



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

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

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

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

Question 1.4

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

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

Question 1.5

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

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

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

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

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

Question 1.6

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

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

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

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

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

Question 1.7

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

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

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

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

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

Question 1.8

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

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

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

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

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

Question 1.9

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

**(a) Court proceedings.**

**(b) Arbitral Tribunals.**

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

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

Question 1.10

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

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

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

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

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

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

Question 2.1 [maximum 3 marks]

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

*Chapter III of the Model Law set forth requirements for recognition of a foreign proceeding and for granting relief. Specifically, articles 15-18 deal with recognition and articles 19-24, in turn, deal with relief. For this reason, considering that the COMI plays an essential role in the dynamics the Model Law, the appropriate date for determining the COMI is the date of commencement of the foreign proceeding. It is worth mentioning that, given the evidence required to be attached to an application for recognition and the relevance attributed to the decision that recognizes the foreign process and appoints the foreign representative, the commencement date of that proceeding is the appropriate date to determine the COMI. In addition, in case the debtor's ceases the activities after the commencement of the foreign proceeding, every evidence that may exist at the time of the application for recognition to indicate that the debtor's COMI is within a particular jurisdiction would produce a clear result about which parameters were considered at the date the decision was issued. Furthermore, deeming the commencement date to determine the COMI provides a test that can be applied with certainty to every insolvency proceeding. Besides of it, the importance of determining where is the COMI of a debtor is intrinsically related to the recognition of a foreign proceeding as a main or a non-main proceeding, as well as to the three automatics effects set forth in article 20 of the MLCBI once a foreign main proceeding is recognized. The insolvency proceeding pending in the debtor's COMI is expected to have the duty to administrate and coordinate the insolvency, regardless of the numbers of State in which a non-main foreign proceeding has been recognized. In addition, if the applicant falsely claims the COMI to be in a particular jurisdiction, due to inappropriate vested interests, the enacting State may consider that there has been an abuse of process, which could affect the recognition application.*

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."**

Commented [SL4]: SUBTOTAL = 8.5 MARKS

Commented [SL5]: 2 marks

US court, chap 15 and *Morning Mist Holdings Ltd v. Kryz (Matter of Fairfield Sentry Ltd)*.

Commented [SL6]: 3 marks



**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 → Timely notice - Article 14 - Notification to foreign creditors of a proceeding under the insolvency law of the enacting State.*

*Statement 2 → Safe Conduct Rule - Article 10. Limited jurisdiction*

*Statement 3 → Rebuttable presumption that the place of the registered office of the debtor is the place of its COMI - Article 16 (paragraph 3) of the Model Law]*

**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 appeal of the IBA case focused on the question of whether or not the British court had jurisdiction to grant the Moratorium Continuation for an indefinite period of time, relief that had been requested by the foreign representative of the Azerbaijan insolvency proceeding. According to the British Court of Appeal, the issue was not a strict sense of jurisdiction, but whether the English court could exercise such power to (a) prevent English creditors (the challenging creditors) from enforcing their rights recognized by English law, in accordance with the Gibbs Rule; and to (b) prolong the stay even after the Azeri reconstruction had come to an end.*

*In respect to the (a) above, the Court of Appeal set forth that it could grant an indefinite Moratorium Continuation only if (i) the stay requested was necessarily to protect the interests of IBA's creditors and if (ii) the granting order of the stay was intended to promote indeed the protection of these creditors. The Court of Appeal held that none of these requirements had been met in the matter. Therefore, the Court of Appeal understood that would be a "far too indirect and imponderable reason" to authorize the stay of an individual execution promoted by a legitimate challenging creditor, whose rights to enforce execution were recognized by English law.*

*In addition, the Court of Appeal considered that the IBA could have applied for a reorganization scheme in the UK at the same time, and did not do so, especially when, since June 2020, the option of the "Restructuring Plan" (RP) - also referred to as a super scheme of arrangement - was available for debtors in financial distress. Therefore, the requirements of article 21 of the Model Law were not fulfilled for granting the relief requested.*

*In respect of (b) above, considering the content of article 18 of the MLCBI, which obliges the foreign representative to communicate any substantial change in the status of the foreign proceeding or modification of the status of his own capacity as a foreign representative, the MLCBI is clear when determining that the foreign proceeding has to be active and the foreign representative must still be in charge. Thus, considering that the designation of the foreign representative had ceased as well as the foreign proceeding had come to an end, the Court of Appeal could no longer grant new orders in support of the foreign proceeding. Furthermore, any relief previously granted under the MLCBI should have been terminated.*

*Hence, the Court of Appeal ruled the matter in favour of the challenging creditors based on the reasons exposed above.]*

**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.***

*[Assuming that (i) both the foreign proceeding and the foreign representative meet all required characteristics as set forth in article 17 (1) of the MLCBI; (ii) that there is no ground to denial recognition based on the public policy exception (article 6 of the Model Law); and that the foreign proceeding was recognized as a main proceeding as set forth in article 17 (2) (a) of the Model Law, it will arise the duty for the foreign representative to promptly inform the court of the enacting State (i) any substantial change in the status of the foreign proceeding or (ii) any modification of the status of his own capacity as a foreign representative before the recognized foreign proceeding, according to the article 18 of the Model Law.*

*In terms of relief, based on article 19 of the Model Law, even prior to a decision that recognizes the foreign proceeding, the applicant may request an interim relief upon application for the recognition of foreign proceeding, since there is an urgent need that must be dealt with by the Court of the enacting State. For instance, this article applies where relief is needed to protect the assets of the debtor located in the enacting State or the interests of the creditors in that particular jurisdiction, between the time of filing for recognition of a foreign proceeding until the application is decided upon. The relief can include (i) stay of execution against the debtor's assets; (ii) an order to preserve value of the debtor's assets; (iii) any relief mentioned in paragraph 1 (c), (d) and (g) of article 21. It is worth mentioning that the court of the enacting State "may refuse to grant relief under this article if such relief would interfere with the administration of a foreign main proceeding", pursuant to article 19(4) of the Model Law.*

*Yet in terms of relief, accordingly to the article 20 of the Model Law, the recognition a foreign main proceeding produces three automatic effects: "(a) Commencement or*

Commented [SL8]: 1.5 marks

Art 29(a)

*continuation of individual actions or individual proceedings concerning the debtor's assets, rights, obligations or liabilities is stayed; (b) Execution against the debtor's assets is stayed; and (c) The right to transfer, encumber or otherwise dispose of any assets of the debtor is suspended." Thus, the decision that recognized a foreign main proceeding provides the automatic relief based on article 20 of MLCBI, except in the case that exist concurrent proceedings being one the foreign main proceeding and the other a domestic insolvency proceeding in the enacting State. In this last hypothesis, preference is given to the domestic proceeding (article 29 of the Model Law) and the automatic relief of Article 20 does not apply to the matter.*

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

Commented [BB9]: SUB TOTAL = 9 MARKS

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

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

Question 3.1 [maximum 4 marks] [3 marks out of 4]

***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.***

*[Firstly, article 9 of the MLCBI set forth the principle *locus standi*, what means that the foreign representative has the right to direct access to the court of the enacting State A, without any need to meet formal requirements such as licenses or consular action and even prior to seek recognition of the foreign insolvency proceeding. [1] Although, such access does not immediately provide any power to the foreign representative. Secondly, article 10 of the MLCBI establishes the safe conduct rule, which is a guarantee that the foreign representative when standing before the court of the enacting State A will not submit the assets of the debtor to the jurisdiction of the enacting State A. This is an important immunity to the foreign representative and to the creditors that an eventual application of recognition of a foreign proceeding in a enacting State will not culminate in a lost of control of the debtors assets located at the home jurisdiction of the foreign representative. In addition, article 11 allows the foreign representative to request the commencement of a domestic insolvency proceeding in the enacting State - even without a recognition of the foreign proceeding [1] - and article 12 allows the foreign representative to participate in the insolvency proceeding taking place in the enacting State, for instance providing the possibility to require protection of the debtor's assets, since there were previously recognized the foreign proceeding.*

Finally, in terms of access for foreign representatives, it must be noted that article 13 of the MLCBI establishes the anti-discrimination principle, throughout are guaranteed to the foreign creditors the same rights owed by the creditors domiciled in the enacting State A. Further, paragraph two of the same article clarifies that the access and the participation of a foreign creditor in the insolvency proceeding do not affect the ranking of claims of the enacting State A. A last right to foreign creditors is provided by article 14 of the MLCBI. As a consequence of the equal treatment principle, this articles set forth that foreign creditors should be timely notice whenever notification of the local creditors in the enacting state is required. Article 14 of the MLCBI as well informs the content that must be included in the notification to be sent to the foreign creditor.

In terms of cooperation, it should be noted that recognition of the foreign insolvency proceeding is not necessarily required to start it. Basically, the MLCBI recommends that the courts in a cross-border insolvency matter should cooperate as maximum as they are capable of (art. 25 (1) of the MLCBI). Furthermore, a cooperation between the courts does not require any formality, such as letters rogatory letters. And, the communication can be established between the court direct to the foreign representative. As cooperation can assume multiples forms, there is not a limitation in how the parties should cooperate, that is why article 27 presents a list of ways of cooperation.[1]

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

Question 3.2 [maximum 5 marks] [2 out of 5 marks]

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

*[Under the MLCBI, the representative of the foreign proceeding may only apply for recognition of the foreign proceeding for which he/she or the body has been appointed as representative (article 15(1)). In addition, the application for recognition of the foreign proceeding must be accompanied by: (a) A certified copy of the decision commencing the foreign proceeding and appointing 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 evidence referred to in subparagraphs (a) and (b), any other evidence acceptable to the court of the existence of the foreign proceeding and of the appointment of the foreign representative. (article 15(2). [1]*

Third, there must be a statement from the representative identifying all the foreign proceedings that he/she is aware of that are conducted against the debtor (article 15(3)). Finally, the court may request a translation of the documents accompanying the application for recognition into an official language of the enacting State (article 15(4)).

Regarding the presumptions, article 16 of the MLCBI indicates that the court of the enacting state must presume the truth of the documents presented by the foreign representative listed in article 15(2), as well as that the representative meets the requirements of article 2(d) of the Model Law. Furthermore, the court must presume the application attachments to be authentic, even if they have not been formally legalized (article 16(2)). Finally, article 16(3) presumes that the *debtor's registered office, or habitual residence in the case of an individual, is presumed to be the center of the debtor's main interests*, which is absolutely relevant to classify the foreign proceeding as main or not (article 17, paragraph 2). [1]

Further, article 17 of MLCBI states that the Court must decide as soon as possible (paragraph 3) on the application for recognition, and that the decision may then be modified or terminated if the grounds for recognition prove to be lacking or cease to exist (paragraph 4). In addition, once the request for recognition is recognized, it is necessary to note whether the enacting state has adopted a reciprocity requirement - i.e. recognizing the foreign proceeding only if the court in the country from which the request for recognition of the proceeding originated would grant the same relief. Although this is not foreseen by the Model Law, some countries have added this point, which may make the adoption of the Model Law useless, as in the case of South Africa. Finally, article 18 set forth that the foreign representative has the duty from the time of filing the application for recognition of the foreign proceeding, to inform the court of the enacting State: (a) *Any substantial change in the status of the recognized foreign proceeding or the status of the foreign representative's appointment; and (b) Any other foreign proceeding regarding the same debtor that becomes known to the foreign representative.*

**You have discussed some of the elements in detail, however your answer should have also included a brief discussion on the following, which are relevant:**

- 1. Exclusions:** If the debtor is an entity that is subject to a special insolvency regime in State B, the foreign representative should first check if the foreign proceedings regarding that type of a debtor are excluded in State A based on Article 1(2) of the implemented Model Law in State A.
- 2. Restrictions: Existing international obligations of State A:** Based on Article 3 of the Model Law, the court in State A should also check if there are no existing international obligations of State A (under a treaty or otherwise) that may conflict with granting the recognition application under the implemented Model Law in State A.
- 3. Public policy exception:** Finally, the court in State A should also ensure based on Article 6 of the Model Law that the recognition application is not manifestly contrary to public policy of State A.

Question 3.3 [maximum 5 marks] [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.**

*[Even prior to a decision that recognizes the foreign proceeding, the applicant may request an interim relief upon application for the recognition of foreign proceeding, based on article 19 of the MLCBI, since there is an urgent need that must be dealt with by the Court of the enacting State A. For instance, this article applies where relief is needed to protect the assets of the debtor located in the enacting State or the interests of the creditors in that particular jurisdiction, between the time of filing for recognition of a foreign proceeding until the application is decided upon. The interim relief can include (i) stay of execution against the debtor's assets; (ii) an order to preserve value of the debtor's assets; (iii) any relief mentioned in paragraph 1 (c), (d) and (g) of article 21. It is worth mentioning that the court of the enacting State "may refuse to grant relief under this article if such relief would interfere with the administration of a foreign main proceeding", pursuant to article 19(4) of the Model Law.*

*In terms of a post-recognition relief, accordingly to the article 20 of the Model Law, the recognition a foreign main proceeding produces three automatic effects: "(a) Commencement or continuation of individual actions or individual proceedings concerning the debtor's assets, rights, obligations or liabilities is stayed; (b) Execution against the debtor's assets is stayed; and (c) The right to transfer, encumber or otherwise dispose of any assets of the debtor is suspended." Thus, the decision that recognized a foreign main proceeding provides the automatic relief based on article 20 of MLCBI.*

*Finally, article 21 of the MLCBI set forth the list of the post relief that could be required by the foreign representative, which includes: (a) 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 stayed under paragraph 1 (a) of article 20; (b) Staying execution against the debtor's assets to the extent it has not been stayed under paragraph 1 (b) of article 20; (c) Suspending the right to transfer, encumber or otherwise dispose of any assets of the debtor to the extent this right has not been suspended under paragraph 1 (c) of article 20; (d) 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; (e) Entrusting the administration or realization of all or part of the debtor's assets located in this State to the foreign representative or another person designated by the court; (f) Extending relief granted under paragraph 1 of article 19; (g) Granting any additional relief that may be available to the Judicial Administrator under the laws of the enacting State.*

*In terms of limitations that must be considered by the court, assuming that there is no concurrent proceeding, there is the necessity to accommodate at the same time the interests of the debtor and all his creditors, without silencing the needs of anyone of them. This principle is provided by the article 22 (1) of the MLCBI. Further, the same*

article 22, in its second paragraph, adverts that the court may create conditions or limitations to the relief granted, accordingly to the circumstances of the matter. And in case that the relief granted still collides with the interests of a person or a body, the person affected by the relief or the foreign representative may request the court to terminate the relief, as well as the court at its own motion is able to terminate it (article 22 (3)).

**Your answer must also include a brief discussion of the following elements:**

- 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?**

*[In the case of Igor Vitalievich Protasov and Khadzhi-Murat Derev the English court was faced with whether a worldwide freezing order granted set forth in the Article 21 of the MLCBI, but granted as a provisional relief under Article 19 of the Model Law, could remain in force even after the recognition in the UK of a Russian bankruptcy as a foreign main proceeding. The English Court comprehended that with the recognition of the Russian insolvency as a main proceeding in the UK this brought domestic insolvency legislation (English legislation) to regulate the case. In this scenario, the Cross-Border Insolvency Regulations 2006 suspended the defendant's rights to transfer, encumber or dispose of any of his assets. Hence, a worldwide freezing order would not need to be continued, because the same effects of the order would already be covered in the effects of the recognition of the foreign proceeding.]*

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

Commented [BB10]: SUB TOTAL = 10 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] [10 out of 15]

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

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

**4.1.1 whether the Bank's liquidation comprises a "foreign proceeding" within the meaning of article 2(a) of the MLCBI [maximum 10 marks]; and [6 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 out 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 → Assuming that the Bank is not excluded from the scope of the MLCBI by article 1(2) of the MLCBI, for an insolvency proceeding to qualify as a foreign proceeding within the meaning of the term under Model Law, the following requirements must be met.**

Firstly, the foreign proceeding to be recognised in the enacting State must be of a "collective nature" [element 1]. That is, it must be a single, collective collection of the bankrupt's assets, whether this is a judicial or administrative [element 2] proceeding [element 3] of a foreign State [element 4].

Second, the law governing the foreign proceeding to be recognized in the enacting State must be related to insolvency [element 5 "pursuant to a law relating to insolvency"].

Third, the debtor's assets and all obligations must be under the control of a foreign court [element 6 "subject to control or supervision of a foreign court"], generally the court from which the application for recognition of foreign proceeding originates.

Fourth, and finally, the foreign proceeding to be recognized must have as its purpose the reorganization of the debtor's debts or the full liquidation of its operation [element 7]

#### **Element 1.**

In the present case, the Bank started to operate in 1991, with its head office registered in Country A. Although this country is not a adherent of Model Law, this does not result in an obstacle for the liquidation procedure to be acknowledged by the British Court, since England has not inserted the principle of reciprocity in its bankruptcy legislation. In this case in point, the English court has jurisdiction to act in the liquidation of the Bank, especially since the last beneficiary of its shares - Mr. Z - placed the 95% portion of the shares it held in the Bank in multiple corporate structures, some of which are registered in England. In addition, internal investigations into the Bank revealed that money may have been sent to multiple offshore companies, some of which are registered in England. It remains to be seen, going forward, whether the English court can recognise the Bank's liquidation proceedings in State A as a foreign proceeding in the UK.

The bank was formally declared insolvent on September 17, 2015 by the National Bank, in accordance with the article 76 of the Law of Country A on Banks and Banking Activity (LBBA). Therefore, the National Bank understood that the Deposit Guarantee Fund (DGF), which is a government body of Country A also responsible for removing insolvent banks from the market, would take over the administration of the Bank's operations. After a period of provisional administration by the DGF, with a determination of the Bank's financial situation, liquidation followed. Article 77 of the LBBA provides that the DGF automatically becomes the liquidator of the bank on the day it receives communication that the National Bank has revoked the bank's license. Therefore, considering that the revocation of the bank's license occurred on December 17, 2015, the DGF assumed all powers to liquidate - collectively - the Bank in accordance with the laws of Country A. Evident, therefore, the collective nature of the procedure.

#### **Element 5**

*Second, the Model Law does not require that the Law of Country A on Banks and Banking Activity be named as an Insolvency Law. It is enough that it deals with the financial crisis of economic agents and the eventual need for their liquidation, for the requirement of the law relating to insolvency to be satisfied. In the case in question, the Law of Country A on Banks and Banking Activity is a government tool that guarantees the stability of its economy, supervising banks that present risks to the society or removing from the market those that have proven to be unable to continue operating. In this regard, it is evident that the Bank has been troubled since January 19, 2015, and was declared insolvent on September 17, 2015, being that the National Bank finally revoked its license on December 17, 2015. Evidently, therefore, that the LBBA meets the requirement of being a law relating to insolvency.*

**Element 6**

*Third, although it is the National Bank's competence to classify the bank as troubled and institute provisional administration, or, liquidate it directly (art. 77 of the LBBA), the government entity conducting the procedure - the DGF - has its independence guaranteed in article 3(3) and 3(7) of the DGF Law, which confirms that the DGF is an institution economically independent from the National Bank, with separate accounting, as well the DFG Law set forth the impossibility for public authorities or the National bank to intervene in the function and powers that have been delegated to the DGF. Therefore, considering this independence of DGF and the information that can be inferred from the fact pattern given for Question 4, the LBBA procedure is supervised by the Court of State A.*

**Element 7**

*Fourth, the Law of Country A on Banks and Banking Activity is clearly a regulation that has commands for interim administration for a financial institution to overcome its financial crisis or, in the impossibility, for the bank to be liquidated. Both procedures of reorganization or liquidation are supervised by a state authority - the DGF. So, the law is evidently insolvency-related, and its purpose is to help financial institutions overcome financial distress or liquidate them.*

*Given this scenario, the Bank's liquidation comprises a "foreign proceeding" within the meaning of article 2(a) of the MLCBI.*

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. In your response, elements 2, 3 and 4 are not specifically addressed. In addition, the elements that have been specifically addressed in your response are a bit light on supporting guidance and source references. For example, in respect of element 1, we would look 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*”.

By way of further illustration, for element 6, we would look 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 → In order to classify a foreign representative under Model Law, two requirements must be met: (1) the person or body must have been appointed and authorized in the foreign proceeding; (2) to the person or body must have been delegated the power to administer the debtor's assets or the power to manage the debtor's affairs, or simply the power to act as a representative of the foreign proceeding.*

*In the instant case, Ms C was first appointed as an interim insolvency administrator of the Bank on September 17, 2015. Ms C was replaced by Ms G on August 17, 2020, in accordance with Resolution 1513 of the Executive Board of Directors of the DGF. To Ms G was given the powers specified in Articles 37, 38, 47-52, 521, and 53 of the DGF Law, among these powers there is the ability to sign contracts related to the sale of the Bank assets in the form of the DGF Law.*

*Given this context, it is worth mentioning that the DGF is empowered to manage the affairs of the Bank under articles 35(5) and 36(1) of the DGF Law. As a consequence, the DGF, according to article 48(3) of the DGF Law, may delegate its powers to an "authorized officer" or "authorized person". This person, according to article 2(1)(17) of the DGF Law must be: "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". Also, Article 35(1) of the DGF Law specifies that an authorized 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." Thus, considering that Ms G is a "leading bank liquidation professional" and assuming she concluded a higher education in the fields of economics, finance or law, as well as that she is not a creditor of the Bank and no conflict of interest was reported in the fact pattern of the Question 4, her appointment within the foreign proceeding is valid. Finally, Ms. G has been delegated the power to manage the bank's assets and can sell them in accordance with the DGF Law. Therefore, the second requirement is also fulfilled. Thus, the applicant falls within the description of "foreign representatives" as defined by article 2(d) of the MLCBI.*

***Please note that both DGF and Ms G are applicants. Your response is primarily focused on Ms G. Please further note that for full marks, your response should also address the assumption of article 16(1) MLCBI.***

\* End of Assessment \*