



SUMMATIVE (FORMAL) ASSESSMENT: MODULE 2A

THE UNCITRAL MODEL LAWS RELATING TO INSOLVENCY

Commented [SL1]: TOTAL = 44

88%

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).**
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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]

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

Question 1.1

Which of the following statements does not reflect the purpose of the Model Law?

- (a) The purpose of the Model Law is to provide greater legal certainty for trade and investment.
- (b) The purpose of the Model Law is to provide protection and maximization of the value of the debtor's assets.
- (c) The purpose of the Model Law is to facilitate the rescue of a financially troubled business, by providing a substantive unification of insolvency law.**
- (d) The purpose of the Model Law is to provide a fair and efficient administration of cross-border insolvencies that protects all creditors and the debtor

Question 1.2

Which of the following statements are reasons for the development of the Model Law?

- (a) The increased risk of fraud due to the interconnected world.
- (b) The difficulty of agreeing multilateral treaties dealing with insolvency law.
- (c) The practical problems caused by the disharmony among national laws governing cross-border insolvencies, despite the success of protocols in practice.

(d) All of the above.

Question 1.3

Which of the following challenges to a recognition application under the Model Law is most likely to be successful?

- (a) The registered office of the debtor is not in the jurisdiction where the foreign proceedings were opened, but the debtor has an establishment in the jurisdiction of the enacting State.**
- (b) The registered office of the debtor is in the jurisdiction of the enacting State, but the debtor has an establishment in the jurisdiction where the foreign proceedings were opened.**

(c) The debtor has neither its COMI nor an establishment in the jurisdiction where the foreign proceedings were opened.

(d) The debtor has neither its COMI nor an establishment in the jurisdiction of the enacting State.

Question 1.4

Which of the following rules or concepts set forth in the Model Law ensures that fundamental principles of law are upheld?

(a) The *locus standi*/access rules.

(b) The public policy exception.

(c) The safe conduct rule.

(d) The "hotchpot" rule.

Question 1.5

For a debtor with its COMI in South Africa and an establishment in Argentina, foreign main proceedings are opened in South Africa and foreign non-main proceedings are opened in Argentina. Both the South African foreign representative and the Argentinian foreign representative have applied for recognition before the relevant court in the UK. Please note that South Africa has implemented the Model Law subject to the so-called principle of reciprocity (based on country designation), Argentina has not implemented the Model Law and the UK has implemented the Model Law without any so-called principle of reciprocity. In this scenario, which of the following statements is the most correct one?

(a) The foreign main proceedings in South Africa will not be recognised in the UK because the UK is not a designated country under South Africa's principle of reciprocity, but the foreign non-main proceedings in Argentina will be recognised in the UK despite Argentina not having implemented the Model Law.

(b) Both the foreign main proceedings in South Africa and the foreign non-main proceedings in Argentina will not be recognised in the UK because the UK has no principle of reciprocity and Argentina has not implemented the Model Law.

(c) Both the foreign main proceedings in South Africa and the foreign non-main proceedings in Argentina will be recognised in the UK.

(d) None of the statements in (a), (b) or (c) are correct.

Question 1.6

Which of the following statements regarding concurrent proceedings under the Model Law is true?

(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?

While the MLCBI does not specifically address the question of when the debtor's COMI is to be determined, it has been accepted that the appropriate date for determining the COMI of a debtor is the date of commencement of the foreign proceedings. As noted in the Guide to Enactment and Interpretation of the UNCITRAL Model Law on Cross-Border Insolvency ("GEI") at para 159, this is due to the evidence required in an application for recognition under article 15 and the relevance accorded to the decision commencing the foreign proceeding and appointment of the foreign representative. This is especially so, where the business activity of the debtor ceases after the commencement of the foreign proceeding; in this case, all that may exist at the time of the application for recognition to indicate the debtor's COMI is the foreign proceeding and the activity of the foreign representative in administering the insolvency estate. Such a test can also be applied with certainty to all insolvency proceedings, and will avoid rendering the determination of the COMI an arbitrary process with different outcomes in different jurisdictions where applications for recognition are made at different times and the debtor may have moved around between those times (particularly in the case of a natural person debtor).

*There are, however, concerns regarding the risk that the debtor may manipulate its COMI in bad faith. Alternatively, companies may wish to be given the discretion to select the jurisdiction that will offer the best prospects for achieving an effective restructuring solution (see *Re: Zetta Jet Pte Ltd and Others (Asia Aviation Holdings Pte Ltd, intervener)* [2019] SGHC 53 at [53] and [61]). As such, the US Second Circuit of Appeals in *Morning Mist Holdings Ltd v Krys (Matter of Fairfield Sentry Ltd)* (2nd Cir Appeals Apr. 16, 2013) suggested that the relevant period to consider may be "between the commencement of the foreign insolvency proceeding and the filing of the Chapter 15 petition [which the US enactment of the Model Law]". Such an approach has the practical effect of allowing for the harmonization of transnational insolvency proceedings on the basis that limiting the inquiry to the time of filing avoids a detailed examination of the operational history of the applicant, which may entail conflicting COMI determinations by different courts (see *Lavie v Ran (In re Ran)*, 607 F.3d 1017, 1025 (5th Cir. 2010)).*

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Other than these approaches, other suggested dates include: (a) the date the court is called to make a decision on the recognition application; and (b) the operational history of the debtor. As for (a), this approach was suggested as it provides flexibility for the court to consider the debtor's COMI where it has been changed between the date the recognition application was filed and the date a court made a determination on recognition (see *Moore v Australian Equity Investors* [2012] FCA 1002 at [18]). And for (b), such an approach was rejected on the basis that it would increase the likelihood of conflicting COMI determinations and competing main proceedings, undermining uniformity and harmonization (see *Betcorp Limited* 400 B.R. 266, 291 (Bankr. D. Nev. 2009)).

Question 2.2 [maximum 3 marks]

Commented [SL5]: 3 marks

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

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

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

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

Statement 1 is provided for under Article 14.

Statement 2 is provided for under Article 10.

Statement 3 is provided for under Article 16(3).

Question 2.3 [2 marks]

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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.

In the *IBA* case, the debtor company, the OJSC International Bank of Azerbaijan ("IBA"), sought to restructure its debts pursuant to an Azerbaijani restructuring proceeding. Under Azerbaijani law, the restructuring plan became binding on all creditors once approved by the requisite majority. However, the debts included English law-governed debts where the respondent creditors had neither participated in the restructuring nor submitted to the jurisdiction of the Azerbaijani court. As a result, pursuant to the English common law rule formulated in *Antony Gibbs & Sons v La Société Industrielle et Commerciale*

des Métaux (1890) LR 25 QBD 399) (which states that, unless a creditor submits to a foreign proceeding, a foreign proceeding designed to bring about the cancellation of a debtor's obligations will discharge only those liabilities governed by the law of the country in which that proceeding took place), the claims of the English creditors could not be discharged or otherwise affected by the Azerbaijani proceedings.

Following the successful application of IBA's foreign representative to the English court for recognition of the Azerbaijani proceeding as a foreign main proceeding under the Cross-Border Insolvency Regulations 2006 (the "CBIR 2006"), two of IBA's creditors did not participate in the Azerbaijani proceedings and were instead seeking relief in the English courts. In order to prevent English enforcement proceedings undermining the successful outcome of the Azerbaijani restructuring, IBA applied for an indefinite continuation of the stay of enforcement actions, even after the restructuring had come to an end. The effect of this indefinite moratorium was to prevent the two creditors from enforcing their English-law governed debts against IBA and, in the same breath, allow the English court to recognise that these debt obligations still exist and were not discharged following the restructuring plan.

At first-instance, the English High Court dismissed IBA's application. The High Court Judge held that the *Gibbs* rule applied and that the permanent stay cannot be accepted as a backdoor round the *Gibbs* rule. Further, the permanent stay would have no basis if there were no longer any foreign proceedings or foreign representatives as defined under the CBIR 2006.

On appeal, the English Court of Appeal upheld the first-instance decision. It held that an indefinite stay was not necessary to protect the interests of IBA's creditors (the requirement under the CBIR 2006 for the grant of appropriate relief) - IBA was trading again and the restructuring was at an end. Further, the scope of the MLCBI was limited to procedural aspects of cross-border insolvency cases - there was nothing in the CBIR 2006 to suggest that the procedural power to grant a stay could be used to extinguish the English-law governed substantive rights of the creditors guaranteed by the *Gibbs* rule. As the Supreme Court had held in *Rubin v Eurofinance SA* [2012] UKSC 46, the principle of universalism could not be used to justify the disregard of English law to assist a foreign insolvency process. Further, it would be inconsistent with the MLCBI's procedural and supporting role for a stay granted under the CBIR 2006 to outlast the foreign proceedings to which the stay related, and was no longer in effect. The English Court of Appeal also suggested that IBA could, in principle, have promoted a parallel scheme of arrangement in the UK.

Question 2.4 [2 marks]

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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.

The starting point is article 29 of the MLCBI, which directs the court to seek cooperation and coordination pursuant to chapter IV (articles 25, 26 and 27) of the Model Law. Article 29(a) of the MLCBI then states that where the domestic proceeding is already underway at the time the application for recognition of the foreign proceeding is granted: (i) any relief granted under Article 19 or 21 of the MLCBI must be consistent with the proceeding in the enacting State; and (ii) Article 20 would not apply where the foreign proceeding is recognised as a foreign main proceeding. Where a foreign non-main proceeding is concerned, Article 29(c) states that the enacting State's court must be satisfied that the relief relates to assets that, under the law of the enacting State, should be administered in the foreign non-main proceeding and that the relief concerns information required in the foreign non-main proceeding.

As regards the foreign representative's duty of information, Article 18 obligates the foreign representative to inform the court promptly, after the time of filing the application for recognition of the foreign proceeding, of "any substantial change in the status of the recognized foreign proceeding or the status of the foreign representative's appointment". This allows the court to modify or terminate the consequences of recognition, especially where changes occur in the foreign proceeding that would have affected the decision on recognition or the relief granted on the basis of recognition.

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] [3 out of 4 marks]

The foreign representative is considering his options to secure the value of the debtor's assets located in State A. With reference to the Model Law's provisions on access and co-operation, explain how these rights in State A can benefit the foreign representative.

In terms of the MLCBI's provisions on access, Article 9 grants the foreign representative direct access to the courts of the enacting State, without having to meet formal requirements such as licenses or consular action. [1] Article 10 then states that the mere fact of an application under MLCBI by the foreign representative does not subject the foreign representative or the foreign assets and affairs of the debtor to the jurisdiction of the courts of this State for any purpose other than the application. This is known as the "safe conduct" rule, which ensures that the court in the enacting State does not assume jurisdiction over all the assets of the debtor on the sole ground that the foreign representative has made an application for recognition of a foreign proceeding. Articles 11 and 12 then concern the foreign representative's right in relation to a proceeding under the insolvency law of the enacting State. Pursuant to Article 11, the foreign representative has standing to request the commencement of an insolvency proceeding, subject to the commencement conditions applicable under that law being satisfied [1]. Recognition is not a precondition to that commencement on the basis that the proceeding may be crucial in cases of an urgent need to preserve the assets of the debtor. Article 12, on the other hand, safeguards the foreign representative's standing to participate in the proceeding in the enacting State.

Turning to the MLCBI's provisions on cooperation, the starting point is to note that cooperation is not dependent upon recognition and may thus occur at an early stage and before an application for recognition. Article 25 prescribes the availability of direct communication between the court and the foreign representative, which avoids the use of time-consuming processes. [1] Article 26 reflects the important role that domestic insolvency representatives can play in devising and implementing cooperative arrangements, within the parameters of their authority. In particular, Article 26(1) states that must

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cooperate to the maximum extent possible with the foreign representatives and that there can be direct communication between both parties.

Your answer should have also included a discussion on the key benefits of both the access and cooperation provisions which are that they save time and therefore, also costs, and as a result value destruction can be avoided, and value enhancement is promoted.

Question 3.2 [maximum 5 marks] **[3.5 out of 5 marks]**

For a recognition application in State A to be successful, the foreign proceeding opened in State B must qualify as a “foreign proceeding” within the meaning of article 2(a) of the MLCBI and the “foreign representative” must qualify as a foreign representative within the meaning of article 2(d) of the MLCBI. Assuming that both qualify as such, list and briefly explain (with reference to the relevant MLCBI articles) any other evidence, restrictions, exclusions and limitations that must be considered, as well as the judicial scrutiny that must be overcome for a recognition application to be successful.

*Article 17 of the MLCBI is the governing provision for determining whether a recognition application is to be granted. The pre-conditions for recognition is set out in Article 17(1), and these include showing that: (a) the foreign proceeding is a proceeding within the meaning of subparagraph (a) of Article 2; (b) the foreign representative applying for recognition is a person or body within the meaning of subparagraph (d) of Article 2; (c) the application meets the requirements of paragraph 2 of article 15; and (d) the application has been submitted to the court referred to in article 4. **[1] - a discussion on COMI is required - see below***

*In terms of evidence, Article 15(2) prescribes that an application for recognition must be accompanied by the following: (a) a certified copy of the decision commencing the foreign proceeding and appointing the foreign representative; (b) a certificate from the foreign court affirming the existence of the foreign proceeding and of the appointment of the foreign representative; or (c) in the absence of evidence referred to in subparagraphs (a) and (b), any other evidence acceptable to the court of the existence of the foreign proceeding and of the appointment of the foreign representative. Further, Art 15(3) states that an application for recognition shall also be accompanied by a statement identifying all foreign proceedings in respect of the debtor that is known to the foreign representative. **[1]***

In this connection, Article 18 imposes a duty on the foreign representative to promptly inform the court of any substantial change in the status of the recognised foreign proceeding or the status of the foreign representative’s appointment

and any other foreign proceeding regarding the same debtor that becomes known to the foreign representative. This should be done from the time of filing the recognition application for the foreign proceeding.

If the requirements under Article 17 are met, recognition is granted as a matter of course. The enacting State's court is not to go further to consider whether the foreign proceeding was correctly commenced under the applicable law. Article 17(4) prescribes the discretion for the enacting State's court to revisit the recognition proceeding or order when the original grounds for granting recognition were fully or partially lacking or had ceased to exist.

Finally, in terms of judicial scrutiny, Article 6 states that recognition should not be granted to the foreign proceeding if it is contrary to the public policy of the State. [1] Other grounds in which a court could refuse to grant recognition is if the court was convinced a foreign decision was the result of corruption (*Gerova Financial Group, Ltd.*, 482 B.R. 86, 94 (Bankr. S.D.N.Y. 2013) at [57]), or where the recognition process is used by the debtor for improper purposes such as to evade its legitimate foreign creditors (*Perry H. Koplik & Sons, Inc*, 357 BR 213 (Bankr. S.D.N.Y. 2006)), and where improper forum shopping and frustration of an existing judgment were the only apparent reasons for the recognition application (*Octaviar Administration Pty Ltd*, 511 B.R. 361, 374 (Bankr. S.D.N.Y. 2014)).

While the MLCBI does not expressly prescribe a provision on abuse of process, it also does not prevent a court in the enacting State from responding to an abuse of process. In this connection, a foreign representative has an obligation to full and frank disclosure to the court in the enacting State. [½] - **reference to Article 6 regarding public policy exception** - If a foreign representative breaches this obligation, then the court could consider this to be abuse of process based on domestic law and procedural rules which could affect the recognition application.

With reference to the question, you should have included 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. Judicial scrutiny:** While the court in State A is able to rely on the rebuttable presumptions set forth in Article 16 of the Model Law, in the context of Article 17 of the Model Law the court will have to assess whether either the COMI or at least an establishment of the debtor is located in State B where the foreign proceedings were opened. If the COMI of the debtor is in State B the foreign proceedings should be recognised as foreign main proceedings and if only an establishment of the debtor is in State B the foreign proceedings should be recognised as foreign non-

main proceedings. Without a COMI or at least an establishment of the debtor in State B, recognition cannot be granted by the court in State A.

Question 3.3 [maximum 5 marks] [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.

In respect of pre-recognition relief, that is governed by Article 19 of the MLCBI. Such reliefs are usually collective in nature in order to protect the assets of the debtor and the interests of the creditors when concern exists that the assets may perish, be susceptible to devaluation or otherwise in jeopardy in the period before the hearing of the recognition application. These reliefs include (but are not limited to): (a) a stay of execution against the debtor's assets; (b) entrusting the administration or realization of all or part of the debtor's assets located in the enacting State to the foreign representative or another person designated by the court, in order to protect and preserve the value of assets that, by their nature or because of other circumstances, are perishable, susceptible to devaluation or otherwise in jeopardy; (c) suspension of the right to transfer, encumber or otherwise dispose of any assets of the debtor; and (d) provision of the examination of witnesses, the taking of evidence or the delivery of information concerning the debtor's assets, affairs, rights, obligations or liabilities. [1]

In terms of requirements, a pre-recognition relief must be sought by a foreign representative, and that an application for recognition must have been made prior to the seeking of pre-recognition relief.

Turning to post-recognition reliefs, there are generally speaking two categories of reliefs. The first category is provided for under Article 20 of the MLCBI, and these reliefs are granted upon recognition of a foreign proceeding as a main proceeding. The second class of reliefs are those granted under Article 21, and that is not dependent on whether the foreign proceedings recognised are main or non-main proceedings. Crucially, while the reliefs under Article 20 flow from the moment of recognition and are necessary to facilitate the orderly and fair conduct of a cross-border insolvency, the reliefs under Article 21 are discretionary, and are granted where it is necessary to protect the assets of the debtor or the interest of creditors and at the request of the foreign representative.[1]

Your answer must include a brief 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] [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?

This specific issue was considered in the English decision of Protasov v Derev [2021] EWHC 392 (Ch). There, the English High Court held that a worldwide freezing order granted under Article 19 would not continue post-recognition under Article 21. The starting position is Article 19(3), which states that any interim relief granted thereunder would terminate following the decision on the application for recognition, unless extended under Article 21(1)(f). The latter provision, in turn, requires the court to consider whether it would be appropriate to extend the interim relief. In the context of a worldwide freezing order, the effect of such an order is already provided for under Article 20(1)(c), which states that upon recognition of foreign proceedings, the bankrupt's rights to deal with any of his assets are suspended. Further, Article 20(2) prescribes that the stay and suspension under Article 20(1) shall be the same in scope and effect as if the debtor was adjudged bankrupt under domestic insolvency law, and subject to the same powers of the court and the same prohibitions, limitations, exceptions and conditions under domestic law. Accordingly, the court in Protasov held that when the recognition order was made, the provisional suspension under the freezing order was superseded by a permanent suspension of the bankrupt's rights by way of Article 20(1) and Article 20(2) of the Model Law. There was therefore no reason for the freezing order to be extended.

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] [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 [10 out of 10]

4.1.2 whether the Applicants fall within the description of "foreign representatives" as defined by article 2(d) of the MLCBI [maximum 5 marks]. [4.5 out of 5]

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

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

Question 4.1

In my submission, the Bank's liquidation is likely to constitute a "foreign proceeding" within the meaning of article 2(a) MLCBI.

I begin with the definition of a "foreign proceeding" within Article 2(a), which states: "Foreign proceeding" means 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".

At the outset, it has been recognised in the Guide to Enactment and Interpretation ("GEI") that the term "foreign proceeding" eschews expressions that may have different technical meanings in different legal systems and instead describe their purpose or function, so as to avoid inadvertently narrowing the range of possible foreign proceedings that might obtain recognition and to avoid unnecessary conflict with terminology used in the laws of the enacting State (see GEI at para 65).

It has been recognised that the following elements are embedded within the definition of "foreign proceeding" under Article 2(a) (see GEI at para 66):

- (a) The proceeding is "collective" in nature.**
- (b) The judicial or administrative proceeding arose ["judicial or administrative" and "proceedings" are two separate elements to be addressed] "out of a law relating to insolvency" [this is a separate element] and, in that proceeding, the debtor's assets and affairs are "subject to control or supervision by a foreign court" [this is a separate element] for "the purpose of reorganization or liquidation [this is a separate element].**
- (c) The control or supervision of the assets and affairs of the debtor is being effected by a "foreign court", namely "a judicial or other authority competent to control or supervise a foreign proceeding".**
- (d) The applicant has been authorized in the 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".**

These requirements are cumulative and should be considered as a whole (see *Stanford International Bank Limited* [2010] EWCA Civ 137 at [23]).

Turning to the first element, *ie*, whether the proceeding is collective in nature, the central inquiry is whether "substantially all of the assets and liabilities of the debtor are dealt with in the proceeding, subject to local priorities and statutory exceptions, and to local exclusions relating to the rights of secured creditors" (see GEI at para 70). A proceeding should not be considered to fail the test of collectivity purely because a particular class of creditors' rights is unaffected by it (see GEI at para 70). To this, case laws have also observed the following to be characteristics of a "collective" proceeding:

- (a) the imposition of an orderly regime (*Larsen v Navios International Inc* [2011] EWHC 878 at [23(j)]) that affects the rights and obligations of all creditors (in the sense that the assets are realised for the benefit of all creditors) (*Manley***

Toys Limited, 580 B.R. 632, 640 (Bankr. D. N. J. 2018); *Betcorp Limited* 400 B.R. 266, 281 (Bankr. D. Nev. 2009) and all assets of the debtor (*Katayama v Japan Airlines Corporation* [2010] FCA 794 at [24]);

- (b) while not all creditors need to receive a share of the distribution (*British-American Insurance Co, Ltd.* 425 B.R. 884, 903 (Bankr. S.D.Fla. 2010)), any distributed assets should be in accordance with statutory priorities (*Gold & Honey, Ltd*, 410 B.R. 357, 372 (Bankr. E.D.N.Y. 2009)); and
- (c) there must be creditor participation (*Stanford International Bank Limited* [2010] EWCA Civ 137) and creditors must be given notice (*British American Isle of Venice, Ltd* 441 B.R. 713, 719 (Bankr. S.D. Fla. 2010)).

On the facts, some of these elements are present. Article 36(5) of the DFG Law provides that, following the Bank's classification as insolvent, a moratorium is imposed that will prevent the claims of depositors and creditors from being satisfied, to cease all execution or enforcement against the Bank's assets and to prevent any encumbrances and restrictions being created over the Bank's property. Further, the LBBA provides that following provisional administration, once the Bank enters liquidation, amongst others, public encumbrances and restrictions on disposal of bank property are terminated and offsetting of counter-claims is prohibited. All of these suggest an orderly regime that is imposed in order to facilitate the liquidation process, and the various restrictions involved appears to affect the rights of all creditors, secured and otherwise. Further, the facts show that the DGF has approved an amended list of creditors' claims totalling approximately USD 1.113 billion. This shows that there are efforts made to involve the creditors in the liquidation process. Of course, it is unclear whether this list includes all the creditors of the Bank. If this is so, then it can be shown that the proceeding is focused on realising assets for the benefit of all creditors, such that the requisite aspect of a "collective" proceeding would be held to be present.

It should also be noted that while subsequent investigations show that the Bank was potentially involved in a multi-million dollar fraud resulting in monies being sent to many overseas companies, the direct basis for the Bank entering into liquidation was focused on reorganising the Bank or realising assets for the benefit of all creditors, and not to prevent detriment to investors (see *Stanford International Bank Limited* [2010] EWCA Civ 137 at [25]-[29]).

Turning to the second element, *ie*, a judicial or administrative proceeding arising out of a law relating to insolvency for the purposes of reorganisation or liquidation, there are two inquiries. First, whether the proceeding involving the bank is a "judicial or administrative proceeding". Second, whether the law under which the proceedings are commenced against the Bank is "a law relating to insolvency". As to the first inquiry, it is clear that the liquidation of the Bank is an administrative proceeding presided by the DGF and approved by the NB. The overarching objective in the present case is to withdraw the Bank from the market and to eventually liquidate it. In doing so, the focus is necessarily administrative in nature.

On the second inquiry, the central plank of the analysis is whether the liquidation of the Bank is conducted under a law that deals with or addresses insolvency or severe financial distress. In this connection, it is irrelevant as to what type of statute or law the provisions prescribing the relevant processes is contained, and it is also irrelevant whether the law relates exclusively to insolvency (see GEI at para 73; *Sturgeon Central Asia Balanced Fund* [2020] EWHC 123). On the facts, the relevant law is that of the LBBA and the DGF Law. While it is unclear whether the LBBA is a law relating exclusively to insolvency, it nevertheless contains processes relating to the classification of banking entities, such as the Bank, as insolvent where the criteria under Article 76 of the LBBA are satisfied. A perusal of those criteria suggests that the central plank of the inquiry is whether the bank in question is under severe financial distress. As for the DGF Law, the processes contained under Articles 34, 35(5) and 36 relating to the provisional administration and eventual liquidation of the bank are processes that flow from, and therefore deal with, a banking entity that has been classified by the LBBA as insolvent. On the facts, it is quite clear that the Bank is at least in severe financial distress. Based on the NB's records, the Bank was engaging in risky operation which entailed, amongst others, 10 months of loss-making activities and the risk that full repayment of loans taken out by its customers has become questionable. Further, the Bank's financial position had deteriorated with increased losses by 15 September 2015. That was why the NB, pursuant to Article 76 of the LBBA, classified the Bank as insolvent. Pursuant to that classification, the DGF proceeded with commencing the administrative process of withdrawing the Bank from the market and its eventual liquidation as authorised by a resolution passed by the NB. And by 7 September 2020, the Bank's current estimated deficiency exceeded USD 823m.

As for the third element, *ie*, the assets and affairs of the debtor are subject to control or supervision by a foreign court, it is crucial to note that the MLCBI does not indicate 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 (see GEI at para 74). In this connection, it has been held that control or supervision may be exercised indirectly by an insolvency representative where, for example, the insolvency representative itself is subject to control or supervision by the court or other regulatory authority (*Betcorp Limited* 400 B.R. 266, 283-284 (Bankr. D.Nev. 2009)). For instance, it has been accepted that a body with oversight of the insurance industry was a body competent to control or supervise the assets and affairs of a debtor insurance company found to be insolvent (*ENNIA Caribe Holdings N.V.*, 594 B.R. 631, 639-640 (Bankr. S.D.N.Y. 2018)). In *Re Agrokor DD* [2017] EWHC 2791 (Ch), Agrokor and its affiliates was subjected to the Extraordinary Administration Proceeding ("EAP") under the newly adopted "Law on Extraordinary Administration Proceeding in Companies of Systemic Importance in Croatia". The English Court of Appeal recognised that the level of court supervision required is relatively low, and can be potential and indirect rather than actual and direct. In the present case, nothing on the facts shows that any judicial authority is involved in the insolvency proceeding of the Bank. That being said, the LBBA empowers the NB, as the designated government authority, to classify the Bank as insolvent in the event the criteria under the LBBA are satisfied. Further, the LBBA empowers the NB to liquidate the bank directly, or to authorise the DFG to administer

the administrative process and the eventual liquidation. Moreover, there is a potential for the court in State A to be involved in the process.

In respect of the final requirement, *ie*, that the proceeding is for the purpose of reorganisation or liquidation, it is clear that the present proceeding involving the Bank is for the purposes of liquidation and to protect and preserve assets for distribution to the Bank's creditors. The fact that one of the reasons for the commencement of the liquidation proceeding is due to the massive fraud perpetrated that involved the Bank is beside the point, and is merely incidental.

Accordingly, it appears likely that the requirements for establishing a "foreign proceeding" within the meaning of Article 2(a) is likely satisfied.

[A well-reasoned response] - the elements of "proceeding" and "Foreign State" could have been addressed separately]

Question 4.2

I submit that it is likely that the Applicants fall within the description of "foreign representatives" as defined by Article 2(d) of the MLCBI. That provision states:

"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 language of Article 2(d) does not specify that the foreign representative must be authorized by the foreign court. Accordingly, a "foreign representative" may include appointments that might be made by a special agency other than the court (see GEI at para 86; see also *Williams v Simpson (No. 5)*[2010] NZHC 1786), and may also include interim appointments (see GEI at paras 79-80). The focus is on the authorisation being provided in the "context of" or in the "course of" the proceeding, rather than upon the body providing the authorisation.

On the facts, it is clear that both Ms G and DGF fall under the category of "foreign representative". Under Article 77 of the LBBA, the DGF is authorised to act, and therefore obtains full power as a liquidator of the Bank on the date it receives confirmation of the NB's decision to revoke the Bank's licence. In addition, the DGF is also extensively empowered with, amongst others, powers of sale, distribution and the power to bring claims for compensation against persons for harm inflicted on the insolvent bank, and the power to investigate the bank's history and bring claims against parties believed to have caused its downfall. It is thus clear that the DGF is authorised to administer the liquidation of the Bank's assets or affairs and falls within the definition of a "foreign representative".

As for Ms G, the DGF's powers were delegated to her pursuant to Article 48(3) of the DGF Law, and these include the authority to sign all agreements related to the sale of

the bank's assets in the manner prescribed by the DGF Law. However, the powers to claim damages from a related party of the Bank, to make a claim against a non-banking financial institution that raised money as loans or deposits from individuals, and to arrange for the sale of the Bank's assets, remains vested in the DGF as the Bank's formally appointed liquidator. Accordingly, Ms G also falls within the definition of a "foreign representative".

For full marks, your response should also include a reference to the assumption of article 16(1) MLCBI.

* End of Assessment *