



SUMMATIVE (FORMAL) ASSESSMENT: MODULE 2A

THE UNCITRAL MODEL LAWS RELATING TO INSOLVENCY

Commented [BB1]: TOTAL = 36.5 MARKS

73%

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

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

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

## INSTRUCTIONS FOR COMPLETION AND SUBMISSION OF ASSESSMENT

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

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

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

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

**ANSWER ALL THE QUESTIONS**

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

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

Commented [SL2]: SUBTOTAL = 9 MARKS

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

## Question 1.1

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

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

## Question 1.2

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

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

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

Question 1.3

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

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

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

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

Question 1.4

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

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

**(b) The public policy exception.**

**(c) The safe conduct rule.**

**(d) The "hotchpot" rule.**

Question 1.5

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

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

- (a) The foreign main proceedings in South Africa will not be recognised in the UK because the UK is not a designated country under South Africa's principle of reciprocity, but the foreign non-main proceedings in Argentina will be recognised in the UK despite Argentina not having implemented the Model Law.*
- (b) Both the foreign main proceedings in South Africa and the foreign non-main proceedings in Argentina will not be recognised in the UK because the UK has no principle of reciprocity and Argentina has not implemented the Model Law.*
- (c) Both the foreign main proceedings in South Africa and the foreign non-main proceedings in Argentina will be recognised in the UK.*
- (d) None of the statements in (a), (b) or (c) are correct.**

Question 1.6

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

- (a) No interim relief based on Article 19 of the Model Law is available if concurrent domestic insolvency proceedings and foreign proceedings exist at the time of the application of the foreign proceedings in the enacting State.*
- (b) In the case of a foreign main proceeding, automatic relief under Article 20 of the Model Law applies if concurrent domestic insolvency proceedings and foreign proceedings exist at the time of the application of the foreign proceedings in the enacting State.*
- (c) The commencement of domestic insolvency proceedings prevents or terminates the recognition of a foreign proceeding.*
- (d) If only after recognition of the foreign proceedings concurrent domestic insolvency proceedings are opened, then any post-recognition relief granted based on Article 21 of the Model Law will not be either adjusted or terminated if consistent with the domestic insolvency proceedings.**

Question 1.7

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

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

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

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

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

Question 1.8

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

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

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

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

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

Question 1.9

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

**(a) Court proceedings.**

**(b) Arbitral Tribunals.**

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

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

Question 1.10

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

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

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

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

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

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

**Question 2.1** [maximum 3 marks]

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

*The COMI of a debtor isn't clearly defined under the MLCBI, but the appropriate date is. The appropriate date is determined to be the date of commencement of the foreign proceeding in question. Where a COMI is deemed to have moved shortly before foreign proceedings are commenced, the evidence required to prove the new COMI will be more taxing including whether it is ascertainable by third parties. This gives clear guidelines of the timings, where the determination of the COMI may be more subjective.*

**Question 2.2** [maximum 3 marks]

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

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

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

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

*Statement 1 relates to article 14 of the Model Law - Grounds to refuse recognition and enforcement of an Insolvency-related judgment. Within 14(a), there are provisions for the notification of creditors of the insolvency process, specifically timing.*

*Statement 2 relates to article 10 of the Model Law - the Safe Conduct Rule. This ensures that the court located in the enacting state does not assume jurisdiction over all assets held by the debtor on the sole basis that there is an application for recognition of a foreign proceeding.*

*Statement 3 relates to article 16 of the Model Law - recognition presumptions regarding COMI. COMI is an undefined key concept, and this article includes a*

**Commented [SL4]:** SUBTOTAL = 8 MARKS

**Commented [SL5]:** 2 marks

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

**Commented [SL6]:** 2.5 marks

Statement 3 = Art 16(3)



*rebuttable presumption that the place of the registered office of the debtor is the place of its COMI.*

**Question 2.3 [2 marks]**

**Commented [SL7]: 2 marks**

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

*The IBA case appeal was brought by an Azeri foreign representative, Ms Gunel Bakhshiyeva, applied for relief under article 21 of the Model Law to have an indefinite continuation of the active moratorium. The moratorium prevented the creditors from enforcing their debt and two creditors disputed its existence as they had unpaid debt instrument claims and had not submitted to the Azerbaijan insolvency process. They argued that the restructuring plan which had been approved by the Azerbaijan insolvency process and was binding on all creditors, was not binding on them as they had not submitted to the insolvency process. Therefore, they requested that the English courts (their debt was under English law) prevent the enforcement of an indefinite moratorium on them. Meanwhile, the Azerbaijan appointment taker was concerned that on conclusion of the restructuring process, the two creditors would enforce their claim under English law based on the Gibbs Rule. This would argue that the restructuring plan cannot discharge the two challenging creditor's claims.*

*The English Court of Appeal upheld the decision to deny an indefinite moratorium giving the reasons that, "the fact of foreign insolvency, even one recognised formally in this jurisdiction, is not of itself a gateway for the application of foreign insolvency laws or rules or given them 'overriding effect' over ordinary principles of English contract law". The stay would have had to have been necessary to protect the interests of IBA's creditors and an appropriate way of achieving such protection. The English Court did not deem either of these conditions to have been achieved. IBA could have run a parallel restructuring scheme in the UK alongside the Azerbaijan scheme. Furthermore, there was no clear scope for the Azerbaijan representative to remain in office after the restructuring had completed and therefore any relief previously granted under Model law should cease.*

*Finally, the decision was made with consideration of the Gibbs Rule and whether the Model Law implementation would have prevented the exercise of rights under the Gibbs Rule. The judge deemed the indefinite moratorium to be a permanent stay around the Gibbs Rule and the intended effect was to prevent the challenging creditors from exercising their rights under English contract law. This reflected a substantive relief, masked as a procedural relief. The judge used his discretion to balance the various interests in accordance with Article 22 of the Model Law.*

**Question 2.4 [2 marks]**

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

*In the situation whereby foreign main proceedings have been recognised but there are existing domestic proceedings, the court in an enacting state has discretionary power (where necessary) to protect the assets of the debtor or the interest of the creditors. Therefore, the first step should be to identify any powers that must be used for this purpose. There will be actions that the enacting state court could request from the foreign representative, e.g. staying the commencement or continuation of individual actions / proceedings, suspending the right to transfer and providing for the examination of witnesses, taking of evidence or the delivery of information. The full possible actions are disclosed in article 21 of the MLCBI and the effect of the new main proceedings will be immediate mandatory relief.*

*The foreign representative has an ongoing duty of information to the enacting state court to keep them updated of developments. This is documented in article 18 of the MLCBI and applies from the time of filing the recognition application for the foreign proceedings. The foreign representative must promptly inform the court of any substantial change in the status of the recognised foreign proceeding, or the foreign representative's appointment. This obligation applies also to foreign proceedings regarding the same debtor that the representative becomes aware of.*

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

***A foreign representative of a foreign proceeding opened in State B in respect of a corporate debtor (the Debtor) is considering whether or not to make a recognition application under the implemented Model Law of State A (which does not contain any 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 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***

**Commented [SL8]:** 1.5 marks

Art 29(a) and 18 (as discussed)

**Commented [BB9]:** SUB TOTAL = 8 MARKS

**access and co-operation, explain how these rights in State A can benefit the foreign representative.**

*The foreign representative can first benefit from article 9 - Standing (Locus Standi). This allows the foreign representative primary standing in court in State A, without the need to fulfil formal requirements such as licenses and consular actions. This will allow them to apply to the court to gain access to the rights provided in that jurisdiction. [1]*

*Article 12 expands the powers provided to the foreign representative, such as the standing to make petitions and to make submissions concerning areas such as the protection, realisation of distribution of assets. However, the foreign proceeding must be recognised in State A before these powers will be available to the representative. It must also be noted that no specific powers or rights are vested through this process.*

*Once the foreign representative has achieved recognition of the proceedings in State A, under article 21, the foreign representative can instruct the court to grant appropriate reliefs, including to stay the commencement or continuation of individual actions or individual proceedings concerning the debtor's assets, rights, obligations or liabilities. This benefits the representative as it gives local powers to prevent other parties from enforcing against assets that the representative would like to realise. This also applies to staying execution against the debtor's assets (where they have not already been stayed).*

*Should the foreign representative be concerned about a transfer of assets that they would pursue to realise, they could apply to the court under article 21 to prevent transfer or disposal of assets. This same article can also grant the foreign representative with the rights to realise all or part of the debtor's assets in State A. This may be undertaken using any additional local reliefs to State A that is available to a domestic office holder. This should give the foreign representative the full suite of powers required to protect and realise assets in State A.*

*Finally, there are certain automatic reliefs that the foreign representative can rely upon on recognition of their proceedings. These include a stay of the commencement or continuation of individual actions / proceedings concerning the debtor's assets, right, obligations or liabilities. There is also a stay of execution against the debtor's assets and suspension of right to transfer / dispose of assets. Whilst these are listed above, they largely automatically apply on recognition.*

**Your answer must also include the following:**

- ***Opening domestic insolvency proceedings (Article 11 MLCBI): The foreign representative is further specifically entitled to apply for the opening of domestic insolvency proceedings in State A, as reflected in Article 11 of the MLCBI. Whether***

*or not the foreign representative would wish to do this will depend on what the requirements are for opening such domestic proceedings. Can these requirements be met? On the other hand, it will depend on what the foreign representative believes he/she can get in terms of (interim) relief for the foreign proceedings in State B. In other words, are domestic insolvency proceedings really needed, or just additional time and costs that should be avoided?*

- ***Cooperation:** Similar to access rights, the cooperation provisions in the MLCBI (articles 25-27) also operate independently of recognition and it is not a prerequisite to the use of the cooperation provisions that recognition of the foreign proceedings is obtained in advance. Courts in State A can freely cooperate with the foreign representative without having to worry whether the status in State B of the foreign representative can be recognised in State A.*
- ***Save Time & Costs:** The key benefits of both the access provisions and the cooperation provisions are that they save time and therefore also costs, as a result of which value destruction can be avoided and value enhancement is being promoted.*

Question 3.2 [maximum 5 marks] [3 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.*

*The key evidence that must be provided to recognise a foreign representative is a certified copy of the decision commencing the foreign proceeding and appointing the foreign representative. If this is unavailable, a certificate from the foreign court affirming the existence of the foreign proceeding and the appointment of the representative may be supplied. In the situation where neither piece of evidence is available, any other evidence proving the same may be provided. This is outlined in Article 15 of the Model Law. [1]*

*To accompany the evidence of a right to be appointed as above, the application should also include evidence identifying all foreign proceedings in respect of the debtor (that are known to the foreign representative). Where State A uses a different language, official translations of the above evidence are likely to be required.*

*The key restrictions that will then apply are specific to different jurisdictions. Some jurisdictions may not grant powers and laws that a foreign insolvency representative would typically have access to if this is not within the domestic*

laws. [½] The impact of this is largely based on case law but may prevent foreign representatives from using their full domestic powers. - refer to Article 3 of the Model Law in your discussion

Article 23 also highlights that powers to bring claims for antecedent transactions. This outlines that the fact that a proceeding is a foreign proceeding shouldn't prevent antecedent transaction claims being made. However, this is still likely to be more restrictive in a foreign proceeding than a domestic one, particularly if it is not a main proceeding.

There is also likely to be more restrictions if an enacting state has a domestic insolvency procedure set up. There may be restrictions around the realisation of assets and powers a main foreign representative can use. However, the hotchpot rule prevents some creditors from being preferred in the foreign main proceeding, where they have received a part repayment in the enacting state. [½]

Article 1 then provides the provisions of exclusions. This excludes certain proceedings from applying aspects of Model Law. Typically, Model Law will apply to any proceeding that is qualified as a "foreign proceeding" as per article 2(a). However, the enacting state has authority to override article 2(a) where special regulatory regimes are in place, e.g. banks and insurance companies. This should be considered when reviewing these proceedings. [½]

There may also be exclusions applied above article 2(a) where there are special regulatory regimes, e.g. public utility companies. The court will have to be careful not to just limit the powers of a foreign representative based on the existence of a special regulatory regime, rather than specific practical reasons. There may be specific exclusions pre-determined which can be considered by the foreign representative. [½]

Finally, there is likely to be judicial scrutiny that must be overcome. This is focussed on looking at the Model law from a judge's perspective and provides examples (as opposed to instructions) of how a judge may look at typical decisions. This perspective may change between jurisdictions and is highly dependent on case law.

**With reference to the question, your answer should have also included a brief discussion on the following:**

1. **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).
2. **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.**

- 3. Public policy exception: Finally, the court in State A should also ensure based on Article 6 of the Model Law that the recognition application is not manifestly contrary to public policy of State A.**

Question 3.3 [maximum 5 marks] [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.**

*During the pre-recognition phase of a proceeding, under article 19 the court in the enacting state can grant interim relief where it is required urgently, upon an application by a foreign representative. This can bring powers such as a stay on execution against the debtor's assets, entrusting the realisation and protection of assets to the foreign representative where deemed necessary, and several of the post - recognition powers may be brought forward to pre-recognition.*

*Ahead of the court's discretionary relief powers, article 20 provides for the automatic relief on recognition of a foreign representative. This includes; a stay on the commencement or continuation of individual actions or individual proceedings concerning the debtor's assets, rights, obligations or liabilities, as well as a stay of execution against the debtor's assets and a suspension of the right to transfer, encumber, or otherwise dispose of any assets of the debtor.*

*Meanwhile, article 21 sets out the court's discretionary power to provide post-recognition relief to both main and non-main proceedings. This gives powers to the court to grant discretionary powers to protect the assets of the debtor or interest of the creditors. The types of relief provided include staying the commencement of individual actions or individual proceedings concerning the debtor's assets, rights, obligations or liabilities. The same reliefs prevent the transfer of the debtors assets and any execution proceedings against the same. It allows the representative to examine witnesses and to take delivery of information concerning the debtor's assets, affairs, rights, obligations, and liabilities. Finally, additional relief can be extended under article 21 where it would have automatically been given in the foreign state that the representative is situated.*

*There is also the extension of any relief provided in article 19, to be effective post-recognition. In addition, the local court may pass on all, or part of the debtor's assets located locally to the foreign representative, at the courts discretion. They must be content that the interests of local creditors in the enacting state are adequately protected.*

*Article 22 should also be mentioned as this outlines automatic reliefs granted to a foreign main proceeding on recognition of their process. This article provides for additional reliefs (or to remove automatic reliefs) as the court sees fit with the main focus being on the interests of the debtor's creditors and other interested parties.*

*Whilst these articles outline the possible relief pre and post recognition, these powers are not unlimited. The court will continue to hold discretion as to which powers are required to protect creditors. These powers may be different between jurisdictions (and courts) and remains one of the issues with Model Law.*

*There is case law which evidences a court's decision to limit powers provided under Model Law. An example (Rubin vs Eurofinance) is the decision of the English court to decide that default judgments are not covered by Model Law. This was a US default judgment looking to be recognised in the UK. The basis was that this would have created a new rule that doesn't currently exist as it would have represented a difference between insolvency and non-insolvency judgments.*

*The Pan Ocean case is also useful case law, which represented the English Court stating that it was unable to grant the appropriate relief under foreign insolvency law. In particular, the Korean liquidator involved tried to trigger the ipso facto clause on a contract, which would have rendered the contract null and void on the company entering insolvency proceedings. However, this provision was present in Korean insolvency law, but not English. In summary, the English court could not grant this clause when it was not present domestically. As such, this shows a limitation of reliefs available.*

**For full marks your answer should have also included a discussion on the following:**

- 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?**

*A worldwide freezing order granted pre-recognition interim relief is unlikely to continue post-recognition due to local insolvency regimes offering other forms of protection, which means that a freezing order is no longer required. Whilst it is understandable before the recognition to provide a freezing order to protect the interest of the creditors, the automatic insolvency powers prevent dissipation post recognition.*

*This was argued in the English case between Igor Vitalievich Protas and Khadzhi-Murat Derev. This case argued the point whether a freezing order could remain after the recognition of a Russian bankruptcy in England as a foreign main proceeding. The judge outlined that the Model law should put the trustee in the same position as an officeholder appointed under domestic law. Therefore, with these statutory powers, a freezing order would not be required.*

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

Commented [BB10]: SUB TOTAL = 11.5 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] [11.5 out of 15]

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

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

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

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

*When looking at this situation from the English courts point of view, the key initial consideration will be whether article 2(a) of the MLCBI applies to these proceedings. Article 2(a) states that a foreign proceeding must have, "a proceeding [element 1], that is either judicial or administrative [element 2], that is collective in nature [element 3], in a foreign state [element 4], is authorised or conducted under a law relating to insolvency [element 5] in which assets and affairs of the debtor are subject to control or supervision by a foreign court [element 6] and which proceeding is for the purpose of reorganisation or liquidation [element 7]".*

*To begin assessing whether this applies to the Bank's liquidation, we first assess whether this represents a 'proceeding'. The Bank's liquidation is a statutory insolvency process to wind up the Bank, based on the facts of the case. The DGF initiated the winding up process and the powers that were granted including to "find, identify and recover property belonging to the bank" and "the power to exercise "such other powers as are necessary to complete the liquidation of a bank"". Therefore, on the facts of the case these appear to be a proceeding to wind up the company and liquidate the assets for the benefit of creditors.*

*We then turn to whether the liquidation is either judicial or administrative proceeding of a collective nature. This appears to fall successfully under an administrative proceeding. There are clear insolvency rules set out for the liquidation of banks in the foreign jurisdiction that appear to represent an administrative proceeding.*

*The proceeding must also have a basis in insolvency-related law of the originating State. This appears to be the case here. The DGF is appointed liquidator and all the bank's management are dismissed on the revoking of the banking license. The DGF representative is then vested with several insolvency powers, largely in line with those of the MLCBI. The protocol and powers are specifically created for the insolvency of banks in the country. This is further supported by the MLCBI not requiring "insolvency law" as a label if the substance is in line with insolvency law.*

*Whilst I believe the facts constitute a basis in insolvency-related law, there is also an argument that these are specific general laws of the country. In this case, the English court would not just be able to recognise the foreign proceeding, instead would have to adjudicate on the facts of the laws being applied in the UK.*

*We then look at whether the proceeding provides an opportunity for involvement of creditors collectively. The material states that DGF is looking to approve creditors of USD 1.113 billion but does not state the nature or location of these creditors. The facts state that the liquidator has, "the power to compile a register of creditor claims and to seek to satisfy those claims". These suggests that the foreign liquidator has a process for collecting and adjudicating claims. The further insolvency powers granted to them then allows them to collect assets on behalf of all creditors. Further information would be required to confirm that foreign creditors are also allowed to participate fairly and evenly. Once this fact has been confirmed, this requirement appears to have been addressed.*

*There must also be control of supervision of the assets and affairs of the debtor by a court or another official body. Whilst the foreign court does not appear to be involved in these proceedings, there is an official body in the form of Deposit Guarantee Fund. They are independent of the bank and have been set up to liquidate banks that are deemed insolvent under the LBBA laws. There are clear rules under this official body for the conduct of the liquidation and oversight over the liquidation. Therefore, this test appears to have been reached and control has been shown.*

*Finally, the purpose of the proceeding must be reorganisation or liquidation of the debtor. This is clearly the purpose of the DGF and the powers provided to the representative reflect this. The DGF is, "responsible for the process of withdrawing insolvent banks from the market and winding down their operations via liquidation". Therefore, this states that the process is in place to liquidate the company.*

*Therefore, on assessment of the facts, the Bank's liquidation appears to fit under article 2(a)'s definition of 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. Aside from element 4, all elements are addressed in your response, albeit at times quite briefly and without providing a lot of guidance and source references.*

For example, for the “collective nature” element, we are looking for a response along the following lines:

1. UNCITRAL’s guide for judiciary, “The Model Law on Insolvency: The Judicial Perspective” (2013) explains the requirement for proceedings to be “collective”:

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

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

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

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

And for the “subject to control or supervision by a foreign court” elements, 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".

*Turning to article 2(b) and whether the Applicants fall within the description of "foreign representatives" as defined by article 2(b). The Applicant must be, "an appointed person or body (including appointed on an interim basis) authorised in the foreign proceeding". Ms G replaced Ms C as authorised officer from 17 August 2020. First reviewing DGF's right to appoint an officer, they have powers under articles 48(3) of the DGF Law to delegate powers (granted to them) to an "authorised officer" or "authorised person". There is also a clear definition of what an authorised person is under article 2(1)(17) of the DGF law. Furthermore article 35(1) of the DGF law states what an authorised person must have. Therefore, there is clear evidence that the representative selected by DGF is authorised.*

*Next turning to whether on the facts Ms G has been appropriately authorised under DGF law, the appointment was pursuant to a Decision of the Executive Board of the Directors of the DGF (No 1513). This outlines that Ms G adequately shows the requirements set out in the rules of appointing a liquidator under DGF rules. It therefore appears that Ms G adequately shows this element of being recognised as a foreign representative.*

*The next test is whether, "the authorisation of the representative is either to administer the reorganisation or liquidation of the debtor's assets or affairs or to act as representative of the foreign proceeding". This is the reason for the appointment of Ms G, "delegates to her all liquidation powers in respect of the Bank". She is an insolvency professional and has been appointed based on the facts to liquidate the company. She therefore appointed to complete both the liquidation and to act as a representative of the foreign proceedings under her powers.*

*In conclusion, these tests have been satisfied based on the facts above. This is despite the foreign representative not being specifically authorised by the foreign court.*

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

\* End of Assessment \*



