



SUMMATIVE (FORMAL) ASSESSMENT: MODULE 2A

THE UNCITRAL MODEL LAWS RELATING TO INSOLVENCY

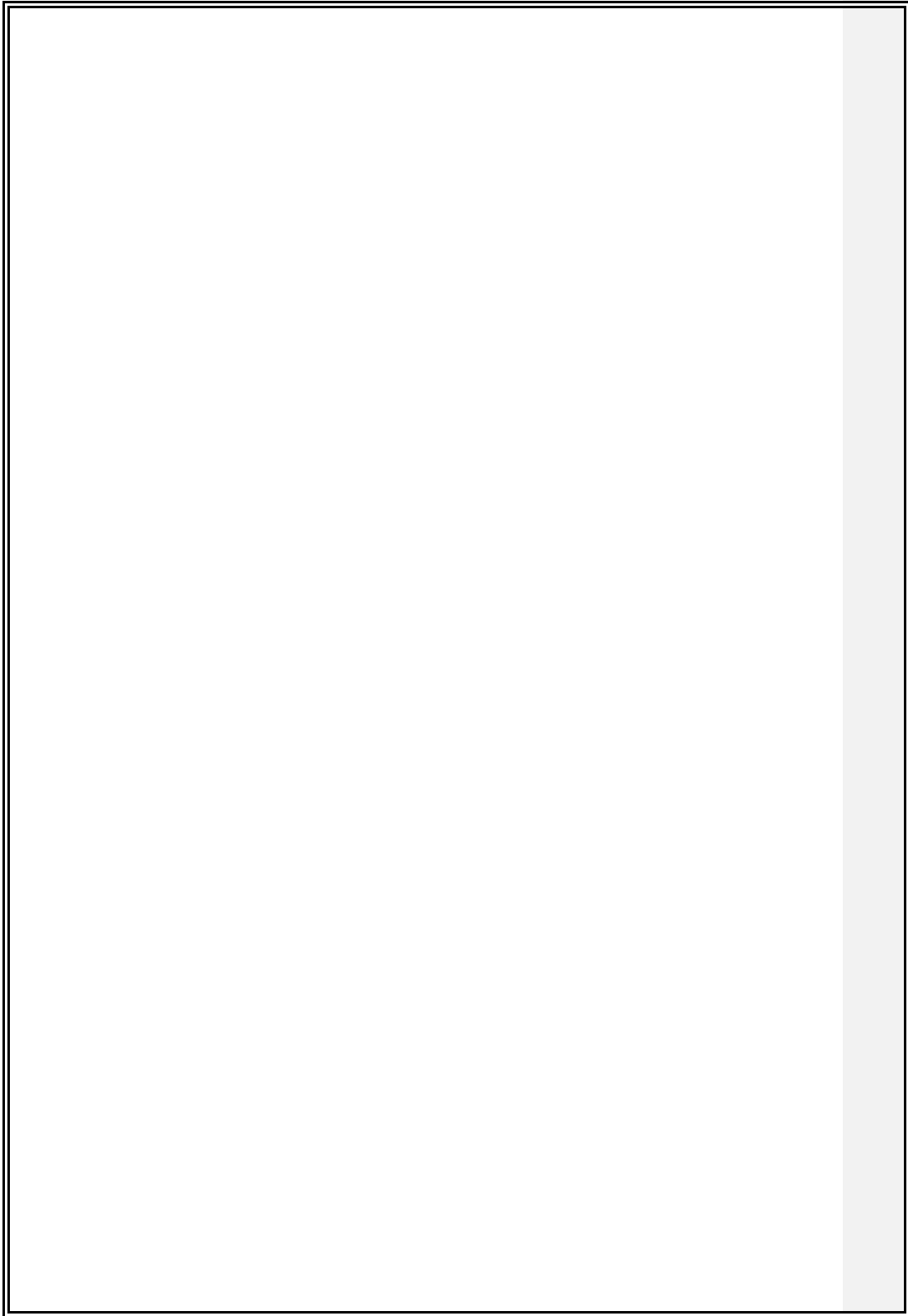
Commented [BB1]: TOTAL = 19 MARKS

38%

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 = 4 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

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

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 [SL4]: Correct answer is (b).

Commented [SL5]: 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

Commented [SL6]: Correct answer is (d).

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

Commented [SL7]: Correct answer is (c).

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

Commented [SL8]: Correct answer is (a).

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]

Commented [SL9]: SUBTOTAL = 7.5 MARKS

Question 2.1 [maximum 3 marks]

Commented [SL10]: 2 marks

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

Also, US position, chapt 15, *Morning Mist Holdings Ltd v. Krys (Matter of Fairfield Sentry Ltd)*.

The appropriate date for determining the COMI of the debtor is at the commencement of the foreign proceeding. A holistic approach must be designed to determine that location of the foreign proceeding in fact corresponds to the actual location of the debtor' COMI. This may take time and require taking into consideration various factors. In addition, evidence to prove the location of the debtor's books and records, financing, location of cash management systems, location of employees, location where commercial policy was determined etc.

Question 2.2 [maximum 3 marks]

Commented [SL11]: 2 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 3 = Art 16(3)

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. As well as the equal treatment principle requiring that foreign creditors should be notified.

Statement 2 - Article 10 Safe Conduct Rule

Statement 3 - Article 31 Presumption of Insolvency

Question 2.3 [2 marks]

Commented [SL12]: 2 marks

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

In the IBA case appeal, the English Court of Appeal upheld the decision in the court of the first instance by Mr Justice Hildyard and focused in particular on the jurisdictional question raised. The question raised was in what sense it may be said that the English court lacked jurisdiction to grant the indefinite Moratorium Continuation requested by the foreign representative?¹²⁸ According to the Court of Appeal, the case did not involve an issue of jurisdiction in the strict sense (that is, the court had no power to deal with and decide the dispute). Instead, the real issue in this case was whether as a matter of settled practice the court should not exercise its power to grant the indefinite Moratorium Continuation where to do so would:

- a) in substance prevent the English creditors (that is, the Challenging Creditors) from enforcing their English law rights in accordance with the Gibbs Rule; and / or*
- b) prolong the stay after the Azeri reconstruction has come to an end.*

The Court of Appeal answered both (a) and (b) in favour of the respondents (the Challenging Creditors).

As far as (a) above is concerned, the court of Appeal held that an English court could only properly grant the indefinite Moratorium Continuation if it were satisfied of two things: first, the stay would have to be necessary to protect the interests of IBA's creditors and, secondly, the stay would have to be an appropriate way of achieving such protection. The Court of Appeal held that neither of these conditions had been satisfied.

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.

The court in the enacting State must strike an appropriate balance between the relief that may be granted to the foreign representative and the interests of the persons that may be affected by the relief. Article 22 specifically mentions the interests of creditors, the debtor and other interested parties. These interests should guide the court in exercising its discretionary powers to grant interim relief in Article 19 and post-recognition relief in Article 21. Relief can be tailored by subjecting it to certain conditions (Article 22(2)) or by modifying or terminating relief that has been granted (Article 22(3)).

Commented [SL13]: 1.5 marks

Art 29(a) and art 18 (which was discussed)

The foreign representative has the ongoing duty to keep the court updated on developments.

Article 18 requires the foreign representative, from the time of filing the recognition application for the foreign proceeding, to promptly inform the court in the enacting State of (i) any substantial change in the status of the recognised foreign proceeding or the status of the foreign representative's appointment and (ii) any other foreign proceeding regarding the same debtor that becomes known to the foreign representative.

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

Commented [BB14]: SUB TOTAL = 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] [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.

The foreign representative in considering his options to secure the value of the debtor's assets located in State A, must first consider his locus standi and access to the foreign court proceeding. Also, the co-ordination amongst the jurisdictions and any relief warranted for optimal disposition of the insolvency.

Chapter II of the Model Law, Articles 9-14 provide provisions for standing, in the courts in the enacting State (i.e. State A) for both the foreign representatives and creditors. The foreign representative can benefit from the rights in State A, by having access granted to the foreign proceeding, without the need to meet formal requirements such as licenses or consular action. Article 9 expresses the principle of direct access by a foreign representative to courts of the enacting state. [1]

Article 11, like Article 9, focuses on providing standing to the foreign representative in the courts of the enacting State, but in this case to request the commencement of a domestic insolvency proceeding in the enacting State without otherwise modifying any of the conditions for the opening of such a

proceeding. No prior recognition of the foreign proceeding is required for this type of access. [1]

Article 12 is another article that provides the foreign representative with standing, but this time recognition of the foreign proceeding is required for this standing to be available. When a domestic insolvency proceeding in the enacting State is opened in respect of the debtor, and following recognition of the foreign proceeding in the enacting State, the foreign representative will have standing to make petitions, requests or submissions concerning issues such as the protection, realisation or distribution of assets or co-operation with the foreign proceeding. However, article 12 does not vest the foreign representative with any specific powers or rights.

Article 10 the so-called "safe conduct" rule ensures that the court in the enacting State does not assume jurisdiction over all the assets of the debtor on the sole ground of the fact that the foreign representative has made an application for the recognition of a foreign proceeding. This article responds to concerns of foreign representatives and creditors about exposure to an all-embracing jurisdiction triggered by an application under the Model Law.

Cross-border co-operation is dealt with in articles 25-27 of the Model Law. As many jurisdictions lack a legislative framework for co-operation and co-ordination between judges in different jurisdictions, the Model Law fills a gap by expressly empowering courts to extend co-operation in certain specific areas. The objective is to enable courts and insolvency representatives from two or more countries to be efficient and achieve optimal results. A further aim is to help promote consistency of treatment of stakeholders across different jurisdictions. Such consistency, in turn, should enhance both transparency and predictability in cross-border insolvency cases. It should further avoid traditional time-consuming and cost-inefficient procedures, such as letters rogatory and requests for consular assistance. Co-operation is not dependent upon recognition and may thus occur at an early stage and before an application for recognition. [1]

Article 25(1) provides that in cross-border insolvencies covered by Article 1 of the Model Law, the court must co-operate to the maximum extent possible with foreign courts or foreign representatives. Article 25(2) further provides that the court in the enacting State is entitled to communicate directly with, or to request information or assistance directly from, foreign courts and foreign representatives. Co-operation is available not only in respect of applications for assistance made in the enacting State, but also applications from proceedings in the enacting State for assistance elsewhere.

In the exercise of its functions and subject to the supervision of the court in the enacting State, the insolvency office-holder (i) must co-operate to the maximum extent possible with foreign courts or foreign representatives (Article 26(1)) and (ii) is

entitled to communicate directly with foreign courts and foreign representatives (Article 26(2)).

Article 27 provides an indicative list of the types of co-operation that are authorised by the Model Law. The list is illustrative rather than exhaustive in order to avoid precluding certain forms of appropriate co-operation and limiting the ability of courts to fashion remedies in keeping with specific circumstances. The non-exhaustive list of appropriate means of co-operation is set out in Article 27, and includes:

- the appointment of a person or body to act at the direction of the court;
- communication of information by any means considered appropriate by the court;
- co-ordination of the administration and supervision of the debtor's assets and affairs;
- approval or implementation by courts of agreements concerning the coordination of proceedings;
- co-ordination of concurrent proceedings regarding the same debtor; and
- any additional forms of examples the enacting State may wish to list.

For full marks you should include the key benefits of both the access provisions and the cooperation provisions and that they save time and therefore also costs, as a result of which value destruction can be avoided and value enhancement is promoted.

Question 3.2 [maximum 5 marks] [1.5 out of 3 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.

The Foreign Representative

The "foreign representative" which has the following elements:

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

Please note that the Model Law does not specify that the foreign representative must be authorised by the foreign court. By specifying the required characteristics of a "foreign proceeding" and a "foreign representative", the definitions limit the scope of application of the Model Law.

Foreign Proceeding

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 Model Law defines foreign proceeding which have the following elements:

[½]

- a proceeding (including an interim proceeding);
- that is either judicial or administrative;
- that is collective in nature;
- that is in a foreign State;
- that is authorised or conducted under a law relating to insolvency;
- in which the assets and affairs of the debtor are subject to control or supervision by a foreign court; and
- which proceeding is for the purpose of reorganisation or liquidation. [½]

Restrictions and Exclusions to be considered:

Banks and insurance companies are mentioned as examples of entities that the enacting State might decide to exclude from the Model Law, as they may require to be administered under a special regulatory regime.¹ Public utility companies or consumers/non-traders could - for policy reasons - also require special solutions in cross-border situations, but an enacting State should be careful not to inadvertently and undesirably limit the right of the insolvency representative or court to seek assistance or recognition abroad of an insolvency proceeding conducted in the territory of the enacting State, merely because that insolvency is subject to a special regulatory regime.² It is advisable that exclusions from the scope of the Model Law be expressly mentioned by the enacting State to make the national insolvency law more transparent (especially for the benefit of foreign users). [½] make reference to Article 3 in respect of this element.

In the matter of *Agrokor DD* [2017] EWHC 2791 (Ch), a number of these elements of a 'foreign proceeding' were tested. As a systemically important company in Croatia, *Agrokor* (together with 50 of its affiliates) was subjected to the Extraordinary

¹ UNCITRAL Guide to Enactment, pp 35-36 at paras 55 and 56.

² UNCITRAL Guide to Enactment, pp 36-37 at paras 57- 61.

Administration Proceeding (EAP) under the newly adopted "Law on Extraordinary Administration Proceeding in Companies of Systemic Importance in Croatia" (Lex Agrokor). Agrokor itself (without the 50 affiliates) made an application before the English court, under the Cross-Border Insolvency Regulations, for the Croatian Extraordinary Proceeding to be recognised. The application was opposed by Sberbank, a creditor with a claim in excess of EUR 1 billion. In the context of assessing whether the Croatian EAP qualified as a "foreign proceeding" the following questions were raised:

1. Whether the extraordinary administration was a "foreign proceeding" within Art 2(i) because

*(i) the extraordinary administration law is not a "law relating to insolvency",
(ii) that law was not one passed for the purpose of reorganisation,
(iii) the proceeding is not a "collective proceeding",
(iv) the extraordinary administration was not "subject to control or supervision by a foreign court"; and because Lex Agrokor is a single group proceeding in respect of both the holding company and all its controlled companies and affiliates, and the CBIR provides for recognition of a single company proceeding, not a single group proceeding.*

2. Whether, even if it were a "foreign proceeding", recognition would be manifestly contrary to English legal public policy.

The court granted recognition of the extraordinary administration and dismissed all Sberbank's objections. The court held that whether the extraordinary administration fell within the scope of the CBIR was a question of English law, but it turned on an interpretation of the characteristics of Lex Agrokor, which were a matter of Croatian law. Under the rules of the English court, questions of foreign law are questions of fact to be decided on the basis of expert evidence.

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. The collective proceeding element is addressed in the UNCITRAL Guide to Enactment, pp 39-40 at paras 6970. However, a proceeding should not be considered to fail the test of collectivity purely because a particular class of creditors' rights is unaffected by it.

The judge in Agrokor considered that the consolidated nature of the extraordinary administration proceedings made it more collective, rather than not collective enough, and rejected Sberbank's objections.

The English court's interpretation of 'collectivity' in this case widens the meaning previously applied in the few English authorities in which it has been considered. In a different context, consolidation and 'more collectivity rather than less' may be to the serious detriment of some creditors.

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

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

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

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

The Model Law allows for the alignment of relief resulting from the recognition of a foreign proceeding, with the relief available in a comparable proceeding under national law.

Under the Model Law, the COMI of the debtor, determines the consequences of the recognition. If the COMI is in the jurisdiction where the foreign proceedings have been opened, the proceedings are main insolvency proceedings with automatic mandatory relief.

If the debtor only has an establishment in the jurisdiction where the foreign proceedings are opened, the proceedings are non-main proceedings without automatic relief, but only discretionary post-recognition relief granted by the court. There is no reciprocity requirement and there is an ongoing duty to keep the court updated on developments.

Urgent interim relief can be granted prior to the recognition decision after the recognition application has been filed, provided the interests of the debtor's creditors and other interested parties are adequately protected. Recognition also provides the foreign representative with standing to exercise local avoidance powers and the right to intervene in local insolvency proceedings.

*There are limits to the relief that is deemed to be appropriate to grant under the Model Law. In that context a number of English cases will be briefly discussed, including the Rubin v Eurofinance case, **the so-called** Pan Ocean case **and the so-called** IBA case, in which the so-called Gibbs Rule (or the Rule in Gibbs), as well as the IBA case appeal.*

Even prior to a decision on the recognition application, the court in the enacting State is entitled to grant urgently needed interim relief upon application for the recognition of a foreign proceeding based on Article 19 of the Model Law. While Article 21 of the Model Law sets out the court's discretionary power to provide post-recognition relief, Article 20 of the Model Law provides for automatic mandatory relief in case the recognised foreign proceeding qualifies as a foreign main proceeding. Article 22 of the Model Law clarifies in paragraph 1 that, in granting or denying relief based on either Article 19 (interim pre-recognition relief) or Article 21 (discretionary post-recognition relief), the court in the enacting State must be satisfied that the interests of the debtor's creditors and other interested parties are adequately protected. For that purpose, the court is granted the power to subject relief to conditions it considers appropriate (paragraph 2) and at the request of the foreign representative or an affected person the court may further modify or terminate the relief (paragraph 3).

A consequence of a recognition decision is also, according to Article 23 of the Model Law, that the foreign representative obtains standing to initiate actions under the law of the enacting State to avoid or otherwise render ineffective legal acts detrimental to the creditors of the debtor (that is, claw-back rights and the power to avoid antecedent transactions). Another consequence of recognition according to Article 24 of the Model Law, is the right of the foreign representative to intervene in any local proceedings in the enacting State in which the debtor is a party, provided the foreign representative meets the local requirements for this.

Your answer should have also included a brief discussion on the following:

- 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] [0 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 worldwide freezing order granted as pre-recognition interim relief ex article 19 of the Model Law, is unlikely to continue post-recognition ex article 21 of the Model Law because there would no longer be a need for the relief, as there would not be a risk of dissipation once recognition has been granted.

SPL Private Finance (PF1) IC Ltd v Arch Financial Products LLP [2015] EWHC 1124 (Comm) (16 January 2015). The issues to be determined were:

- 1. Whether there was a real risk of dissipation of assets*
- 2. Whether there was a need for specific disclosure (for which see Section E below)*
- 3. Whether there was a need for further protective injunctive relief in a different jurisdiction (for which see Section D below)*

The applicant pointed to several factors indicating real risk of dissipation:

(a) at trial, there had been very strong findings of dishonesty, including a finding that the respondent had dishonestly assisted breaches of fiduciary duty;

(b) at trial, the respondent's evidence had been subject to adverse credibility findings;

(c) in 2009, the respondent had transferred 50% of the relevant company's shares for no consideration;

(d) the respondent had placed his principal residence into a trust which was held 3% by the respondent and 97% by the respondent's wife;

(e) in 2009, the respondent had established a family settlement trust in favour of his children; and

(f) the respondent was very financially sophisticated.

The respondent submitted among other things that where a stay of execution of the trial judgment had been granted and an application for permission to appeal was pending, it would be unjust and without purpose to continue the freezing order; the

applicant had delayed in seeking the continuation of the freezing order; as the respondent had few assets, it was unlikely he would dissipate them.

The court held that the applicant's applications for (1) continuation of the freezing order (2) specific disclosure (3) permission to seek a freezing order in Guernsey and (4) to use documents already disclosed for collateral purposes in proceedings under Section 423 of the Insolvency Act 1986 were granted. A decision to continue or set aside a freezing order required a particular consideration of whether there was a real risk of dissipation.

There must be solid evidence (as opposed to mere suspicions) of a likelihood of dissipation. In this respect, the mere identification of a finding of dishonesty was insufficient; there still had to be consideration of whether the dishonesty justifies an inference that there is a real risk of dissipation. However, the fact that there had been very strong dishonesty findings at trial and adverse credibility findings in respect of the respondent's evidence at trial provided a strong basis for an inference of real risk of dissipation.

The fact that there had been granted a stay of execution did not provide an overarching reason why a freezing order should be set aside.

There was still a need (post-judgment) to preserve remaining assets despite the fact that the execution process had been halted. Any delay on the part of the applicant was not such that would impact on consideration of the issue of real risk of dissipation to any significant extent.

The correct answer is:

A recent English case between Igor Vitalievich Protasov and Khadzhi-Murat Derev [Order of 24 February 2021 by Mr Justice Adam Johnson, [2021] EWHC 392 (CH)] exactly addressed the question.

While the English court held to have jurisdiction in the strict sense to grant such post-recognition discretionary relief, it found that relevant restrictions and limitations existed which served to inhibit the proper exercise of that jurisdiction. The English court found that the English bankruptcy regime offers other forms of protection which mean that relief in the form of a freezing order or similar injunction is simply not warranted. According to the court, "(...) the scheme of the Model Law is intended to put the foreign trustee or bankruptcy manager in the same position, as far as practicable, as an officeholder appointed under domestic law, and consistent with that, the effect of recognition of a foreign main proceeding is to bring into play the same wide infrastructure of the insolvency legislation. Absent some exceptional reason, a freezing order or other similar order will not in my view be required or justified.

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

Commented [BB15]: SUB TOTAL = 0 MARKS

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] [0 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

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].

For full marks your response must address in sufficient detail each of the separate elements of the definition of "foreign proceeding" as set forth in article 2(a) of the MLCBI and the definition of "foreign representative" as set forth in article 2(d) of the MBCLI respectively,

provide guidance and source references as appropriate and apply the facts. Unfortunately, you have not provided any response and therefore no marks can be rewarded.

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 *