



SUMMATIVE (FORMAL) ASSESSMENT: MODULE 2A

THE UNCITRAL MODEL LAWS RELATING TO INSOLVENCY

Commented [SL1]: TOTAL = 35

70%

This is the summative (formal) assessment for Module 2A of this course and is compulsory for all candidates who selected this module as one of their compulsory modules from Module 2. Please read instruction 6.1 on the next page very carefully.

If you selected this module as one of your elective modules, please read instruction 6.2 on the next page very carefully.

The mark awarded for this assessment will determine your final mark for Module 2A. *In order to pass this module, you need to obtain a mark of 50% or more for this assessment.*

INSTRUCTIONS FOR COMPLETION AND SUBMISSION OF ASSESSMENT

Please read the following instructions very carefully before submitting / uploading your assessment on the Foundation Certificate web pages.

1. **You must use this document for the answering of the assessment for this module. The answers to each question must be completed using this document with the answers populated under each question.**
2. **All assessments must be submitted electronically in MS Word format, using a standard A4 size page and a 11-point Arial font. This document has been set up with these parameters - please do not change the document settings in any way. DO NOT submit your assessment in PDF format as it will be returned to you unmarked.**
3. **No limit has been set for the length of your answers to the questions. However, please be guided by the mark allocation for each question. More often than not, one fact / statement will earn one mark (unless it is obvious from the question that this is not the case).**
4. **You must save this document using the following format: [student ID.assessment2A]. An example would be something along the following lines: 202223-336.assessment2A. Please also include the filename as a footer to each page of the assessment (this has been pre-populated for you, merely replace the words "studentID" with the student number allocated to you). Do not include your name or any other identifying words in your file name. Assessments that do not comply with this instruction will be returned to candidates unmarked.**
5. **Before you will be allowed to upload / submit your assessment via the portal on the Foundation Certificate web pages, you will be required to confirm / certify that you are the person who completed the assessment and that the work submitted is your own, original work. Please see the part of the Course Handbook that deals with plagiarism and dishonesty in the submission of assessments. Please note that copying and pasting from the Guidance Text into your answer is prohibited and constitutes plagiarism. You must write the answers to the questions in your own words.**
- 6.1 **If you selected Module 2A as one of your compulsory modules (see the e-mail that was sent to you when your place on the course was confirmed), the final time and date for the submission of this assessment is 23:00 (11 pm) GMT on 1 March 2023. The assessment submission portal will close at 23:00 (11 pm) GMT on 1 March 2023. No submissions can be made after the portal has closed and no further uploading of documents will be allowed, no matter the circumstances.**
- 6.2 **If you selected Module 2A as one of your elective modules (see the e-mail that was sent to you when your place on the course was confirmed), you have a choice as to when you may submit this assessment. You may either submit the assessment by 23:00 (11 pm) GMT on 1 March 2023 or by 23:00 (11 pm) BST (GMT +1) on 31 July 2023. If you elect to submit by 1 March 2023, you may not**

submit the assessment again by 31 July 2023 (for example, in order to achieve a higher mark).

- 7. Prior to being populated with your answers, this assessment consists of 14 pages.***

ANSWER ALL THE QUESTIONS

Please note that all references to the "MLCBI" or "Model Law" in this assessment are references to the Model Law on Cross-Border Insolvency.

QUESTION 1 (multiple-choice questions) [10 marks in total]

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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?

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

(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 appropriate date for determining the COMI of a debtor is the date of commencement of the foreign proceeding. The courts have considered other possible dates which include.

i. **The date of commencement of foreign proceedings**

The rationale of choosing a date of commencement of the foreign proceeding is that it avoids different outcomes in different jurisdictions where applications for recognition are made at different times and the debtor may have moved around between those times. It has also been noted that the date of commencement of the foreign proceeding is fixed and readily verifiable. On the other hand the date for filing an application for recognition may vary depending on the circumstances and the diligence of the foreign representatives.¹

ii. **The date of application for recognition.**

The suggestion is that this approach allows for the harmonisation of cross-border insolvency proceedings on the basis that limiting the inquiry to the time of filing avoids a detailed examination of the operational history of the debtor which may result in conflicting COMI determinations by different courts. Furthermore it allows the court to account for shifts in the debtor's COMI in the period between the commencement of the foreign insolvency proceeding and the date of application for recognition. It offsets the debtor's ability to manipulate the COMI.

Determination of the COMI by reference to the date of application for recognition may allow the debtor the discretion to take advantage of a jurisdiction that will offer the best prospects for achieving an effective restructuring solution.

A debtor's COMI may move prior to commencement of insolvency proceedings. In this instance the suggestion is that the receiving court, in determining whether to recognise the proceedings should consider additional factors like whether the COMI is ascertainable to 3rd parties.

iii. **Operational history of the debtor.**

This method has been rejected as it increases the likelihood of conflicting COMI determinations and competing main proceedings impact upon the question whether COMI is easily ascertainable by 3rd parties.

¹ Digest of Case Law on the UNCITRAL Model Law on Cross-Border Insolvency, p50

Commented [SL4]: SUBTOTAL = 7 MARKS

Commented [SL5]: 2 marks

US courts, chap 15 and *Morning Mist Holdings Ltd v. Krys (Matter of Fairfield Sentry Ltd)*.

Question 2.2 [maximum 3 marks]

Commented [SL6]: 2.5 marks

Statement 3 = Art 16(3)

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."*

ACCESS OF FOREIGN REPRESENTATIVES AND CREDITORS OF A PROCEEDING (identify laws of the enacting State relating to insolvency). The Article lays down the requirement of notification to creditors. **ARTICLE 14**

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

LIMITED JURISDICTION.

The sole fact that an application pursuant to this law is made to a court in this State by a 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. **ARTICLE 10**

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

PRESUMPTIONS CONCERNING RECOGNITION

1. If the decision or certificate referred to in paragraph 2 of article 15 indicates that the foreign proceeding is a proceeding within the meaning of subparagraph (a) of article 2 and that the foreign representative is a person or body within the meaning of subparagraph (d) of article 2, the court is entitled to so presume.
2. The court is entitled to presume that documents submitted in support of the application for recognition are authentic, whether or not they have been legalised.
3. In the absence of proof to the contrary, the debtor's registered office, or habitual residence in the case of an individual, is presumed to be the centre of the debtor's main interests. **Article 16.**

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.

In this case an Azeri foreign representative was granted a recognition order and requested appropriate relief under the Model law in the form of an indefinite continuation of the automatic moratorium that resulted from an earlier recognition order. The issue was that the court should not exercise its power to grant an indefinite moratorium continuation if to do so would.

- a. Prevent English creditors from enforcing their English law rights in accordance with the “Gibb’s Rule” and or,
- b. Prolong the stay after the Azeri reconstruction has come to an end.

The Court of Appeal held that an English court could properly grant the indefinite moratorium continuation if it was satisfied that.

- i. The stay would be necessary to protect the interests of IBA’s creditors and;
- ii. The stay would be an appropriate way of achieving such protection.

The court held that neither of the conditions had been satisfied and therefor declined to exercise its power in grant the indefinite moratorium continuation.

Question 2.4 [2 marks]

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

In terms of Article 29 (b) (ii) the court may modify or terminate relief granted under Article 20 if the relief is inconsistent with the domestic insolvency proceedings.

The foreign representative has a duty to 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 proceedings regarding the same debtor that becomes known to the foreign representative.

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

Commented [SL8]: 0.5 marks

Arts 29(a) and 18

Commented [SL9]: SUBTOTAL = 5 MARKS

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] [0 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 COMI of the debtor will determine the consequences of the recognition, so that if the COMI of the debtor is in the jurisdiction where the foreign proceedings have been opened, the proceedings are main insolvency proceedings with automatic mandatory relief. If a debtor only has an establishment in the jurisdiction where the foreign proceedings are opened, the proceedings are non-main proceedings, without automatic relief, but only discretionary post-recognition relief granted by the law.

In cases deemed urgent in order to secure the assets of the debtor, the foreign representative may approach the court before the court has decided on the recognition application for specific relief that secures the assets of the debtor. The relief available is addressed in Article 19. It is provisional and limited in that it terminates upon the granting of the recognition application. The relief available gives the foreign representative certain rights which included. **No recognition is needed, the foreign representative has automatic standing before the courts in State A without having to meet any formal requirements such as a license or any consular action. This is contained in Article 9 of the MLCBI.**

- Entrusting the administration or realisation of all or part of the debtor's assets located in the state to the foreign representative or other person's designated by the court to protect and preserve the value of the assets that maybe perishable, susceptible to devaluation or otherwise be in jeopardy.²

There is also post-recognition relief under Article 21 which is discretionary in nature available which gives the foreign representative certain rights which include;

- Staying execution/action against the debtor's assets;
- Staying the right to encumber/transfer or dispose of assets of the debtor
- The foreign representative is enabled to examine witnesses, take evidence or delivery of information concerning the debtor's assets;
- Extend relief granted under Article 19.

Cross-border cooperation is necessary to prevent dissipation of the debtor's assets and maximise the value of the assets. Article 26 allows the foreign representative under the supervision of the court, to devise and implement cooperative arrangements. The forms of cooperation under Article 27, include cooperation between the courts and coordination of the supervision of the debtor's assets and affairs.

² Article 19 (1) (b).

The benefit of recognition to the foreign representative is that it gives the foreign representative access to tools and protections available to a local insolvency holder in the enacting state. Such tools include the examination of witnesses, taking of evidence or delivery of information concerning the debtor's assets. Relief available under Article 20 is automatic if the recognised foreign proceeding qualifies as a main foreign proceeding.

Article 23 enables the foreign representative after recognition to begin actions under the law of the enacting state to avoid or cancel acts detrimental to creditors of the debtor.

Article 24 enables the foreign representative to intervene in local proceedings in the enacting state, in which the debtor is a party .

The benefits of automatic relief like staying actions, enables "breathing space" until appropriate measures are taken for re-organisation or liquidation of the debtor's assets. The suspension of transfers provides an immediate restriction preventing multi-national debtors from moving money and property across international borders, thus containing fraud. The availability of urgent interim relief under Article 19 helps prevent the dissipation of assets and preserve the *status quo* for the benefit of stakeholders until the recognition application can be heard.

Your answer must include the following:

- ***Opening domestic insolvency proceedings (Article 11 MLCBI): The foreign representative is further specifically entitled to apply for the opening of domestic insolvency proceedings in State A, as reflected in Article 11 of the MLCBI. Whether or not the foreign representative would wish to do this will depend on what the requirements are for opening such domestic proceedings. Can these requirements be met? On the other hand, it will depend on what the foreign representative believes he/she can get in terms of (interim) relief for the foreign proceedings in State B. In other words, are domestic insolvency proceedings really needed, or just additional time and costs that should be avoided?***
- ***Cooperation: Similar to access rights, the cooperation provisions in the MLCBI (articles 25-27) also operate independently of recognition and it is not a prerequisite to the use of the cooperation provisions that recognition of the foreign proceedings is obtained in advance. Courts in State A can freely cooperate with the foreign representative without having to worry whether the status in State B of the foreign representative can be recognised in State A.***
- ***Save Time & Costs: The key benefits of both the access provisions and the cooperation provisions are that they save time and therefore also costs, as a result of which value destruction can be avoided and value enhancement is being promoted.***

Question 3.2 [maximum 5 marks] [1 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.

Availability of relief before and after recognition of a foreign proceeding by the enacting State is subject to the court's discretion. The court must be satisfied that the interests of the creditors and other interested persons including the debtor are adequately protected.³ The court may modify or terminate the relief granted if so requested by a person affected thereby.⁴

The court may refuse to grant relief under the Model Law if the action would be so manifestly against the public policy of the enacting State.⁵ [½] - refer to Article 6 which deals with public policy exception. It has been suggested that the use of "manifestly", emphasises that the public policy exception should be narrowly interpreted and invoked only in exceptional circumstances concerning matters of fundamental importance for the enacting State.⁶

When the local insolvency proceeding is already under-way at the time that a recognition of a foreign proceeding is requested, any relief granted for the benefit of the foreign proceeding must be consistent with the local proceeding.

When the local proceedings begin after the recognition or application for recognition, the relief granted for the benefit of the foreign proceeding must be reviewed and modified or terminated if inconsistent with the local proceeding.

International obligations of the enacting State are given priority over the Model Law.⁷ An example is the supremacy of the Cape Town Convention which may take priority over the model law in restructuring of airlines. [½] refer to Article 3 which deals with international obligations of State A

If the foreign main proceeding was recognised first in the enacting State then any relief granted thereafter either under Article 19 or 21 to a representative of a foreign non-main proceeding must be consistent with the foreign main proceeding.⁸ If the application for recognition or the recognition of the foreign non-main proceedings comes first, then once the foreign main proceeding is recognised in the enacting State, any relief granted under Article 19 or 21 must be reviewed by the court and modified or terminated if inconsistent with the foreign main proceeding.⁹

With reference to the question, consider the following discussions in your answer:

- 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**

³ Article 22 (1). UNCITRAL Legislative Guide on Insolvency Law p. 314.

⁴ Article 22 (2,3).

⁵ Article 6.

⁶ Digest of Case Law on the UNCITRAL Model Law on Cross-Border Insolvency, p20.

⁷ Article 3.

⁸ Article 30 (a).

⁹ Article 30 (b).

international obligations of State A (under a treaty or otherwise) that may conflict with granting the recognition application under the implemented Model Law in State A.

- 3. Sufficient evidence: Article 15 of the Model Law sets forth in paragraph 2 what evidence in respect of the commencement of the foreign proceedings and the appointment of the foreign representative must accompany the recognition application. A statement identifying all foreign proceedings in respect of the debtor that are known to the foreign representative must also accompany the recognition application (Article 15(3) of the Model Law).**
- 4. Judicial scrutiny: While the court in State A is able to rely on the rebuttable presumptions set forth in Article 16 of the Model Law, in the context of Article 17 of the Model Law the court will have to assess whether either the COMI or at least an establishment of the debtor is located in State B where the foreign proceedings were opened. If the COMI of the debtor is in State B the foreign proceedings should be recognised as foreign main proceedings and if only an establishment of the debtor is in State B the foreign proceedings should be recognised as foreign non-main proceedings. Without a COMI or at least an establishment of the debtor in State B, recognition cannot be granted by the court in State A.**
- 5. Public policy exception: Finally, the court in State A should also ensure based on Article 6 of the Model Law that the recognition application is not manifestly contrary to public policy of State A.**

Question 3.3 [maximum 5 marks] [3 out of 5 marks]

As far as relief is concerned, briefly explain (with reference to the relevant MLCBI articles) what pre- and post-recognition relief can be considered in the context of the MLCBI. Also address which restrictions, limitations or conditions should be considered in this context. For the purposes of this question, it can be assumed that there is no concurrence of proceedings.

Article 17 distinguishes between foreign main and non-main proceedings as the available relief is different.¹⁰ Main proceedings trigger an automatic relief in the form of a stay of individual creditor actions concerning assets of the debtor,¹¹ and an automatic freeze of assets under Article 20 (1) (c), subject to the exceptions under Article 20 (2).

Article 19 provides urgent interim pre-recognition relief in collective insolvency proceedings ending when the application for recognition is decided. The court may extend the relief granted under Article 19 in appropriate cases.¹² The relief granted under Article 19 applies to both foreign main and non-main proceedings. The relief is intended to protect the assets of the debtor or the interests of the creditors and includes

- Staying execution against the debtor's assets.

¹⁰ Article 17(2).

¹¹ Article 20 (1) (a, b).

¹² Article 21 1(f).

- Entrusting the administration or realisation of all or part of the debtor's assets located in the enacting State to the foreign representative or other appointed person to protect and preserve the value of the assets which by their nature are perishable, vulnerable to devaluation or otherwise in jeopardy.
- Suspending the right to transfer, encumber or otherwise dispose of any of the assets of the debtor;
- Examination of witnesses, taking of evidence or delivery of information concerning the debtor's assets, affairs, rights, obligations or liabilities.

The interim relief maybe refused if the granting of it would interfere with the administration of a foreign main proceeding.¹³

Post recognition relief is provided for under Article 21, where the Court maintains the discretion to grant appropriate relief to protect the assets of the debtor or interests of the creditors. The relief is not unlimited. The turning over of assets to the foreign representative is discretionary and the built-in safeguards include the court's satisfaction that local creditors' interests are protected before the assets are handed over to the foreign representative.¹⁴ The court may subject the relief granted to conditions it deems appropriate to protect local interests¹⁵.

Article 20 provides for automatic relief upon the recognition of a foreign main proceeding. It is a post recognition relief. It allows for orderly and fair cross-border insolvency proceedings. The Court maintains the discretion to terminate or modify the automatic stay contemplated if it would be contrary to the legitimate interests of party.¹⁶ The automatic stay and suspension does not affect the right to begin individual actions to the extent necessary to preserve a claim against a debtor.¹⁷

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

- 1. 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.**
- 2. 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?

¹³ Article 19 (4).

¹⁴ Article 21 (2).

¹⁵ UNCITAL Legislative Guide on Insolvency Law p 347 paragraph 157.

¹⁶ Article 20 (2).

¹⁷ Article 20(3).

The court maintains its discretionary powers to limit, modify or cancel a freezing order. In the case of *Igor*¹⁸, The court held that the Model Law on Cross-Border Insolvency is intended to put the foreign representative in the same position, as far as is practical, as an office holder appointed under domestic law, hence the local tools are available to the foreign representative under local insolvency legislation. A world-wide freezing order would therefore not be 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.

¹⁸ *Igor Vitalievich Prolasov & Khadzhi-Murat Derev* (Order of 24 February 2021 by Justice Adam Johnson [2021] EWHC 392 (CH),

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 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]; [10 out of 10]

In determining whether the Bank's liquidation comprises a "foreign proceeding", regard must be had to the following elements as laid down in *Agrokor's case*¹⁹.

1. A statutory framework that constrains a company's actions and that regulates the final distribution of a company's assets.²⁰ This is satisfied as Country A has a specific Insolvency procedure for banks. The National Bank is empowered by Article 77 of the law of country A on Banks and Banking activity to liquidate the Bank. Further, the Deposit Guarantee Fund (DGF) is a government body of Country A tasked with winding down insolvent banks through liquidation.
2. The statutory framework should be either judicial or administrative. The facts of the case demonstrate the proceedings are administrative in that the law of country A empowers the National Bank and subsequently DGF to wind up the affairs of the Bank. The process is controlled by the regulatory body.
3. The process must be collective in nature. The intention is to achieve a coordinated global solution for all stakeholders of an insolvency proceeding. Some of the characteristics of a collective proceeding include the imposition of an organised system that affects the rights and obligation of all creditors and the assets of the debtor.²¹ The LBBA is consolidated in nature satisfying the requirement that the organised insolvency process be organised. There is an imposition of an orderly regime affecting the rights and obligations of all creditors and all the assets of the debtor in that under Article 77 of the LBBA, DGF automatically becomes liquidator of the Bank on the date it receives confirmation of the National Bank's decision to revoke the troubled Bank's banking license. DGF assumes full control of the bank with extensive powers including the power to compile a register of creditors' claims and seek to satisfy them. The law empowers DGF to dispose of the Bank's assets and any other powers necessary to complete the Bank's liquidation.
4. The process must be in a foreign state which requirement is satisfied as the insolvency proceedings commenced in State A.
5. The proceedings must be authorised or conducted under a law relating to insolvency. In *Agrokor's case* the court held that it was sufficient if the law dealt with insolvency or financial distress. Article 76 of LBBA empowers the National Bank to classify Banks as insolvent if they satisfy the criteria laid down. From the facts Bank A was clearly insolvent as its records indicated that its financial position had deteriorated with increased losses.
6. The assets and affairs of the debtor must be subject to control or supervision by a foreign court. The level of control is not specified in the Model Law on Cross-Border Insolvency. The control or supervision maybe exercised by the court or other regulatory body. Both the assets and affairs of the debtor must be subject to control

¹⁹ DD [2017] EWHC 2791 (CH)

²⁰ Digest of Case Law on the UNCITRAL Model Law on Cross-Border Insolvency p6 paragraph 4.

²¹ Digest of Case Law on the UNCITRAL Model Law on Cross-Border Insolvency p.6 paragraph 7 (a-f).

to satisfy the definition of a foreign proceeding.²² From the facts LBBA gives the liquidator control over the Bank's assets and this is contained in Article 77 which establishes that DGF or a delegated person has extensive powers over the assets of the Bank. The liquidator as the duly authorised person by DGF is directly supervised by DGF.

7. A further requirement is that the proceeding is for the purpose of re-organisation or liquidation. The purpose of LBBA is to liquidate a bank once it has been declared insolvent by the National Bank. The powers of DGF are to liquidate insolvent banks. This is pursuant to Article 34 of LBBA. In the Agrokor's case the court found that the purpose of the Lex Agrokor if restructuring failed was to commence bankruptcy proceedings.

The Bank's liquidation comprises a "foreign proceeding" within the meaning of Article 2(a) of the MLCBI.

4.1.2 whether the Applicants fall within the description of "foreign representatives" as defined by article 2(d) of the MLCBI [maximum 5 marks]. [4 out of 5]

The key elements qualifying a foreign representative include.

1. A person or body including one appointed on an interim basis.
2. Authorised in a foreign proceeding.
3. To administer the re-organisation or liquidation of the debtor's assets or affairs or to act as a representative in the foreign proceeding.
4. The MLCBI does not specify that the foreign representative must be authorised by the foreign court. It has been suggested that it includes appointments made by a special agency other than the court.²³ A person or body has been interpreted to mean a natural or juristic person created by a legal authority.²⁴
5. The foreign representative must have power to administer the re-organisation or liquidation of the debtor's assets at the time of application for recognition. If they do not have the power at the time of application for recognition but are subsequently granted powers Article 18 of the MLCBI may be relevant.

The appointed liquidator of Bank A meets the following criterion.

- She is a natural person appointed by an administrative body, namely DGF, duly authorised under the insolvency law of Country A. DGF is empowered to wind up insolvent banks in terms of the law of LBBA. Ms.G is accountable to DGF as specified under Article 35 (1) of the DGF law. She is delegated liquidation powers set out in Articles 37, 38, 47-52, 521 and 53 of the DGF law. The body however has excluded from her liquidation powers the authority to sell Bank A's assets, which it has reserved for itself. This limitation in her powers to fully liquidate a bank even under the supervision of DGF does not qualify her as a foreign representative within the meaning of Article 2 (d) of the MLCBI.

²² Digest of Case Law on the UNCITRAL Model Law on Cross-Border Insolvency p.7 paragraph 13.

²³ Digest of Case Law on the UNCITRAL Model Law on Cross-Border Insolvency p.10 paragraph 37.

²⁴ Digest of Case Law on the UNCITRAL Model Law on Cross-Border Insolvency p.10 paragraph 38.

- DGF on the other-hand qualifies as a foreign representative being a body empowered in terms of the Insolvency Laws of country A to wind up the affairs of insolvent banks with extensive liquidation powers provided for under Article 37 of DGF law.

For full marks your response should have applied the facts in a bit more detail and also address the assumption of article 16(1) MLCBI.

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 *