that the DGF automatically becomes liquidator of a bank on the date it receives confirmation of the NB's decision to revoke the bank's licence. At that point, the DGF acquires the full powers of a liquidator under the law of Country A.

When the bank enters liquidation, all powers of the bank's management and control bodies are terminated (as are the provisional administrators' powers if the bank is first in provisional administration); all banking activities are terminated; all money liabilities due to the bank are deemed to become due; and, among other things, the DGF alienates the bank's property and funds. Public encumbrances and restrictions on disposal of bank property are terminated and offsetting of counter-claims is prohibited.

As liquidator, the DGF has extensive powers, including the power to investigate the bank's history and bring claims against parties believed to have caused its downfall. Those powers include:

- (i) the power to exercise management powers and take over management of the property (including the money) of the bank;**
- (ii) the power to compile a register of creditor claims and to seek to satisfy those claims;**
- (iii) the power to take steps to find, identify and recover property belonging to the bank;**
- (iv) the power to dismiss employees and withdraw from/terminate contracts;**
- (v) the power to dispose of the bank's assets; and**
- (vi) the power to exercise "such other powers as are necessary to complete the liquidation of a bank".**

The DGF also has powers of sale, distribution and the power to bring claims for compensation against persons for harm inflicted on the insolvent bank.

However, article 48(3) of the DGF Law empowers the DGF to delegate its powers to an "authorised officer" or "authorised person". The "Fund's authorised person" is defined by article 2(1)(17) of the DGF Law as: "an employee of the Fund, who on behalf of the Fund and within the powers provided for by this Law and / or delegated by the Fund, performs actions to ensure the bank's withdrawal from the market during provisional administration of the insolvent bank and/or bank liquidation".

Article 35(1) of the DGF Law specifies that an authorised person, must have: "...high professional and moral qualities, impeccable business reputation, complete higher education in the field of economics, finance or law...and professional experience necessary." An authorised person may not be a creditor of the relevant bank, have a criminal record, have any obligations to the relevant bank, or have any conflict of interest with the bank. Once appointed, the authorised officer is accountable to the DGF for their actions and may exercise the powers delegated to them by the DGF in pursuance of the bank's liquidation.

The DGF's independence is addressed at articles 3(3) and 3(7) of the DGF Law which confirm that it is an economically independent institution with separate balance sheet and accounts from the NB and that neither public authorities nor the NB have any right to interfere in the exercise of its functions and powers.

Article 37 establishes that the DGF (or its authorised person, insofar as such powers are delegated) has extensive powers, including powers to exercise managerial and

supervisory powers, to enter into contracts, to restrict or terminate the bank's transactions, and to file property and non-property claims with a court.

(2) The Bank's liquidation

The Bank was formally classified by the NB as "troubled" on 19 January 2015. The translated NB resolution records:

"The statistical reports-based analysis of the Bank's compliance with the banking law requirements has found that the Bank has been engaged in risky operations."

Those operations included:

- (i) a breach, for eight consecutive reporting periods, of the NB's minimum capital requirements;**
- (ii) 10 months of loss-making activities;**
- (iii) a reduction in its holding of highly liquid assets;**
- (iv) a critically low balance of funds held with the NB; and**
- (v) 48% of the Bank's liabilities being dependent on individuals and a significant increase in "adversely classified assets" which are understood to be loans, whose full repayment has become questionable.**

Despite initially appearing to improve, by September 2015 the Bank's financial position had deteriorated further with increased losses, a further reduction in regulatory capital and numerous complaints to the NB. On 17 September 2015, the NB classified the Bank as insolvent pursuant to article 76 of the LBBA. On the same day, the DGF passed a resolution commencing the process of withdrawing the Bank from the market and appointing Ms C as interim administrator.

Three months later, on 17 December 2015, the NB formally revoked the Bank's banking licence and resolved that it be liquidated. The following day, the DGF initiated the liquidation procedure and appointed Ms C as the first of the DGF's authorised persons to whom powers of the liquidator were delegated. Ms C was replaced as authorised officer with effect from 17 August 2020 by Ms G.

Ms G's appointment was pursuant to a Decision of the Executive Board of the Directors of the DGF, No 1513 (Resolution 1513). Resolution 1513 notes that Ms G is a "leading bank liquidation professional". It delegates to her all liquidation powers in respect of the Bank set out in the DGF Law and in particular articles 37, 38, 47-52, 521 and 53 of the DGF Law, including the authority to sign all agreements related to the sale of the bank's assets in the manner prescribed by the DGF Law. Resolution 1513 expressly

excludes from Ms G's authority the power to claim damages from a related party of the Bank, the power to make a claim against a non-banking financial institution that raised money as loans or deposits from individuals, and the power to arrange for the sale of the Bank's assets. Each of the excluded powers remains vested in the DGF as the Bank's formally appointed liquidator.

On 14 December 2020, the Bank's liquidation was extended to an indefinite date, described as arising when circumstances rendered the sale of the Bank's assets and satisfaction of creditor's claims, no longer possible.

On 7 September 2020, the DGF resolved to approve an amended list of creditors' claims totalling approximately USD 1.113 billion. The Affidavit states that the Bank's current, estimated deficiency exceeds USD 823 million.

QUESTION 4.1 [maximum 15 marks] [10 out of 15]

Prior to any determination made in the English Proceedings, Ms G, in her capacity as authorised officer of the Deposit Guarantee Fund (or DGF) of Country A in respect of the liquidation of the Commercial Bank for Business Corporation (the Bank), together with the DGF (the Applicants), applied for recognition of the liquidation of the Bank before the English court based on the Cross-Border Insolvency Regulations 2006 (CBIR), the English adopted version of the MLCBI.

Assuming you are the judge in the English court considering this recognition application, you are required to discuss:

4.1.1 whether the Bank's liquidation comprises a "foreign proceeding" within the meaning of article 2(a) of the MLCBI [maximum 10 marks]; and [6 out of 10]

Article 2(a) of the Model Law defines a "foreign proceeding" as "a collective judicial or administrative proceeding in a foreign State, including an interim proceeding, pursuant to a law relating to insolvency in which proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganization or liquidation"

According to the Affidavit, the Bank's liquidation has commenced pursuant to the Law of Country A on Banks and Banking Activity (the "LBBA"). It had been in provisional administration prior to liquidation which commenced the following day after the National Bank ("NB") had revoked its licence.

It is not immediately clear that the liquidation comprises a "foreign proceeding" within the meaning of Article 2(a). However, there are various factors which suggest that it may fall within the definition.

First, the liquidation has proceeded under the LBBA. On its face, it appears to be a law dealing with banking in Country A but it clearly also covers the liquidation and

administration of banks in financial distress so it's likely to be considered "a law relating to insolvency" for the purposes of Article 2(a).

For full marks, your response should address each element in sufficient detail, providing guidance and source references, as appropriate, and apply the facts. For this element, we are look for something along the following lines:

1. The Guide to Enactment provides at paragraph 48:

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

Further explanation is provided at paragraph 73:

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

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

Second, from the information available, it appears that the liquidation may be considered to be subject to the control or supervision by the court because the Deposit Guarantee Fund (the "DGF") is a governmental body of Country A though more information is needed to understand whether it is a regulatory body and/or whether the liquidation comes under indirect control of the courts of Country A. The DGF's rights to deal with the assets and creditors of the Bank does not appear to depend upon the court granting it powers but that would not likely be determinative of whether the liquidation would be considered to be under the control or supervision of the Courts.

Again, for full marks, more detail, guidance and application of the facts is required. We are looking for something along the following lines:

- 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.*
8. *The assets and affairs of the Bank are subject to the control of the DGF, an official body which exercises its powers in the liquidation free from intervention by government or the NB and which should be considered, for the purposes of the definition set out in article 2(e) of the MLCBI, as a "foreign court".*

Third, the appointment of DGF does appear to be for the purposes of liquidation and reorganisation, in that, once the Bank was classified as insolvent, the DGF is tasked with removing it from the market and winding down its operations.

Fourth, when the Bank entered liquidation, all of its powers of management terminated, banking activities were terminated and all money liabilities due to the Bank became due and payable. DGF, as liquidator, was granted extensive powers including the right to exercise management powers; the power to settle a list of creditors and to satisfy their claims; the power to take steps to identify and recover property belonging to the Bank; the power to dispose of the Bank's assets and a general power to exercise such powers as are necessary to the complete the liquidation. In other words, the assets of the Bank appear to come under the control of a regulatory body for the purposes, amongst other things, of determining creditor claims and paying them off.

See comments above.

Fifth, the liquidation of the Bank does seem to be a collective process in that it appears that the DGF is empowered to settle a list of all creditors - the liquidation doesn't seem to be for the purposes of preferring one class of creditors over another. However, it is not clear from the information available whether there is true creditor participation and this would require more information. There is also no information regarding notification to creditors or the ability to appeal the proceedings.

See comments above.

In the round, however, the Bank's liquidation may be recognised as falling within the definition in Article 2(a) but requires more information as to the nuances of the law to provide a definitive view.

Please also address the "proceedings" element and the "judicial or administrative" element.

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 out of 5]

"Foreign representative" means "a person or body, including one appointed on an interim basis, authorized in a foreign proceeding to administer the reorganization or the liquidation of the debtor's assets or affairs or to act as a representative of the foreign proceeding".

The first point to note is that whether the Applicants' appointment would fall in the definition of "foreign representative" will depend upon whether the liquidation of the Bank falls in the definition of "foreign proceedings". The following response assumes that it does. [Please also reference in this context the assumption set forth in article 16(1) of the MLCBI]

The DGF was not appointed by the Court - its appointment followed automatically after the Bank's license was revoked. This would not prevent it from falling in the definition of "foreign representative". It would also fall within the definition when the Bank was in provisional administration.

The DGF was appointed for the purposes of winding down the Bank and is authorised to administer the Bank's liquidation (including having powers to get in assets of the Bank and to identify and repay creditors) however given a number of these powers have been delegated to Mrs G may affect the DGF's rights to be considered a foreign representative for the purposes of Article 2(d).

There is also no requirement for a foreign representative to be a natural person therefore the DGF, being a governmental authority, would not be challenged on that basis.

Further information would be required as to the actual powers which remain vested in the DGF to confirm whether it in fact should be considered a foreign

representative. It may be that it would only be considered a foreign representative once it terminates its delegation of powers to Mrs G.

As to Mrs G, it is relevant to note that she has been delegated a number of powers but not all powers in the liquidation. The powers she has been delegated include the power to get in the assets of the Bank and to pay creditor claims. Therefore it seems likely that she would be considered a foreign representative within the meaning of 2(d).

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 *