



SUMMATIVE (FORMAL) ASSESSMENT: MODULE 2A

THE UNCITRAL MODEL LAWS RELATING TO INSOLVENCY

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73%

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

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

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

INSTRUCTIONS FOR COMPLETION AND SUBMISSION OF ASSESSMENT

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

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

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

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

ANSWER ALL THE QUESTIONS

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

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

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

Question 1.1

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

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

Question 1.2

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

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

(d) All of the above.

Question 1.3

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

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

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

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

Question 1.4

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

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

(b) The public policy exception.

(c) The safe conduct rule.

(d) The "hotchpot" rule.

Question 1.5

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

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

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

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

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

Question 1.6

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

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

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

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

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

Question 1.7

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

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

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

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

(d) All of the above.

Question 1.8

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

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

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

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

(d) All of the above.

Question 1.9

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

(a) Court proceedings.

(b) Arbitral Tribunals.

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

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

Question 1.10

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

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

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

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

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

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

Question 2.1 [maximum 3 marks]

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

[There is no definitely of COMI in the Model Law itself.

MLCBI seeks to address or harmonise the substantive differentiates among insolvency regimes in different jurisdictions, based on the premise that a debtor's "centre of main interest" (COMI) is the proper jurisdiction for its primary insolvency case of "main proceeding". However, MLCBI leaves it to the discretion of the court to decide where exactly is a debtor's COMI. the UNCITRAL Guide to Enactment as well as the European Insolvency Regulation, does provide some guidance and key factors for the court to determine or ascertain the debtor's COMI.

It considers

- (a) the location where the central administration of the debtor takes place;*
- (b) anything that is readily ascertainable by third parties eg. the debtor's creditors; and*
- (c) other factors like location of the debtor's books and records, location of its employees, the registered office, location that governed the preparation and audit of accounts, etc..*

MLCBI stated that the appropriate date for determining the COMI, or whether an establishment exists, is the date of commencement of the foreign proceeding. If the COMI of the debtor move, and the move is in near the commencement date of the foreign proceeding, the appropriate evidence which include those readily ascertainable by creditors will be harder to establish.

Once COMI is established, it will decide whether the foreign proceeding is a main proceeding or non-main proceeding. If it is a foreign main proceeding, then the automatic mandatory relief under Article 20 will apply.

I noted that there have been some debates to determine the timing of COMI determination.

The Europe (and UK before Brexit) jurisdiction view that COMI should be determined by the court at the point when foreign proceeding commenced. This is in line with the MLCBI's view.

The US view that COMI should be determined at the point of the filing of the recognition application in respect to the foreign proceeding. This view supported by

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US position in *Morning Mist Holdings Ltd v. Krys (Matter of Fairfield Sentry Ltd)*.

a Singapore court case, *Re Zetta Jet Pte Ltd* [2019] SGHC 53, indicated that what matters is the COMI at the time of the application for recognition, which mirror the US court's reasoning.

The Australian view that COMI should be determined at the hearing of the recognition application.

After Brexit, UK proceedings also need to rely on Model Law as a gateway to seek recognition of foreign proceedings. A UK case, *Re Toisa Ltd* appears to agree with the US view. The court ruled that the appropriate date on which COMI should be determined was the date of the recognition application.

In conclusion, regardless of the different view on timing of COMI, it is an universally accepted principle of international insolvency law that a debtor's insolvency proceeding should be driven by the jurisdiction where it has its COMI.]

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."

The requirement of notification of creditors is provided for in Article 14 of the Model Law with the heading "Notification to foreign creditors of a proceeding under [identify laws of the enacting State relating to insolvency]".

Foreign creditors are entitled to individual notification of the commencement of the local proceeding regarding the debtor under the insolvency law of the enacting State. Foreign creditors are to be treated equally like the local creditors, hence, whenever notification is required for the local creditors, foreign creditors should be notified as well.

The "Safe Conduct Rule" is provided for in Article 10 in the Model Law with the title "Limited Jurisdiction".

When a foreign representative makes an application for recognition of a foreign proceeding in an enacting State, the application alone does not mean that the enacting State assumes jurisdiction over all the foreign assets and affairs of the debtor. This limitation is intended to shield the foreign representative to the extent necessary to make court access a meaningful proposition. Other possible grounds for jurisdiction over the foreign representative or the assets and affairs of the debtor under the laws of the enacting State are not affected; a tort committed by, or misconduct on the part

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Statement 3 = Art 16(3)

of, the foreign representative may provide grounds for dealing with the consequences of that tort or misconduct.

There is no definition of COMI in the Model Law.

Article 16 on Recognition presumptions stated that in the absence of proof to the contrary, the debtor's registered office, or habitual residence in the case of an individual, is presumed to be the COMI. This means, for a corporate debtor, Article 16 of the Model Law contains a rebuttable presumption that the debtor's registered office is its COMI. And for an individual debtor, his habitual residence is the COMI. So once the court has established the COMI or establishment of the debtor, it can then decide whether the foreign proceeding that it recognised will be recognised as a foreign main proceeding or a foreign non-main proceeding. If neither COMI nor an establishment of the debtor exists in the foreign state where the underlying foreign proceeding was commenced which the foreign representative is seeking recognition, then, the court in the enacting State will have to deny the recognition application.

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.

[In the IBA case appeal, the Court of Appeal held that an English court could only properly grant the indefinite Moratorium Continuation if (a) the stay is necessary to protect the interest of the IBA's creditors and (b) the stay would have to be an appropriate way of achieving such protection.

Since these 2 conditions are not met in the IBA case, and based on the evidence presented to the court, IBA creditors do not need further protection, hence the Court should not grant the indefinite Moratorium Continuation.

Another argument is that if Model Law had intended the continuance of relief after the end of the relevant foreign proceeding, it would surely have addressed the question explicitly and provided appropriate machinery for that purpose. Since the Model Law did not explicitly provide for continuation of relief, the Court should not grant the indefinite Moratorium Continuation.]

Question 2.4 [2 marks]

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

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Gibbs Rule

Based on Article 18 of the MLCBI, the English Court of Appeal in the IBA case appeal held that had the MLCBI ever contemplated the continuance of relief after the end of the relevant foreign proceeding, it would have addressed the question explicitly and provided appropriate machinery for that purpose.

Commented [SL7]: 1 mark

Art 29(a) and art 18 (as mentioned)

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.

[Where the foreign proceeding is a foreign main proceeding, Article 20 of the Model Law, the court in an enacting State, upon recognition of the foreign main proceeding should grant automatic mandatory relief. These automatic mandatory relief are designed to allow time for steps to be taken to organise an orderly and fair cross-border insolvency proceeding.]

Article 18 requires the foreign representative to promptly inform the court in the enacting State of (a) any substantial change in the status of the recognised foreign proceeding or the status of the foreign representative's appointment and (b) if the foreign representative is aware of any other foreign proceeding regarding the same debtor, he should inform the court in the enacting State promptly.]

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

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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] [1.5 out of 4 marks]

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

[In view that State A has implemented the Model Law and that it did not contain any reciprocity provision, it is not envisaged that the foreign proceeding open in State B will be denied recognition. [1/2]

Upon recognition of the foreign proceeding, the court in State A has discretionary power under Article 21 to grant appropriate relief to protect the assets of the debtor or the interest of creditors, which include among others, suspending the right to transfer, encumber or otherwise disposal of the assets. It also can provide for the examination of witnesses, the taking of evidence or the delivery of information concerning the debtor's assets, affairs, rights, obligations, or liabilities. It can further entrust the administration or realisation of all or part of the debtor's assets in State A to the foreign representative in State B.

Since the debtor has assets located in State A, the foreign representative in State B should apply for the foreign proceeding to be recognised in State A and apply for relief because recognition allows the foreign representative to access certain tools and protections available to the local insolvency officeholder in State A. For example, he can seek power allowing for examination of witnesses, taking of evidence, or delivery of information concerning the debtor's assets in State A. This also assist in gathering information for him to ascertain whether insolvency "claw-back" actions or claims against the directors, exist. If found to be in existence, he have the cooperation of the court in State A to deal with whatever necessary for him to recovery these assets, which is intended in the Model Law.

He has the rights to deal with the assets in State A to prevent dissipation of the assets and protect/preserve the assets until a time when suitable solution is available for the benefits of the creditors.

Upon recognition, the access rights provide the foreign representative standing before courts in State A, without having to go through the time consuming and costly process, to facilitate co-operation and communication with the courts. This means, it is more efficient [1] and can achieve optimal results, promote consistency treatment or anti-discrimination to stakeholders including foreign creditors, in cross-border insolvencies across jurisdictions.]

Your answer should have included the following and specific reference to the Articles contained in the MLCBI:

- **Legal standing (Article 9 MLCBI):** *The key access for the foreign representative is set forth in Article 9 MLCBI. In the capacity of foreign representative, the foreign representative has automatic standing before the courts in State A without having to meet any formal requirements such as a license or any consular action. In other words, the "status" in State B of the foreign representative is automatically recognised in State A for the purpose of granting the foreign representative standing before the courts in State A. This allows the foreign representative to safeguard and pursue assets of the debtor estate in State A before its courts.*
- **Opening domestic insolvency proceedings (Article 11 MLCBI):** *The foreign representative is further specifically entitled to apply for the opening of domestic insolvency proceedings in State A, as reflected in Article 11 of the MLCBI. Whether or not the foreign representative would wish to do this will depend on what the requirements are for opening such domestic proceedings. Can these requirements be met? On the other hand, it will depend on what the foreign representative believes he/she can get in terms of (interim) relief for the foreign proceedings in State B. In other words, are domestic insolvency proceedings really needed, or just additional time and costs that should be avoided?*
- **Cooperation:** *Similar to access rights, the cooperation provisions in the MLCBI (articles 25-27) also operate independently of recognition and it is not a prerequisite to the use of the cooperation provisions that recognition of the foreign proceedings is obtained in advance. Courts in State A can freely cooperate with the*

foreign representative without having to worry whether the status in State B of the foreign representative can be recognised in State A.

- **Save Time & Costs: The key benefits of both the access provisions and the cooperation provisions are that they save time and therefore also costs, as a result of which value destruction can be avoided and value enhancement is being promoted.**

Question 3.2 [maximum 5 marks] [4 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.

[Under Article 15 of the Model Law, the application for recognition of the foreign proceeding must be supported by the following documents:

- (a) a certified copy of the decision commencing the foreign proceeding and appointment of the foreign representative; or*
- (b) a certificate from the foreign court affirming the existence of the foreign proceeding and of the appointment of the foreign representative; or*
- (c) in the absence of (a) & (b) above, any other evidence acceptable to the court of the existence of the foreign proceeding and the appointment of the foreign representative. [1]*

Article 15 also stated that, the application must contain a statement identifying all foreign proceedings in respect of the debtor that are known to the foreign representative.

In view that the above supporting documents to be provided by the foreign representative in State B, might be in a foreign language, the court in State A may require a translation of these documents into an official language of State A.

Article 16 of the Model Law stated that, since the “foreign proceeding” and “foreign representative” qualify for the meaning of article 2(a) and 2(d) of the MLCBI, the court is entitled to presume that documents submitted in support of the application for recognition are authentic, whether or not they have been legalised.

The court also has to decide when recognising the foreign proceeding, whether it is a foreign main or non-main proceeding by determining whether the debtor has registered office or merely an establishment in State B. Article 16 stated that in the absence of proof to the contrary, the debtor’s registered office is presumed to be the COMI, hence the foreign proceeding will be recognised as foreign main proceeding if

the debtor's registered office is in State B. If it is a foreign main proceeding, then the court in State A upon recognition of this foreign main proceeding, shall grant automatic mandatory relief under Article 20. If neither COMI or an establishment exist, then the foreign proceeding application will be denied recognition. [1]

Other consideration is the public policy contains in Article 6. Prior to the recognition of the foreign proceeding, the court will review whether granting the foreign proceeding will be manifestly contrary to any public policy of fundamental importance for its State. [1]

The foreign representative in State B, has an obligation for full and frank disclosure to the court in State A, where he is applying for recognition under the Model Law. If he breaches this requirement, eg. Falsely claiming that the COMI of the debtor is in a particular State, or where the foreign representative has inappropriate alternative motives and not disclosed to the court, this could be considered an abuse of process and as such justify a denial of the requested recognition based on the public policy exception ruling in Article 6.] [1]

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

- 1. Exclusions:** *If the debtor is an entity that is subject to a special insolvency regime in State B, the foreign representative should first check if the foreign proceedings regarding that type of a debtor are excluded in State A based on Article 1(2) of the implemented Model Law in State A.*
- 2. 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.*

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

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

[Article 19 of the MLCBI gives the court power to grant Interim Pre-recognition Relief to both foreign main and non-main proceedings. This interim relief may be granted upon application for the recognition of a foreign proceeding.

Article 20 of the MLCBI empowered the court to grant automatic mandatory relief to foreign main proceeding upon the recognition of the foreign main proceeding.

Article 21 of the MLCBI allows the court discretionary power to grant appropriate relief as it deems fit, post-recognition of the foreign proceeding.

The interim pre-recognition relief in Article 19 including:

- *a stay of execution against the debtor's assets;*
- *entrusting the administration or realisation of all or part of the debtor's assets located in the enacting State to the foreign representative or another person designated by the court, in order to protect and preserve the value of assets that, by their nature or because of other circumstances, are perishable, susceptible to devaluation or otherwise in jeopardy;*
- *any of the post-recognition relief provided for in Article 21 of the Model Law:-*
 - (a) suspending the right to transfer, encumber or otherwise dispose of any assets of the debtor;*
 - (b) providing for the examination of witnesses, the taking of evidence or the delivery of information concerning the debtor's assets, affairs, rights, obligations or liabilities; and*
 - (c) granting any additional relief that may be available to a domestic liquidator/ office holder under the laws of the enacting State.*

However, if the interim relief would interfere with the administration of a foreign main proceeding, the court may refuse to grant such interim relief.

The appropriate post-recognition relief in Article 21 including:

- *staying the commencement or continuation of individual actions or individual proceedings concerning the debtor's assets, rights, obligations or liabilities, to the extent they have not been automatically stayed under Article 20(1)(a);*
- *staying execution against the debtor's assets to the extent it has not been stayed automatically under Article 20(1)(b);*
- *suspending the right to transfer, encumber or otherwise dispose of any assets of the debtor to the extent this right has not been automatically suspended under Article 20(1)(c);*
- *providing for the examination of witnesses, the taking of evidence or the delivery of information concerning the debtor's assets, affairs, rights, obligations or liabilities;*
- *entrusting the administration or realisation of all or part of the debtor's assets in the enacting State to the foreign representative or another person designated by the court;*
- *extending any interim relief granted pursuant to Article 19(1) of the Model Law; and*
- *granting any additional relief that may be available to a domestic liquidator / office holder under the laws of the enacting State.*

However, such relief is not unlimited and the relief should not interfere with the administration of another insolvency proceeding, in particular the main proceeding. Since in this case, there is no concurrent proceedings, this concern is not applicable.

Article 22 of the MLCBI lays down conditions for the court to consider before it exercises its discretionary power in granting or denying pre-recognition or post-recognition relief available in either Article 19 or Article 21. The basic condition is that the court must be satisfied that the interests of the debtor's creditors and other interested parties are adequately protected. For this reason, the court is granted the

power to set conditions it considers appropriate. At the request of the foreign representative or an affected person, the court may modify or terminate the relief.

The following 4 cases clarify Article 21 of the MLCBI with regards to the court's discretionary power:

- (1) In the case of *Rubin v Eurofinance SA*, the English Supreme court concludes that the enforcement of an insolvency-related in personam default judgment is not covered by the Model Law.
- (2) In the case of *Fibria Celulose S/A v Pan Ocean Co Ltd* (Pan Ocean case), the English court rejected to provide the appropriate relief relating to the issue of ipso facto clauses (allowing termination of the contract upon one of the parties entering into insolvency proceeding) because there is no good reason for the English court to prefer the policy decision made in Korea (i.e. Korean insolvency law declares ipso facto clauses null and void) over the policy decision made in UK (i.e. The English Supreme Court clarified that ipso facto clauses are valid and enforceable in a UK insolvency case).
- (3) In the UK "rule in *Antony Gibbs*" or the "Gibbs Rule" derives from a case of *Antony Gibbs & Sons v La Societe Industrielle et Commerciale des Metaux*, it is stated that for the general proposition that a debt governed by English law cannot be discharged or compromised by a foreign insolvency proceeding.
- (4) In the IBA case, the relief for indefinite Moratorium Continuation is not granted as the case did not meet certain conditions deemed necessary by the court.

Article 22 of the Model Law on Balancing interest, stressed that the court 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 and all the case laws mentioned above provide guidance to the court in exercising its discretionary powers to grant interim pre-recognition relief in Article 19 and post-recognition relief in Article 21.]

For full marks, your answer should have included a brief discussion along the following lines:

1. **Existing international obligations of State A:** Based on Article 3 of the Model Law, the court in State A should again verify that there are no existing international obligations of State A (under a treaty or otherwise) that may conflict with granting the requested relief under the implemented Model Law in State A.
2. **Public policy exception:** The court in State A should, based on Article 6 of the Model Law, also again verify that the relief application is not manifestly contrary to public policy of State A.

Question 3.4 [maximum 1 mark] [1 mark]

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

[Article 19 of the Model Law stated that the court in an enacting State is entitled to grant interim pre-recognition relief at the application of the foreign representative for recognition of the foreign proceeding.]

Under this Article 19, a worldwide freezing order was granted to a Russian bankruptcy case between Igor Vitalievich Protasov and Khadzhi-Murat Derev. This is a foreign main proceeding recognised in the UK. However, post recognition of this foreign main proceeding, the English court rule that the worldwide freezing order is not necessary because upon recognition of a foreign main proceeding, automatic mandatory relief is granted, and the court also has discretionary power under Article 21 to provide other post-recognition relief if necessary. The court in the enacting State found that relevant restrictions and limitations existed which served to inhibit the proper exercise of that jurisdiction. The court cannot find any special or exceptional reasons to justify for the continuation of the worldwide freezing order.]

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

Commented [BB9]: SUB TOTAL = 11 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] [11 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 [6.5 out of 10]

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

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

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

4.1.1 Although Country A has not adopted the MLCBI, the Bank's liquidation comprised a "foreign proceeding" within the meaning of article 2(a) of the MLCBI because it met the key elements specified in the definition [there are 7 separate elements in the definition that each need to be addressed - see general comments below].

- (i) **The Bank did enter into a provisional administration;**
- (ii) **The Bank is in a foreign State;**
- (iii) **The administration is under a law relating to insolvency. Pursuant to Article 76 of the Law in Country A on Banks and Banking Activity (LBBA), the Bank was classified as insolvent. LBBA can be viewed as a law relating to insolvency because it sets out criteria in Article 76 and that once the bank met these criteria, it will be classified as insolvent. The Bank is also very much insolvent as the Affidavit states that the Bank's current, estimated deficiency exceeds USD 823 million.**
- (iv) **The assets and affairs of the Bank are subject to control or supervision by DGF which is a government body of Country A. Although government body is different from the court, it did not negate the supervision of the court.**
- (v) **The proceeding is collective in nature because the DGF has full and exclusive rights to manage the Bank and all power of the Bank's management during the provisional administration.**

- (vi) *The proceeding is for the purpose of reorganisation or liquidation. In this case, the Bank entered liquidation after the NB revokes its licence pursuant to Article 76 of the LBBA. LBBA could be described as a law for the purpose of reorganisation or liquidation because it specific a process from the point the Bank is classified as “troubled” until it entered liquidation. The DGF as the government body of Country A is tasked principally with providing deposit insurance to bank depositors in Country A. Hence, the administration of DGF over the Bank from “Trouble” status to administration process, to the point that the Bank’s licence is revoked and then enter liquidation, is for the purpose of reorganisation or liquidation.*
- (vii) *Article 77 of the LBBA provides that the DGF automatically becomes liquidator of the Bank on the date it receives confirmation of the NB’s decision to revoke the Bank’s licence. At the point, the DGF acquires the full powers of a liquidator under the law of Country A. The DGF as liquidator has extensive powers, including powers to exercise managerial and supervisory powers, to enter contracts, to restrict or terminate the Bank’s instructions, and to file property and non-property claims with a court.*

In view that the proceeding met the key elements within the meaning of article 2(a) of the MLCBI, the Bank’s liquidation is a foreign proceeding.

For full marks your response must address in sufficient detail each of the 7 separate elements of the definition of “foreign proceeding” as set forth in article 2(a) of the MLCBI, provide guidance and source references as appropriate and apply the facts. It is not entirely clear which elements are addressed under (i) and (vii). In addition, a number of the elements are addressed rather briefly, For example, for the “subject to the control or supervision of a foreign court” element, we are looking for a response along the following lines:

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

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

4.1.2 The applicants are Ms. G and the DGF jointly.

The key elements to qualify Ms. G and the DGF as foreign representative include the following:

- (i) **A person or body, including one appointed on an interim basis;**
- (ii) **Authorised in a foreign proceeding;**
- (iii) **To administer the reorganisation or liquidation of the debtor's assets or to act as representative of the foreign proceeding.**

In this case, Ms. G is a person and the DGF is a body, which met the condition set out in (i) above.

Both Ms. G and the DGF are authorised in the Bank's liquidation, which is a foreign proceeding as stated in condition (ii) above.

Mr. G replaces Ms. C as liquidator of the Bank, pursuant to a Decision of the Executive Board of the Directors of the DGF. Ms. G is acting in the capacity as authorised officer of the DGF.

DGF is a government body of Country A, tasked principally with providing deposit insurance to bank depositors in Country A. Article 77 of the LBBA provides that the DGF automatically becomes liquidator of a bank on the date it received confirmation of the NB's decision to revoke the bank's licence.

Both Ms. G and DGF have power to administer the liquidation of the Bank's assets and act as representative of this foreign proceeding, hence it met the condition (iii) above. The Resolution 1513 passed by the Executive Board of the Directors of the DGF delegated to Ms. G, all liquidation powers in respect of the Bank set out in the DGF Law. However, certain powers were expressly excluded from Ms. G's authority. These excluded powers remains vested in the DGF as the Bank's formally appointed liquidator. Together, as joint applicants, both Ms. G and the DGF indeed have full authority to administer the liquidation of the Bank's assets and t act as representatives of the foreign proceeding.

Hence, Ms. G together with the DGF as joint applicants, fall within the description of "foreign representatives" as defined by article 2(d) of the MLCBI.

For full marks your response should also address the assumption of article 16(1) MLCBI.

*** End of Assessment ***