



SUMMATIVE (FORMAL) ASSESSMENT: MODULE 2A

THE UNCITRAL MODEL LAWS RELATING TO INSOLVENCY

Commented [SL1]: TOTAL = 36.5

73%

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

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

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

INSTRUCTIONS FOR COMPLETION AND SUBMISSION OF ASSESSMENT

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

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

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

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

ANSWER ALL THE QUESTIONS

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

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

Commented [SL2]: SUBTOTAL = 9 MARKS

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

Question 1.1

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

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

Question 1.2

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

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

(d) **All of the above.**

Question 1.3

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

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

- (a) *The registered office of the debtor is not in the jurisdiction where the foreign proceedings were opened, but the debtor has an establishment in the jurisdiction of the enacting State.*
- (b) *The registered office of the debtor is in the jurisdiction of the enacting State, but the debtor has an establishment in the jurisdiction where the foreign proceedings were opened.*
- (c) *The debtor has neither its COMI nor an establishment in the jurisdiction where the foreign proceedings were opened.*

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

Question 1.4

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

- (a) *The locus standi/access rules.*
- (b) **The public policy exception.**
- (c) *The safe conduct rule.*
- (d) *The "hotchpot" rule.*

Question 1.5

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

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

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

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

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

Question 1.6

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

(a) No interim relief based on Article 19 of the Model Law is available if concurrent domestic insolvency proceedings and foreign proceedings exist at the time of the application of the foreign proceedings in the enacting State.

(b) In the case of a foreign main proceeding, automatic relief under Article 20 of the Model Law applies if concurrent domestic insolvency proceedings and foreign proceedings exist at the time of the application of the foreign proceedings in the enacting State.

(c) The commencement of domestic insolvency proceedings prevents or terminates the recognition of a foreign proceeding.

(d) If only after recognition of the foreign proceedings concurrent domestic insolvency proceedings are opened, then any post-recognition relief granted based on Article 21 of the Model Law will not be either adjusted or terminated if consistent with the domestic insolvency proceedings.

Question 1.7

When using its discretionary power to grant post-recognition relief pursuant to Article 21 of the Model Law, what should the court in the enacting State primarily consider?

(a) The court must be satisfied that the interests of the creditors and other interested parties, excluding the debtor, are adequately protected.

(b) The court should consider whether the relief requested is necessary for the protection of the assets of the debtor or the interests of the creditors and strike an appropriate balance between the relief that may be granted and the persons that may be affected.

(c) The court should be satisfied that the foreign proceeding is a main proceeding.

(d) All of the above.

Question 1.8

Which of the statements below regarding the Centre of Main Interest (COMI) and the Model Law is correct?

(a) COMI is not a defined term in the Model Law.

(b) For a corporate debtor, the Model Law does contain a rebuttable presumption that the debtor's registered office is its COMI.

(c) For an individual debtor, the Model Law does contain a rebuttable presumption that the debtor's habitual residence is its COMI.

(d) All of the above.

Question 1.9

An automatic stay of execution according to article 20 in the Model Law covers:

(a) Court proceedings.

(b) Arbitral Tribunals.

(c) Both (a) and (b).

(d) Neither (a) nor (b).

Question 1.10

Article 13 grants access to the creditors in a foreign proceeding. Which of the following statements correctly describes the protection granted in Article 13?

(a) A foreign creditor has the same rights regarding the commencement of, and participation in, a proceeding as creditors in this State.

(b) A foreign creditor has the same rights as it has in its home state.

(c) All foreign creditors' claims are, as a minimum, considered to be unsecured claims.

(d) Article 13 contains a uniform ranking system to avoid discrimination.

QUESTION 2 (direct questions) [10 marks in total]

Question 2.1 [maximum 3 marks]

Under the MLCBI, explain and discuss what the appropriate date is for determining the COMI of a debtor?

It is generally accepted that the determination of the COMI of a debtor is not a straightforward process. This lack of straightforwardness is a direct result of there being no definition of COMI in the Model Law. In attempting to define COMI in the absence of an accepted definition, assistance can be gained from considering the Guide to Enactment, domestic decisions in which courts have had to make factual determinations as to the COMI of a debtor.

Various factors must be considered. The two most important factors for the determination of the COMI of a debtor are the location from which the central administration of the debtor takes place and whether this is readily ascertainable by its creditors. These are matters of fact which must be proved in each case.

These two factors demonstrate that the appropriate date for determining the COMI of a debtor is the date on which the application for recognition of the foreign insolvency proceedings is instituted as set out in the Guide to Enactment. It also helps to promote certainty by satisfying the second principal factor that the creditors must be able readily identify the COMI of a debtor. Using the date of commencement of the foreign insolvency proceedings is perhaps the most objective way to determine the overall question of the location of the COMI of a debtor.

*This test is mainly used in Europe pursuant to the insolvency regulation and is not universally accepted. While the European Insolvency Regulation does not define the timing, such a position has been determined in two cases arising from the European Court of Justice: *Susanne Staubitz-Schreiber* Case C-1/04 [2006] ECR I-701 and *Interedil Srl* Case C-369/09, [2011] ECR I-9939.*

*For example, in the United States, the COMI of the debtor is determined at the time that the application to recognise the foreign insolvency proceedings is filed. This was arrived at in two main US cases: *In re Ran* 607 F 3d 1017 (5th Cir, 2010) and *In re Fairfield Sentry Ltd* 714 F3d 127 (2nd Cir, 2013). In both cases the US courts had to determine the date with reference to the definition of foreign main proceeding.*

In other countries such as Australia, the COMI of the debtor is determined at the time that the application for recognition is actually decided.

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Commented [SL5]: 3 marks

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 refers to Article 14 which sets out the requirement that foreign creditors are e

entitled to individual notification of the important timelines under the domestic insolvency law of the relevant enacting State. While the court of the enacting states has an overriding discretion to act different in appropriate circumstances in any given case, a foreign creditor will ordinarily be entitled to receive notification as to the commencement of domestic insolvency proceedings as well as the any relevant time limits. It is important to note that cumbersome notification through diplomatic channels is not to be used as they are not appropriate to insolvency proceedings due to the need to distribute information in a timely manner.

Statement 2 refers to Article 10. Article 10 provides that the court in the enacting State should only assume jurisdiction over assets located in that State rather than over all of the assets of the debtors in circumstances where the sole basis for that assumption of jurisdiction is the fact that an application for the recognition of a foreign proceeding has been filed. This limitation is seen as necessary given the chilling effect that such overall control would have on the rights of other creditors who are located outside the control of the enacting State.

Statement 3 refers to Article 16 (Article 16(3) specifically) which deals with the rebuttable resumption that the registered office of a debtor is taken to be its registered address for the purpose of determining main and non-main insolvency proceedings. This presumption can be rebutted upon consideration of a number of factors including where the debtor's financial records are filed and kept, the location of its primary banking services, the location where primary commercial policy is determined as well as the primary location of its employees. This list of factors is inexhaustive for obvious reasons.

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.

Commented [SL6]: 3 marks

Commented [SL7]: 2 marks

In the IBA case appeal, the English Court of Appeal had to determine whether the decision of Hildyard J in the High Court was correct. In that High Court decision, Hildyard J had refused to grant an Indefinite Moratorium Continuation in respect of certain restructuring proceedings in Azerbaijan in respect of which stays and compromises had been granted. However, there was a concern by the foreign representative in Azerbaijan that English creditors could still enforce their claims on the basis of the Gibbs Rule which provided essentially that a debt governed by English law could not be discharged or compromised by a foreign insolvency proceeding unless the creditor had submitted to the jurisdiction of the foreign insolvency court. Hildyard J refused to grant the IMC on the basis that the Gibbs Rule denied him jurisdiction to grant it. In this context, the question of jurisdiction dealt with not whether the High Court was competent to grant the relief sought but whether it should actually do so in light of the Gibbs Rule and the particular facts of the case.

The Court of Appeal upheld the decision on two primary bases: (a) the grant of the IMC would squarely contradict substantive English law as encapsulated in the Gibbs Rule and (b) prolong the stay granted in the proceedings in Azerbaijan. In determining (a), the Court of Appeal found that the IMC could only be obtained if the foreign representative could show that it was necessary to protect the interests of the IBA's creditors and that the stay was itself an appropriate way of ensuring such protection. On the facts, the Court of Appeal found that the IMC was not necessary since the IBA's creditors needed no such protection as the proceedings in Azerbaijan could achieve their purposes without it and the risk to those proceedings by potential English creditors was too remote. A relevant consideration was also the fact that IBA chose not to promote a parallel scheme of arrangement in England which could have offered similar protection as the IMC.

In relation to (b), the Court found that the Azerbaijan restructuring proceedings had come to an end and that the grant of the IMC would have the effect of continuing a stay long after the conclusion of the substantive foreign proceedings. This was clearly at odds with the import and intention of the Model law.

Question 2.4 [2 marks]

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

Once a main foreign proceeding has been recognised as such, the domestic court has the discretion to exercise several powers. The most relevant of these powers which the domestic court should use its discretion to exercise is the imposition of a stay pursuant

to Article 21. This stay stops the prosecution of any claims and enforcement procedures against the debtor's action which may be in train, suspends all dealings with the debtor's property (transfer or encumbering). Automatic stays of these actions may have already taken effect upon recognition of the foreign main proceedings, but further action may be necessary in relation to the prosecution of individual claims or enforcement processes. This relief is intended to further the objects of the insolvency process by ensuring that the assets of the debtor are reserved for the creditors collectively and therefore, immune from individual actions which have the potential to undermine the overall process.

Under Article 18, the foreign representative has the obligation to promptly inform the domestic court in the enacting State of any substantial change in the status of the foreign main proceedings or the status of the representative. There is also an obligation to inform the domestic court of any other foreign proceedings which become known to the foreign representative. These self-explanatory duties, are immediately imposed upon the filing of the application for recognition and are designed (together with Articles 25 and 26) to ensure maximum cooperation and openness between the court in the domestic enacting State and the foreign representatives.

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

Commented [SL9]: SUBTOTAL = 8.5 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] [3 out of 4 marks]

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

There are several very useful benefits of which the foreign representative can avail himself under the Model Law to secure the value of the debtor's assets. Some of these benefits would apply once there has been a successful application for recognition under Article 11 whereas others apply before. These benefits would also be available whether the foreign proceedings are classified as main or non-main foreign insolvency proceedings. As a foreign representative, he has locus standi and would be entitled to apply directly to the Court under Article 9. This removes the need for him to obtain official authorisation from any regulatory body or creditors. [1] However, his specific

powers to deal with the assets of the debtors in the enacting State will only come from a successful recognition under Article 11.

In terms of access, the foreign representative would be entitled, upon recognition, to participate in any ongoing domestic insolvency proceedings pursuant to Article 12. This is of immense benefit since it allows the foreign representative direct information as to the existing assets of the debtor which may be available for realisation. The foreign representative will thereafter have standing to apply for interim relief and to otherwise get in and protect the assets of the debtor. This would allow the foreign representative to streamline the foreign insolvency proceedings in line with the domestic proceedings to maximise the value of assets for the benefit of the creditors.

[1]

Under the Model Law, cooperation between the courts and foreign representatives is high encouraged to the maximum extent possible as provided for in Articles 25 and 26. Article 25 in particular provides that such communication may be directly between the domestic court and the foreign representative. This benefits the foreign representative to the extent that they are kept updated on the domestic insolvency proceedings which then allow for their views to be taken into account. It also allows for both the foreign representative and the domestic court to formally coordinate the two processes. The foreign representative is also entitled to transmit any relevant information to the domestic court which is also important for both the domestic insolvency process and the foreign insolvency proceedings. [½]

As set out in Article 27, there is the added benefit that a structure can be set up to further the communications objective. Pursuant to this Article, the domestic court can appoint a body or person to act on the directions of the court and there is a great measure of flexibility to work out appropriate means of communication acceptable to both sides. [½]

In your answer you should have also discussed the following - 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.

An application for recognition by a foreign representative must be made pursuant to Article 15 which gives the standing necessary to make the application. This application must be made to the designated domestic court as per Article 4 of the Model Law. In making that application, the foreign representative must provide EITHER a certified copy of the decision commencing the foreign proceedings [½] and appointing the foreign representative as such OR a certificate from the foreign court which confirms the existence of the foreign proceedings and the appointment of the foreign representative. If neither of these two instruments are available, then the domestic court vested with power to accept proof, in an appropriate manner, of the existence of the foreign proceedings and the foreign representative's appointment. [½]

These documents must be in the language of the domestic court and must also be accompanied by a statement of the foreign representative identifying all known foreign proceedings.

The domestic court is entitled to presume the authenticity of all of these documents under Article 16. It will also accept the face value of the documents insofar as they certify that the foreign proceedings are a proceeding within the meaning of Article 2(a) of the Model Law and that the foreign representative is such a person within the meaning of Article 2(d).

It should also be noted that unless there is evidence to the contrary, the domestic court will also assume that the registered office in the case of a company or the habitual residence in the case of an individual is the COMI. [½]

The decision to recognise foreign proceedings is a discretionary one. It is however settled law that in exercising discretions of this nature, the domestic court is enjoined to consider only relevant factors and must ignore irrelevant ones. The discretion in this case, pursuant to Article 17, can be exercised to recognise the foreign proceedings either as main proceedings or non-main proceedings with the type of relief available being the main differentiator. [½]

In order to obtain recognition as a foreign main proceeding, the foreign representative must demonstrate to the domestic court that foreign insolvency proceedings are being prosecuted in the COMI of the debtor. If that cannot be demonstrated, the domestic court will grant recognition as a foreign non-main proceeding.

Although there is no definition of COMI in the Model Law, there is an acceptable test which the domestic court can use to come to a decision. The COMI of a debtor can be said to be the location where its central administration takes place and which location is readily ascertainable by its creditors.

These are only two factors, and the domestic court will be entitled to consider others in coming to a finding on COMI in order to designate the foreign proceedings as main or non-main. The weight to be given to any one factor would depend on the specific facts of the case. These other factors include the place from which the debtor's commercial policy takes place, the place where its employees are located, the location of its primary bank as well as the location in which the debtor is regulated. This list is not intended to be exhaustive. Importantly as well, the date on which the foreign proceedings have been commenced will be the appropriate date to determine the COMI of the debtor.

The foreign representative must be mindful that the application for recognition is not an abuse of the process of the domestic court. This would be a matter of domestic law and would apply if, for example, a previous application for recognition on the same facts has been refused.

It should also be noted that there is no bar to recognition on the basis of non-reciprocity.

In your answer you should have also discussed the following:

- 1. Exclusions:*** *If the debtor is an entity that is subject to a special insolvency regime in State B, the foreign representative should first check if the foreign proceedings regarding that type of a debtor are excluded in State A based on Article 1(2) of the implemented Model Law in State A.*
- 2. Restrictions: Existing international obligations of State A:*** *Based on Article 3 of the Model Law, the court in State A should also check if there are no existing international obligations of State A (under a treaty or otherwise) that may conflict with granting the recognition application under the implemented Model Law in State A.*
- 3. 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.

Upon filing an application for recognition pursuant to Article 15 and prior to a decision on same, a foreign representative may apply for urgent relief in order to protect the assets of the debtor or the interests of the creditors. This application can be made pursuant to Article 19 and the provisional relief can provide for a staying all execution

against the assets of the debtor, vesting the administration or realisation of the part or all of the debtor's assets in the foreign representative or some other court appointed person. In order to obtain the second relief, the foreign representative must show that the assets are perishable, susceptible to a reduction in value or are otherwise in jeopardy. The foreign representative may also apply to have the rights to transfer, encumber or dispose of the assets of the debtor suspended. [1]

The domestic court would also have the power to grant any additional relief that may be necessary in the circumstances. However, it should be noted that these rights terminate upon recognition and that the court has general power to refuse such relief if it is likely to interfere with the foreign main proceeding. This appears to give the impression that interim relief is only likely to be given where the application is for recognition as foreign main proceedings since making such an order pursuant to an application for recognitions as a foreign non main proceedings is invariably likely to interfere with the administration of a foreign main proceeding unless special circumstances exist.

These reliefs are important tools to ensure that the status quo is maintained and that the assets of the debtor remain available for realisation and distribution.

There are certain reliefs which take effect upon recognition as a foreign main proceeding. These include automatic stays of (1) the commencement and continuation of individual actions in respect of the debtor's assets, liabilities, rights and obligations and (2) execution against the debtor's assets. The right to transfer, encumber or otherwise dispose of the debtor's assets is also suspended. The right to commence individual actions or proceedings necessary to preserve a claim against the debtor is not affected. This would most likely apply to stave off any applicable limitation periods. [1]

It should be noted that the scope, extent and modification of the stay are all matters of domestic law and further provisions may also be made to exempt the filing and prosecution certain domestic insolvency proceedings pursuant to article 20(4).

All of the above remedies are available post-recognition upon application by the foreign representative under Article 21. Unlike precognition relief, there is no implied or express distinction between foreign main and foreign non-main relief. In addition to those reliefs, the foreign representative may also apply to continue any interim order as well as for orders for the examination of witnesses and evidence and information regarding the debtor's affairs. [½]

There is one significant qualification to relief under this head: the domestic court must satisfy itself that the relief sought by the foreign representative relates to assets which as per domestic law should be administered in the foreign proceedings. This may in principle exempt certain assets (such as land) from being the subject of post recognition relief under this section unless there are special circumstances as determined by the domestic court.

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

- 1. Adequate protection:** Pursuant to Article 22 of the Model Law any interim relief under Article 19 of the Model Law or any post-recognition relief under Article 21 of the Model Law require the court in State A to be satisfied that the interests of the creditors and the other interested persons, including the debtor, are adequately protected and any relief may be subject to conditions as the court considers appropriate.
- 2. Existing international obligations of State A:** Based on Article 3 of the Model Law, the court in State A should again verify that there are no existing international obligations of State A (under a treaty or otherwise) that may conflict with granting the requested relief under the implemented Model Law in State A.
- 3. Public policy exception:** The court in State A should, based on Article 6 of the Model Law, also again verify that the relief application is not manifestly contrary to public policy of State A.

Question 3.4 [maximum 1 mark] [1 mark]

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

Where a worldwide freezing order has been granted pursuant to Article 19, it is unlikely to continue post recognition under Article 21 on the basis that, while it may be necessary to secure the assets of the debtor in the first instance in order to enable the liquidator or administrator to intervene and secure them, the exceptional nature of a world-wide freezing order is not ordinarily necessary for the foreign insolvency proceedings to be properly conducted. This was set out in Igor Vitalievich Protasov v Khadzhi-Murat Derev where it was found that absent special or exceptional circumstances, such an order would be discontinued as there were enough tools at the disposal of the liquidator or administrator to conduct the insolvency proceedings. [1]

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] [9.5 out of 15]

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

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

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

4.1.2 whether the Applicants fall within the description of "foreign representatives" as defined by article 2(d) of the MLCBI [maximum 5 marks]. [2.5 out of 5]

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

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

* End of Assessment *

I am required to determine the above questions. The first question is the more difficult of the two. One must first look at Article 2(a) of the Model Law which tells us what is a foreign proceeding for the purposes of granting a recognition under Article 16 [17]. The definition itself comprises seven constituent parts and I am required to satisfy myself that the facts disclosed satisfies them. I find that the Bank's liquidation proceedings amount to "foreign proceedings" within the definition of section 2(a) for the following reasons:

- i. the proceedings which have been instituted against the Bank have their basis in both the LBBA and the DGF Law. These two pieces of legislation provide for*

an incremental regulatory system with the obligations of the NB and DGF taking effect at various times. This is the cumulative effect of sections 75 through 77 of the LBBA when read together with section 34 of the DGF Law. These provisions allow for a systematic decision as to the financial status of a relevant bank to be made. [which element are you addressing here? The "judicial or administrative" element? The "pursuant to a law relating to insolvency" element?]

- ii. For the same reasons, I find that the procedures set out in the above referenced sections pursuant to which the Bank has been placed into liquidation are administrative in nature. These procedures set out the regulatory landscape in which banks are to function and the powers conferred on the DGF and the NB when taken together and considered in light of the cumulative process of classification leading to liquidation, are administrative conditions which must be complied with. For this reason, a breach of those conditions would entitle the NB and or DGF at the appropriate juncture to act in accordance with either the LBBA or the DGF Law.*
- iii. The power is vested in the DGF to compile a register of creditors, to dispose of the assets of a bank, to identify and recover bank property among others. The presence of these powers satisfies me that the liquidation proceedings are demonstrably collective in nature as they have as their main purposes the recovery of assets with a view to satisfying any claims by creditors.*

For full marks your response in respect of this element should be 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".

- iv. **there is no contest that Country A is a foreign state. It is an independent and sovereign state which is not subject to English control. This is a fact of which I am entitled to take judicial notice.**
- v. **For the same reasons as have been identified in i. above, I find that the liquidation proceedings have been commenced under a law related to insolvency. There is no definition of what constitutes "a law related to insolvency" and the term has to be given a wide and purposive interpretation. Applying that interpretation, I am satisfied that the LBBA and the DGF Law deal with the recovery and distributions of assets belonging to banks that have been classified as insolvent under the laws of Country A. It is also a matter of fact that the Bank is insolvent. On that basis, I find that they are laws related to insolvency.**
- vi. **The question as to whether the assets and affairs of the Bank are subject to control or supervision by a foreign court is less straightforward as there is no reference to judicial supervision in Country A being part and parcel of the liquidation regime set out in the DGF Law or the LBBA. The case of In the Matter of Agrokor DD is highly instructive on this point. In that case, it was pointed out that the level of court supervision required by the Model Law is relatively low. It further set out that under the CBIR, potential court supervision may suffice. I note that the DGF Law and the LBBA are legislation enacted by the Parliament of Country A. I also note that both the NB and DGF are both governmental bodies whose authority come from the laws referred to. I am also cognisant of articles 3(3) and 3(7) of the DGF Law which sets up the DGF as an independent institution. This is usually the case with most regulatory bodies and there is nothing in that section or the facts which suggests that the court in Country A cannot intervene to monitor the manner in which the legislation is being applied. Being mindful of the low threshold applicable to this element of the definition, I therefore find that there is a potential level of court supervision possible over NB and DGF.**

For full marks your response should address the "subject to the control or supervision by a foreign court" element 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.*

vii. *There is no doubt, having regard to the powers of the DGF and NB as well as the nature of the statutory regime under which they operate, that the liquidation process under which the Bank has been placed is a proceeding for the purposes of liquidation. The demonstrated purpose of the LBBA and the DFG law is to protect the financial system of Country A and to deal with insolvent banks in a comprehensive manner so as to limit the exposure of its financial system to risk. In coming to this finding, I have considered Articles 75 - 77 of the LBBA and the expert opinion of John Doe in which this question as well as question vi. above were both answered in the affirmative.*

I also find that Mrs G in her capacity as authorised officer of DGF does not meet the definition under Article 2(d) to be appointed as a foreign representative. Conversely, I find that DGF does meet the definition. I say so for the following reasons:

- a. *It must be noted that there is no requirement under the Model Law for potential foreign representative to be authorised by a foreign court. All that*

has to be shown is that the representative is a parody or body who is authorised in a foreign proceeding to administer the reorganisation or liquidation process or to act as a representative in the foreign proceedings.

- b. DGF is the regulatory body entrusted to administer the liquidation process under the DGF Law in Country A. That authority may be delegated and in fact, has been delegated to Mrs G. I note the conditions in article 48(3) and 35(1) of the DGF Law which prescribe the persons or officers to whom the DGF may delegate its powers.*
- c. While ordinarily Mrs. G would qualify as a foreign representative in terms of section 2(d), I find that to appoint both her and DGF would amount to an abuse of the process of the English Court since I have not been presented with any valid explanation as to why the appointment of two representatives is being sought. The definition speaks to a person or body: there is not reference to both being appointable and I would find that absent special circumstances, there is no basis on which two persons representing the same entity would simultaneously be appointed as foreign representative of a foreign insolvency proceeding.*
- d. In light of the fact that the substantive power in relation to the conduct of the liquidation is vested in DGF, together with the abuse of process concerns set out above, I would appoint DGF as the foreign representative and I would decline to so appoint Mrs. G.*

For full marks to Q 4.1.2 we are looking for a response along the following lines:

1. Foreign representative" is defined by article 2(d) of the MLCBI to mean:

'a person or body, including one appointed on an interim basis, authorised in a foreign proceeding to administer the reorganisation or the liquidation of the debtor's assets or affairs or to act as a representative of the foreign proceeding'

2. 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.'

3. 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.

4. 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".

5. 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.

- 6. 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.*
- 7. 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.*