



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

**THE UNCITRAL MODEL LAWS RELATING TO INSOLVENCY**

Commented [SL1]: TOTAL = 33.5

67%

*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 (c).

- (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.**

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Commented [SL4]: Correct answer is (a).

(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?**

*First and foremost, MLCBI does not define the concept of COMI. However the UNCITRAL Guide to Enactment provides guidance that is very much aligned with the European Insolvency Regulation (EIR), focusing on the location of debtor's central administration and whether that location can be easily pinpointed by the creditors. Both of these criteria need to be addressed by the court, although the court has (depending on the circumstances of a particular case) the freedom to weigh the relative importance of each factor in its decision making.*

*In addition, court could also opt to rely on other relevant factors to come up with its ruling on a debtor's COMI, including the location of employees, the jurisdiction of law applicable to most disputes, amongst others. This would suggest that the debtor has some optionality when it comes to choosing its COMI (aka "forum shopping") to generate an outcome that may not be entirely favourable to creditors.*

*To limit the impact of potential "forum shopping" MLCBI has narrowed down the time period for the identification of COMI (or the debtor's establishment) to the date of commencement of the foreign proceedings. Naturally, some debtors may try to manipulate this definition by moving its aspects of COMI just prior to the initiation of foreign proceedings. However, this is likely to fail the second prong of the test in that creditors are unlikely to associate the new COMI with the debtor.*

*Nevertheless, there is some debate around whether COMI definition should be relaxed in order to achieve more optimal recoveries for creditors, especially in situations where the debtor is located in a jurisdiction that has developing bankruptcy laws.<sup>1</sup> Having been part of a couple of cross border insolvencies myself, I can understand why an estate with money to forum shop may prefer to use the US for bankruptcy proceedings given the worldwide stay of execution (and the contempt of court non-compliant creditors would face). In addition, threat from the long arm of the US DOJ against third parties whose actions may have had a detrimental impact on the bankruptcy of the debtor could also be helpful. That said, I do not wholeheartedly endorse this view, and would have to put it to the test through further research.*

<sup>1</sup> Rosa M. Rojas Vértiz: *The MLCBI, the COMI and Emerging Markets: Is it time for amendments?* (July 2022)

Commented [SL5]: SUBTOTAL = 8 MARKS

Commented [SL6]: 2.5 marks

Also US courts: Chap 15 and *Morning Mist Holdings Ltd v. Krys (Matter of Fairfield Sentry Ltd)*



**Question 2.2** [maximum 3 marks]

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

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

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

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

*Statement 1: Article 14 / Timely Notice / based on the equal treatment principle, this provision requires that foreign creditors are notified contemporaneously along with domestic creditors in the enacting State.*

*Statement 2: Article 10 / Safe Conduct Rule / ensures that assets of the debtor are not subsumed by the court in the enacting State purely on the basis of the foreign representative making an application for the recognition of a foreign proceeding.*

*Statement 3: Article 16 / COMI / allows for the court in the enacting State to challenge the COMI of a petitioning debtor, especially in circumstances where only the debtor's registered office is located but there is no other physical (or other) presence that would tie it to the jurisdiction.*

**Question 2.3** [2 marks]

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

*To start with it would be helpful to contextualize the 1890 Gibbs case (Antony Gibbs & Sons v La Societe Industrielle et Commerciale des Metaux) which forms the basis for this analysis, and for that purpose we will rely on the summary provided by US Bankruptcy Judge Martin Glenn: "(...) the essence of the decision is that where a debtor, in the case domiciled in France, made a contract governed by English law and to be performed in England, was declared a bankrupt and its debts discharged under foreign law in a foreign proceeding (the French law in a French proceeding), the plaintiff was not bound by the discharge and could maintain an action on the contract and recover damages in an English court. (...)"<sup>2</sup>*

<sup>2</sup> p5 of the US Chapter 15 Agrokro Opinion (supra, note 49)

Commented [SL7]: 2.5 marks

Statement 3 = Art 16(3)

Commented [SL8]: 2 marks

*In the case of IBA appeal, the English Court of Appeal had considered two questions before deciding on whether or not to exercise its power in relation to the indefinite Moratorium Continuation.*

*First, it wanted to make sure that its decision was not unnecessarily preventing English creditors from exercising its rights under English law, in contravention to the Gibbs Rule. Considering that the IBA restructuring was successfully concluded under Azeri courts in Azerbaijan and was binding on all creditors (including English law creditors), it seemed that the general body of IBA creditors were sufficiently protected. Furthermore, if the IBA creditors' worries about the claims from the Challenging Creditors, they could have used an English law scheme as a threat to cram down the dissenting creditors. Taking both of these points into account (i.e., binding nature of the IBA restructuring under Azeri law and the lack of use of a UK scheme), the Court of Appeal ruled that the threat to IBA creditors from Challenging Creditors was indirect and unknown, and therefore not sufficient for the purposes of extending the indefinite Moratorium Continuation.*

*Second point was that since the foreign main proceedings have come to an end in Azerbaijan, with the IBA restructuring being concluded successfully under Azeri law, foreign representative no longer warranted support of the English courts and any relief previously granted under the Model Law should cease. In addition, Model Law does not address the continuation of relief after the foreign proceedings have come to an end. Therefore, the Court of Appeal voted not to exercise its power to grant the Indefinite Moratorium Continuation.*

*(Please help me understand if this is correct): Based on my reading of the IBA case then it would appear that any time there are English dissenting creditors, and following the Gibbs Rule, English courts should necessarily be accessed (either through a scheme or the recently enacted "super-scheme"), otherwise any application for protection under Model Law (post restructuring implementation in a local court) will not be effective as long as the English creditors do not subject themselves to the foreign court proceedings.*

**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 line with Article 20, once the foreign main proceeding has been recognized, there is an automatic stay of individual actions or proceedings against the debtor, in addition to an automatic stay of execution against the debtor's assets. Furthermore, the right to transfer, encumber or dispose of debtor's assets is immediately suspended.*

Commented [SL9]: 1 mark

Art 29(a) instead of art 20

*As mandated by Article 18, from the time of the filing for recognition, the foreign representative has the obligation to promptly inform the court of any substantial change in status (of either the recognized foreign proceeding or the foreign representative's appointment), and any additional foreign proceeding opened against the debtor that the foreign representative becomes aware of.*

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

Commented [SL10]: SUBTOTAL = 7.5 MARKS

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

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

Question 3.1 [maximum 4 marks] [2 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.**

*First of all, under Article 9 the foreign representative would automatically be granted access (without the need to apply for recognition) and would have standing in local courts [1] without the need for expensive and cumbersome procedures normally required in these circumstances.*

*Second, co-operation between the local (enacting) State and the foreign representative (and courts) can commence ahead of the application for recognition, allowing for an efficient exchange of information and a more transparent / predictable insolvency proceeding where stakeholders from different jurisdictions are treated more equally. Further details can be found in Articles 25 to 27 and the Practice Guide. Specifically:*

- *Article 25 outlines that the court in the enacting State must co-operate;*
- *Article 26 provides additional support as it requires the local insolvency office holder to co-operate; and*
- *Article 27 outlines a number of cooperation and communication mechanisms that can be followed to assist with Articles 25 and 26. [1]*

*Finally, the Practice Guide contains practical steps (based on prior experience from similar situations) for implementing some of the points discussed above, which could help the foreign representative in taking immediate action to preserve the rights of creditors in State A.*

*What is not entirely clear is whether the proceeding in State B would be considered a foreign main or non-main proceeding, based on the COMI of the debtor. That will initially drive the recognition classification and subsequently the type of relief available to the debtor.*

**Your answer must include reference to 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?
- ***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] [2 out of 5 marks]

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

*Recognition of the foreign office holder helps the office holder access certain tools and protections available locally (e.g., examination of witnesses) and circumvents the need to open a separate foreign proceeding in the enacting State. Articles 15 to 17 contain relevant provisions that dictate recognition requirements and presumptions permitting the foreign office holder to avoid a drawn-out and lengthy process to initiate a separate set of proceedings locally.*

*As far as requirements for recognition are concerned, Article 15 provides a list of documents that would normally be required for this purpose, including certified copies of decisions to commence the foreign proceedings or appoint the insolvency professional, certificates from foreign courts confirming existence of proceedings, or, in absence of these documents, any other evidence. In addition, the foreign*

representative would (to the best of their knowledge) have to declare all foreign proceedings against the debtor. [1]

In order to simplify the process, and presumably to highlight the autonomy of the courts in the enacting State, Article 16 recognizes the local courts' right to exercise their judgement. Specifically in the case of Article 16, local courts can assume that the foreign proceedings qualify under article 2(a) and that the foreign representative meets the requirements of article 2(d) as long as the supporting documentation submitted as part of the recognition application in line with Article 15 stipulates that (i.e., there is no need to do a separate audit / verification of the papers).

Finally, assuming that the requirements of Article 15 have been met, and considering we have been told that both the foreign proceeding (subject to article 2(a)) and the foreign representative (subject to article 2(d)) qualify for recognition, Article 17 states that the recognition decision must be made at the earliest (but can be subsequently modified) by the court in State A. Depending on the location of the foreign proceeding it will either be recognized as a main proceeding (if the location is the same as the debtor's COMI) [½] or non-main (if the debtor only has an establishment), [½] which will subsequently drive the availability of automatic relief under Article 20.

In this case it is also worth noting that State A does not have a reciprocity requirement which should be beneficial to the foreign representative (in terms of time and cost) to get recognition, access and relief from local courts.

**With reference to the question, the following should have also been included 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 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. 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.

**4. 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] [2.5 out of 5 marks]

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

*Prior to getting recognition, the foreign representative can apply for interim relief from local courts by leveraging the provisions of Article 19 including stay of execution, examination of witnesses, suspending rights of transfer and any other relief that may be warranted given the circumstances of the case. It is worth pointing out that the provisions of Article 19 apply to both foreign main and non-main proceedings, which is significant given that we do not have clarity on debtor's COMI.*

*Once recognition has been granted, the representative in a foreign main proceeding can rely on Article 20 and its automatic relief to stay the commencement or continuation of individual actions, execution against the debtor's assets and right of transfer of debtor's assets. However, it is worth pointing out that Article 20 / paragraph 2 also gives local courts the authority to suspend the automatic stay if it is contrary to legitimate interests of the stakeholders (including the debtor).*

*Article 21 has more flexibility in that it applies to both foreign main and non-main proceedings, and that it gives the courts of the enacting State the discretionary power to protect the debtor's assets using a slate of relief measures which expand on the provisions of Article 20. For example, foreign representative may be granted the right to examine witnesses, administer debtor's assets in the enacting State, and even some other rights that are on par with the rights of the local office holder. However, there are limitations, specifically in relation to English cases, where the local courts have ruled that relief provided under Article 21 is not valid in the following circumstances:*

- *Insolvency related to default judgements against a person;*
- *Application of a foreign insolvency law to an English law governed contract; and*
- *Extending the continuation of an indefinite moratorium to a foreign representative on the conclusion of the foreign main proceedings.*

*In addition to Articles 20 and 21 listed above, the foreign representative is empowered to interfere in local proceedings (to the extent they are not already stayed using existing provisions) using the provisions of Article 24.*

**Your answer should also 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?**

*A pre-recognition interim relief is meant to put the foreign office holder on the same footing as the local office holder. Once the foreign proceeding has achieved recognition with the local courts, the foreign office holder will (for all intents and purposes) have access to the same legal infrastructure and treatment as local appointees and in that sense will no longer need to rely on pre-recognition reliefs granted under Article 19. This was born out in the case of Igor Vitalievich Protasov and Khadzi-Murat Derev, where the English court decided not to extend the worldwide freezing order granted as part of the pre-recognition relief.*

QUESTION 4 (fact-based application-type question) [15 marks in total]

**Read the following facts very carefully before answering the questions that follow.**

(1) Background

**The Commercial Bank for Business Corporation (the Bank) has operated since 1991. The Bank's registered office is situated in Country A, which has not adopted the MLCBI. As of 13 August 2015, the Bank's majority ultimate beneficial owner was Mr Z, who held approximately 95% of the Bank's shares through various corporate entities (including some registered in England).**

**The Bank entered provisional administration on 17 September 2015 and liquidation on 17 December 2015. Investigations into the Bank have revealed that it appears to have been potentially involved in a multi-million dollar fraud resulting in monies being**

**sent to many overseas companies, including entities incorporated and registered in England.**

**Proceedings were commenced in the High Court of England and Wales (Chancery Division) against various defendants on 11 February 2021 (the English Proceedings).**

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

*Classification of the bank as troubled*

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

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

*Classification of the bank as insolvent*

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

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

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

*Provisional administration*

**The Deposit Guarantee Fund (DGF) is a governmental body of Country A tasked principally with providing deposit insurance to bank depositors in Country A.**



**However, the Affidavit explained that the DGF is also responsible for the process of withdrawing insolvent banks from the market and winding down their operations via liquidation. Its powers include those related to early detection and intervention, and the power to act in a bank's interim or provisional administration and its ultimate liquidation.**

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

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

#### ***Liquidation***

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

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

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

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

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

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

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

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

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

**Article 37 establishes that the DGF (or its authorised person, insofar as such powers are delegated) has extensive powers, including powers to exercise managerial and supervisory powers, to enter into contracts, to restrict or terminate the bank's transactions, and to file property and non-property claims with a court.**

(2) The Bank's liquidation

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

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

**Those operations included:**

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

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

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

***Ms G's appointment was pursuant to a Decision of the Executive Board of the Directors of the DGF, No 1513 (Resolution 1513). Resolution 1513 notes that Ms G is a "leading bank liquidation professional". It delegates to her all liquidation powers in respect of the Bank set out in the DGF Law and in particular articles 37, 38, 47-52, 521 and 53 of the DGF Law, including the authority to sign all agreements related to the sale of the bank's assets in the manner prescribed by the DGF Law. Resolution 1513 expressly excludes from Ms G's authority the power to claim damages from a related party of the Bank, the power to make a claim against a non-banking financial institution that raised money as loans or deposits from individuals, and the power to arrange for the sale of***

**the Bank's assets. Each of the excluded powers remains vested in the DGF as the Bank's formally appointed liquidator.**

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

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

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

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

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

**4.1.1 whether the Bank's liquidation comprises a "foreign proceeding" within the meaning of article 2(a) of the MLCBI [maximum 10 marks]; and [7 out of 10]**

**In order for the Bank's liquidation to be considered a "foreign proceeding" we will consider the following questions:**

- a) Can the liquidation be considered as a proceeding?
- b) Is it either judicial or administrative?
- c) Is it collective in nature?
- d) Is it in a foreign State?
- e) Is it authorized or conducted under local insolvency laws? **[the more accurate description of this element is "pursuant to a law relating to insolvency"]** and
- f) Are the assets of the debtor subject to the supervision of a foreign court? **the more accurate description of this element is "subject to the control or supervision of a foreign court"]**

**As this is clearly a liquidation we will not need to consider the final criteria, i.e., is the proceeding a reorganisation or a liquidation?**

**The Bank's liquidation is driven by local banking regulations (i.e., law) which give the National Bank the right to declare a "troubled bank" insolvent if the issues which led to the "troubled" classification are not resolved within 180 days of being identified. Once the Bank was declared insolvent, DGF, another government entity, is tasked**

*with withdrawing the Bank from the market and liquidating their operations in a controlled manner, pursuant to Article 34 of the DGF Law. Therefore, we can conclude that the liquidation can be considered as an administrative proceeding.*

*Initially DGF assumes the role of a provisional administrator, which according to article 36(5) permits the establishment of a moratorium that prevents the claims of depositors and other creditors being satisfied, stays the execution against the bank's assets, or any encumbrances or restrictions being applied for that matter. On this basis it would appear that the proceeding is collective in nature as it does not seem to favour any one type of creditor over the other, and instead focuses on maximizing availability of assets for the overall estate.*

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

- 1. UNCITRAL's guide for judiciary, "The Model Law on Insolvency: The Judicial Perspective" (2013) explains the requirement for proceedings to be "collective":***

*"The UNCITRAL Model Law was intended to apply only to particular types of insolvency proceedings. The Guide to Enactment and Interpretation indicates that the notion of a "collective" insolvency proceeding is based on the desirability of achieving a coordinated, global solution for all stakeholders of an insolvency proceeding. It is not intended that the Model Law be used merely as a collection device for a particular creditor or group of creditors who might have initiated a collection proceeding in another State, or as a tool for gathering up assets in a winding up or conservation proceeding that does not also include provision for addressing the claims of creditors. The Model Law may be an appropriate tool for certain kinds of actions that serve a regulatory purpose, such as receiverships for such publicly regulated entities as insurance companies or brokerage firms, provided the proceeding is collective as that term is used in the Model Law."*

- 2. The Guide to Enactment and Interpretation of the UNCITRAL Model Law (2014) explains that when:***

*"evaluating whether a given proceeding is collective for the purpose of the Model Law, a key consideration is whether substantially all of the assets and liabilities of the debtor are dealt with in the proceeding, subject to local priorities and statutory exceptions, and to local exclusions relating to the rights of secured creditors. A proceeding should not be considered to fail the test of collectivity purely because a class of creditors' rights is unaffected by it."*

- 3. Based on the facts provided the understanding is that all of the Bank's creditors are entitled to claim in the liquidation and that their claims are met from available assets, according to the statutory order of priorities. Consequently, the conclusion can be reached that the Bank's liquidation is a "collective proceeding".***

*The liquidation was initiated in Country A, which is outside England, and therefore would qualify as foreign.*

*The liquidation is being conducted under local insolvency laws applicable to Country A's banks and financial institutions (Articles 75 and 76 of LBBA, and Article 34 of DGF Law). However, it was not entirely clear if the bank was insolvent on a balance sheet basis (or merely not compliant with local banking regulations) because the*

*justification for putting the Bank into insolvency is that it failed to remedy identified breaches within 180 days. Subsequent determination in September 2020 that the estimated deficiency exceeded US\$823m confirms that Bank A is insolvent and would therefore meet the necessary criteria as far as this aspect of MLCBI Article 2 is concerned.*

**Please see the above comment regarding what is required for full marks.**

*Finally, the involvement or supervision of local courts is probably the most contentious aspect to decide because the facts of the case do not suggest involvement of the court in Bank A's liquidation at any point in time. However there are a couple of mitigating factors that we could consider in this instance. First - CIBR does not require actual court involvement in a case; potential court involvement is sufficient for the purposes of this test. Second - it would seem likely, given the substantial deficit that the Bank A has, and the power of DGF to bring claims against parties who precipitated the insolvency - that the court is likely to be involved at some point in time. Third - DGF also has the capacity to delegate its powers to an "authorized officer" or an "authorized person". It is not entirely clear, but it would seem that an "authorized officer" could be an officer of the court and in doing so could potentially bring direct court supervision into the case.*

**Please see the above comment regarding what is required for full marks. For this element we are looking for something along the following lines:**

- 1. The term "foreign court" is defined at article 2(e) of the MLCBI and means: "a judicial or other authority competent to control or supervise a foreign proceeding".**
- 2. The Guide to Enactment notes: "87) A foreign proceeding that meets the requisites of article 2, subparagraph (a), should receive the same treatment irrespective of whether it has been commenced and supervised by a judicial body or an administrative body. Therefore, in order to obviate the need to refer to a foreign non-judicial authority whenever reference is made to a foreign court, the definition of "foreign court" in subparagraph (e) includes also non-judicial authorities."**
- 3. In Re Sanko Steamship Co Ltd [2015] EWHC 1031 (Ch) Simon Barker QC, noted that a foreign proceeding may be recognised where the control or supervision of the proceeding is undertaken by a non-judicial administrative body.**
- 4. The Guide to Enactment states: "74) The Model Law specifies neither the level of control or supervision required to satisfy this aspect of the definition nor the time at which that control or supervision should arise. Although it is intended that the control or supervision required under subparagraph (a) should be formal in nature, it may be potential rather than actual. As noted in paragraph 71, a proceeding in which the debtor retains some measure of control over its assets, albeit under court supervision, such as a debtor-in-possession would satisfy this requirement. Control or supervision may be exercised not only directly by the court but also by an insolvency representative where, for example, the insolvency representative is subject to control or supervision by the court. Mere supervision of an insolvency representative by a licensing authority would not be sufficient."**

5. *In this case the DGF has control of all of the Bank's assets and overall control of the liquidation.*
6. *The DGF's independence is addressed at articles 3(3) and 3(7) of the DGF Law which confirm that it is an economically independent institution with separate balance sheet and accounts from the NB and that neither public authorities nor the NB have any right to interfere in the exercise of its functions and powers.*
7. *Article 37 establishes that the DGF (or its authorised person, insofar as such powers are delegated) has extensive powers, including powers to exercise managerial and supervisory powers, to enter into contracts, to restrict or terminate the bank's transactions, and to file property and non-property claims with a court.*
8. *The assets and affairs of the Bank are subject to the control of the DGF, an official body which exercises its powers in the liquidation free from intervention by government or the NB and which should be considered, for the purposes of the definition set out in article 2(e) of the MLCBI, as a "foreign court".*

*On this basis it would appear that the English courts would recognize Bank A liquidation as a foreign proceeding in line with Article 2 (a) of MLCBI.*

**4.1.2 whether the Applicants fall within the description of "foreign representatives" as defined by article 2(d) of the MLCBI [maximum 5 marks]. [3 out of 5]**

*To assess whether Ms. G and DGF should be considered as a "foreign representative" under the definition of Article 2(d) of MLCBI, we would have to answer whether she:*

- a) *Is a person / body, including one appointed on an interim basis?*
- b) *Is authorized in a foreign proceeding? And*
- c) *Can administer the liquidation of Bank A's assets or affairs or to act as a representative of the foreign proceeding?*

*Clearly Ms. G and DGF would meet the first and the second criteria as they are respectfully a person/body, authorized in the liquidation of Bank A in a foreign jurisdiction.*

*It is not clear whether Ms. G has full authority over the liquidation of Bank A's assets, given the limitations imposed on her by Resolution 1513, which expressly excludes Ms. G's power to arrange for the sale of the Bank's assets, vesting it in DGF as the formally appointed liquidator. However, given that the application to the English court is made jointly by Ms. G and DGF, based on available information it can be concluded that combined (or even DGF on a standalone basis if it so wished) they would be considered as "foreign representatives" under Article 2(d) of MLCBI. Presumably this would not be an issue since like liquidations tend to (for a whole host of reasons beyond the scope of this answer) have joint liquidators.*

***For full marks we are looking for a response along the following lines:***

1. ***Article 16(1) of the MLCBI provides:***

'If the decision or certificate referred to in paragraph 2 of article 15 indicates that the foreign proceeding is a proceeding within the meaning of sub-paragraph (i) of article 2 and that the foreign representative is a body or person within the meaning of sub-paragraph (j) of article 2, the court is entitled to so presume.'

- 2. This application is brought jointly by the DGF and Ms G. The DGF's role as liquidator arises under statute and article 77 of the LBBA provides that the DGF is automatically appointed as liquidator on the day it receives the NB's decision pursuant to article 77 revoking a bank's licence and commencing its liquidation.**
- 3. 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".**
- 4. 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.**
- 5. 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.**
- 6. As a result of the sharing of some, but not all of the liquidator's powers and the division of responsibility between Ms G and the DGF, it seems likely that depending on the nature and timing of relief sought from this Court pursuant to the CBIR (if any), the appropriate applicant may, in the future, be either or both of Ms G and the DGF. I am satisfied that subject to the express limitations on Ms G's powers, they are both authorised to administer the liquidation and as such both meet the definition of "foreign representative". In our judgment they**



***both had the necessary standing to apply in that capacity, for recognition of the Bank's liquidation.***

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 \*