



SUMMATIVE (FORMAL) ASSESSMENT: MODULE 2A

THE UNCITRAL MODEL LAWS RELATING TO INSOLVENCY

Commented [BB1]: TOTAL = 42.5 MARKS

85% - Very well done!

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

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

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

INSTRUCTIONS FOR COMPLETION AND SUBMISSION OF ASSESSMENT

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

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

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

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

ANSWER ALL THE QUESTIONS

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

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

Commented [SL2]: SUBTOTAL = 9 MARKS

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

Question 1.1

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

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

Question 1.2

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

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

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

Question 1.3

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

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

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

Question 1.4

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

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

Question 1.5

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

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

Question 1.6

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

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

Question 1.7

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

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

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

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

(d) All of the above.

Question 1.8

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

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

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

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

(d) All of the above.

Question 1.9

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

(a) Court proceedings.

(b) Arbitral Tribunals.

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

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

Question 1.10

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

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

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

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

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

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

Commented [SL4]: SUBTOTAL = 9 MARKS

Question 2.1 [maximum 3 marks]

Commented [SL5]: 3 marks

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

The appropriate date for the determining the COMI of a debtor is the date of commencement of the foreign proceeding.

There have however been various possibilities referenced by courts as being the appropriate date for determining the COMI of a debtor. These include:

- 1. The date of commencement of the foreign proceeding for which an application for recognition is launched;*
- 2. The date of the filing of the application for recognition;*
- 3. The date the court decides on the application for recognition;*
- 4. A date determined by reference to the operational history of the debtor.*

It was also held in the US judgment of Morning Mist Holdings Ltd v Krys (Matter of Fairfield Sentry Ltd), that:

- 1. A debtor's COMI should be determined based on its activities when the Chapter 15 petition for recognition is filed;*
- 2. However, given the EIR and other international interpretations, a court may consider the period between the commencement of the foreign proceeding and the filing of the Chapter 15 petition for recognition; and*
- 3. That the debtor's relevant activities, including liquidation activities and administrative functions may be considered.*

Question 2.2 [maximum 3 marks]

Commented [SL6]: 2.5 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 = Art 16(3)

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

Statement 1: Article 14: ***"Notification to foreign creditors of a proceeding under" a particular State's law of insolvency / Timely Notice***

Statement 2: Article 10: ***"Limited jurisdiction" / Safe Conduct Rule***

Statement 3: Article 16: ***"Presumptions concerning recognition" / Recognition Presumption in relation to a debtor's 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.

According to the Court of Appeal the issue in this case was whether the court should not exercise its power to grant the indefinite Moratorium Continuation, where to exercise its discretion would:

- 1. Prevent the English creditors from enforcing their rights in the English law in accordance with the Gibbs rule; and / or***
- 2. Lengthen the period of the Moratorium after the reconstruction process in Azeri was finalised.***

With reference to what is stated in 1 above, the Court of Appeal held that:

- 1.1. It could only grant the indefinite Moratorium Continuation if the Moratorium / stay is necessary to protect the interest of IBA's creditors and that the stay is the suitable course of action to in fact protect the interests of the said creditors and***
- 1.2. that neither of these conditions were satisfied;***

With reference to what is stated in 2 above, the Court of Appeal held:

- 2.1. That the obligation in terms of Article 18 of the Model Law (for a foreign representative to inform the court of any substantial change in the status of the foreign proceeding, recognised as such, or in the status of the said foreign representative's appointment) requires that the foreign proceeding must still exist and that the foreign representative must still be in office; and***
- 2.2. that the implication of the above is that, once the foreign proceeding ends and the foreign representative no longer holds his appointment, there is no scope for the granting of further orders in relation to the foreign proceeding and any relief granted under the Model Law while the foreign proceeding was still ongoing, should terminate.***

The Court of Appeal therefore upheld the decision that the court should not exercise its power to grant the indefinite Moratorium Continuation.

Question 2.4 [2 marks]

In terms of relief, what should the court in an enacting State, where a domestic proceeding has already been opened in respect of the debtor, do after recognition of a foreign main proceeding? In your answer you should mention the most relevant article of the MLCBI. What (ongoing) duty of information does the foreign representative in 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 terms of Article 22 of the Model Law, titled "Protection of creditors and other interested parties", and specifically paragraph 1 thereof the court in the enacting State must ensure that any relief and conditions that may be granted must be tailored in such a way so as to ensure that the relief granted to the foreign representative and the interests of those affected by the said relief are balanced and that no group of creditors are favoured over another. The court in the enacting state must therefore be satisfied that the interest of the creditors, the debtor and other interested parties are protected before any interim relief is granted in terms of Article 19 of the Model Law or post-recognition relief is granted in terms of Article 21 of the Model Law. The court in the enacting state may impose conditions on the relief granted in terms of the abovementioned Articles and may, when requested to do so by the foreign representative or a person affected by the relief so granted, or of its own accord, modify or terminate the relief granted.

In terms of Article 18 of the Model Law, titled "Subsequent Information" a foreign representative is obliged to, from the time of the filing of the application for recognition to the time where the foreign proceeding ends, inform the court in the enacting state of:

- 1. any substantial change in the status of the foreign proceeding, recognised as such, or in the status of the said foreign representative's appointment; and*
- 2. any other foreign proceeding that the foreign representative obtains knowledge of and which relates to the same debtor.*

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.

In my answer, State A will be referred to as the "enacting state" and State B will be referred to as the "foreign state"

Commented [SL8]: 1.5 marks

Arts 29(a) and 18 (as discussed)

Commented [BB9]: SUB TOTAL = 10 MARKS

Question 3.1 [maximum 4 marks] [2 out of 4 marks]

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

The Model Law is premised on four key concepts, including the concepts of access and co-operation.

*The provisions on access is contained in Chapter II of the Model Law, which chapter is titled "Access of foreign representatives and creditors to courts in this State". It includes *inter alia* the following rights pertaining to access by foreign representatives to courts in the enacting state:*

1. Article 9: **Right of direct access** - the foreign representative will be entitled to apply directly to a court in the enacting state for the recognition of the foreign proceeding. The foreign representative will therefore not be required to meet any formal requirements of the enacting state, such as licenses or consular action; **[1]**
2. Article 10: **Limited jurisdiction** - even though an application for recognition is brought in the enacting state, the assets and affairs of the debtor which is situated in the foreign state will not be subjected to the jurisdiction of the courts of the enacting state. The foreign representative can therefore freely approach the court in the enacting state without the fear of losing his right in the assets situated in the foreign state.

The provisions on co-operation is contained in Chapter IV of the Model Law, which chapter is titled "Cooperation with foreign courts and foreign representatives" and facilitates co-operation between the courts in the enacting state and the foreign courts and foreign representatives in various ways, including:

1. Article 25: **the courts in the enacting state are obliged to cooperate to the maximum extent possible, either directly or through an insolvency practitioner / office-holder of the enacting state, with the foreign courts or the foreign representative. The courts in the enacting state is further entitled to communicate directly with or request information or assistance directly from the foreign courts or the foreign representative without the need to make use of traditional time-consuming procedures to request information or evidence from a specified person within the jurisdiction of the foreign court through the foreign court.**
2. Article 26: **an insolvency practitioner / office-holder of the enacting state is obliged to, in the exercise of its functions and in the supervision of the court, cooperate to the maximum extent possible with the foreign courts or the foreign representative. The insolvency practitioner / office-holder of the enacting state is further entitled, in the exercise of its functions and in the supervision of the court, to communicate directly with the foreign courts or the foreign representative, which shortens the recognition process. [1]**

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

Question 3.2 [maximum 5 marks] [4 out of 5 marks]

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

In terms of Article 15, a foreign representative may apply to the court in the enacting state for recognition of the foreign proceeding in which he is appointed. The following evidence must be provided in the application for recognition:

1. A certified copy of the court order commencing the foreign proceeding (sequestration / liquidation) and the appointment of the foreign representative as insolvency practitioner / office-holder; or
2. A certificate from the foreign court confirming the existence of the foreign proceeding and the appointment of the foreign representative as insolvency practitioner / office-holder; or
3. If the abovementioned evidence cannot be provided, any other evidence acceptable to the court must be provided confirming the existence of the foreign proceeding and the appointment of the foreign representative as insolvency practitioner / office-holder, and
4. A statement identifying all the other foreign proceedings which are known to the foreign representative in relation to the debtor.
5. The court may further require a translation of the abovementioned documents supplied into an official language of the enacting state. [1]

In terms of Article 17, a foreign proceeding shall be recognized if the recognition is not contrary to the public policy document of the enacting state. [1] If it is contrary to the public policy of the enacting state, the courts in the enacting state may refuse the

recognition in terms of Article 6.[1] If it is not contrary to the public policy document and if an application for recognition of a foreign proceeding is submitted to the court in the enacting state by a foreign representative, which application complies with the requirements of Article 15, an application for recognition should be granted.

The foreign proceeding shall be recognised as a foreign main proceeding if debtor has its COMI in the foreign state where the foreign proceedings were opened and as a foreign non-main proceeding if the debtor only has an establishment (defined in Article 2 as "any place of operations where the debtor carries out a non-transitory economic activity with human means and goods and services") foreign state where the foreign proceedings were opened. [½]

The term COMI is not defined in the Model Law, however in terms of Article 16(3), it is presumed that, in the absence of proof to the contrary, a debtor's COMI is the debtor's registered office or habitual residence in the case of an individual debtor. [½] The presumption may be opposed by interested parties and therefore the COMI of a debtor needs to be securitised by the courts before a foreign proceeding is recognised as a foreign main proceeding. In terms of the Guide to Enactment and Interpretation of the UNCITRAL Model Law on Cross-Border Insolvency ("GEI"), when there is an allegation that a debtor's COMI is not at its place of registration, the party alleging same must prove its correct location to the court.

Some states and courts have different approaches in determining the COMI of a debtor. In some states the foreign representative seeking recognition of a foreign proceeding as a main proceeding must prove where the COMI of a debtor is. It has been held that where there is a substantial dispute, reliance on the presumption will be inappropriate and where the dispute cannot be resolved by way of cross-examination, the court must be satisfied that the COMI is not in the state where the registered office is situated.

There are ultimately two key factors that must be considered when the COMI of a debtor is being determine under the Model Law:

- 1. The location where the debtor's central administration takes place; and*
- 2. Which location is readily determinable by the debtor's creditors.*

An application for recognition can further be refused if the court is satisfied that some form of fraud, bad faith, abuse of process occurred or that the application was launched for an improper purpose. The circumstances surrounding the application and for example the movement of a debtor's COMI must therefore be scrutinised by the courts before a recognition order is granted.

For full marks the other point which is relevant is Article 3 of the Model Law relating to restrictions and existing international obligations of State A - the court in State A should also check if there are no existing international obligations of State A (under a treaty or otherwise) that may conflict with granting the recognition application under the implemented Model Law in State A.

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

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

Article 19 of the Model Law determines what relief may be granted upon the filing of an application for the recognition of a foreign proceeding, in other words it determines what pre-recognition relief can be considered, as the application was filed, but the recognition order has not yet been granted.

In circumstances where relief is urgently required to protect the assets of the debtor or the interests of the creditors and pending the recognition decision, the foreign representative can request the court to grant provisional or interim relief in the form of, including but not limited to, the following:

1. Staying execution proceedings;
2. Entrusting the administration or realisation of the debtors' assets (or a part thereof) located in the enacting state to the foreign representative or a person designated by the court, so as to protect and preserve the assets of the debtor that are perishable, at the risk of decreasing in value or in jeopardy in the period between the filing of the application for recognition and the hearing of the application;
3. Suspending the right to transfer, encumber or dispose of assets of the debtor;
4. Providing for the examination of witnesses, taking of evidence or delivery of information in relation to the debtor's financial affairs, including assets, liabilities, rights and obligations;
5. Granting any additional relief that may be available to an insolvency office-holder in terms of the laws of the enacting state

If a stay of execution proceedings were granted for a specified time, the court may extend this relief. Unless the relief is extended as such, this relief will terminate upon the granting of an order in the application for recognition.

If the court is of the opinion that the granting of the relief requested will interfere with the administration of the foreign main proceeding, the court may refuse to grant the requested relief.

Requirements that must be met under Article 19 are:

1. The application must be made by a foreign representative - if the court finds that there are insufficient evidence that the applicant is the foreign representative, the relief will not be granted;
2. An application for recognition must have been filed - the court has no authority to grant an order for interim relief where an application seeking recognition has not been filed;

- 3. The application must be for relief that is urgently required to protect and preserve the assets of the debtor.*

Article 21 of the Model Law determines what relief may be granted upon the recognition of a foreign proceeding, in other words it determines what post-recognition relief can be considered once a recognition order is granted.

Once an order is granted recognising a foreign proceeding, whether a main or non-main proceeding, a foreign representative may request the court to grant relief where it is necessary to protect the assets of the debtor or the interests of creditor. The relief that may be granted includes but is not limited to, the following:

- 1. Staying the commencement or continuation of individual actions or proceedings in relation to the debtor's financial affairs, including assets, liabilities, rights and obligations, if they have not yet been stayed in terms of paragraph 1(a) of Article 20;*
- 2. Staying execution proceedings if they have not yet been stayed in terms of paragraph 1(b) of Article 20;*
- 3. Suspending the right to transfer, encumber or dispose of assets of the debtor if it has not yet been stayed in terms of paragraph 1(c) of Article 20;*
- 4. Providing for the examination of witnesses, taking of evidence or delivery of information in relation to the debtor's financial affairs, including assets, liabilities, rights and obligations*
- 5. Entrusting the administration or realisation of the debtors' assets (or a part thereof) located in the enacting state to the foreign representative or a person designated by the court;*
- 6. Extending relief granted under paragraph 1 of Article 19;*
- 7. Granting any additional relief that may be available to the insolvency office-holder of the enacting state*
- 8. If the court is satisfied that the interests of creditors in the enacting state is protected, entrusting the distribution of the debtor's assets (or a part thereof) located in the enacting state to the foreign representative or a person designated by the court.*

If relief is granted to a representative of a foreign non-main proceeding, the court must be satisfied that under the laws of the enacting state, the relief relates to assets that should be administered in the foreign non-main proceeding or concerns information required in that proceeding.

The court considering the application for the relief must, in its discretion and after the recognition order has been granted, determine whether the granting of the relief is appropriate.

In terms of Article 22 the court in the enacting State must ensure that any relief and conditions that may be granted must be tailored in such a way so as to ensure that the relief granted to the foreign representative and the interests of those affected by the said relief are balanced and that no group of creditors are favoured over another. The

court in the enacting state must therefore be satisfied that the interest of the creditors, the debtor and other interested parties are protected before any post-recognition relief is granted in terms of Article 21. The court in the enacting state may grant the relief in terms of Article 21, but subject the relief granted to any conditions it considers appropriate. and may, when requested to do so by the foreign representative or a person affected by the relief so granted, or of its own accord, modify or terminate the relief granted.

Your answer must also include a brief 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?

The question as to whether a worldwide freezing order granted as pre-recognition interim relief in terms of Article 19 can continue under Article 21 once a recognition order is granted was considered in a recent English case between Igor Vitalievich Protasov and Khadzi-Murat Derev. The court held that although it has the jurisdiction to grant such discretionary post-recognition relief, there exists restrictions and limitations which inhibits the exercise of that jurisdiction. The court further held that, as the English bankruptcy law offers other forms of protection, the post-recognition continuation of a freezing order granted as pre-recognition interim relief is not warranted, required or justified, as the English bankruptcy law can be applied - which is the whole purpose of a recognition application.

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

Commented [BB10]: SUB TOTAL = 14.5 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] [14.5 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 [10 out of 10]

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

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

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

4.1.1 In terms of the definition of a "foreign proceeding" as found in Article 2(a), various elements [7 in total] must be considered when the question as to whether a proceeding is a "foreign proceeding" within the meaning of the Model Law. These elements are the following:

1. a judicial (granted by a judge in a court of law) or administrative (usually carried out by a government body) [element 1] proceeding (including an interim proceeding [element 2]):

1.1. The National Bank ("NB") has the authority in terms of Article 77 of the Law of Country A on Banks and Banking Activity (LBBA) to liquidate a bank directly by revoking its license;

1.2. On 17 December 2015 the NB formally revoked the Bank's banking license and resolved that it be liquidated;

- 1.3. *The NB, being a government body, therefore commenced liquidation proceedings by revoking the Bank's license;*
 - 1.4. *As a result, an administrative proceeding was concluded when the resolution to liquidate the Bank was made by NB.*
2. *that involves creditors collectively [element 3]:*
- 2.1. *On 7 September 2020 the Deposit Guarantee Fund ("DGF"), being the liquidator automatically appointed in terms of Article 77 of the LBBA on the date it received confirmation of the NB's decision to revoke the bank's license, compiled a list of the Bank's creditors; and*
 - 2.2. *the claims totalled an amount of approximately USD \$1,113 billion;*
 - 2.3. *The proceeding therefore definitely involves creditors collectively.*
3. *that is in a foreign state [element 4]:*
- 3.1. *The Bank's registered head office is situated in Country A;*
 - 3.2. *In terms of of Article 16(3) of the Model Law, which is applicable in England in the form of the UK Cross-Border Insolvency Regulations 2006 ("CBIR"), it is presumed that, in the absence of proof to the contrary, a debtor's COMI is the debtor's registered office;*
 - 3.3. *Therefore the Bank's COMI is in Country A, being a foreign state.*
4. *that is authorised or conducted under a law relating to insolvency [element 5]:*
- 4.1. *In terms of Article 77 of the LBBA the NB had the authority to liquidate a bank directly by revoking its license;*
 - 4.2. *In terms of Article 77 of the LBBA, the DGF automatically became the liquidator on the date it received confirmation of the NB's decision to revoke the Bank's license;*
 - 4.3. *In terms of Article 34 of the DGF Law, the DGF will begin the process of withdrawing the insolvent Bank from the market and wind down its operations via liquidation;*
 - 4.4. *The LBBA, read with the DGF law can therefore be classified as laws relating to insolvency applicable in Country A and the liquidation was authorised in terms thereof*
5. *in which the assets and affairs of the debtor are subject to control or supervision by a foreign court or another official body [element 6]:*
- 5.1. *As liquidator, the DGF has extensive powers to, inter alia, take over the management of the property and money of the Bank, compile a register of creditors' claims, recover property belonging to the Bank; the power to dispose of assets and to distribute the funds to creditors;*
 - 5.2. *The affairs of the Bank are therefore, after liquidation, subject to the control and supervision of the DGF, being a governmental body of Country A.*

6. *which proceeding is for the purpose of reorganisation or liquidation of the debtor [element 7]:*

- 6.1. *The DGF has powers of sale, distribution and any such powers that are necessary to complete the liquidation of the Bank;*
- 6.2. *The purpose of the proceeding is therefore the liquidation of the Bank.*

As all of the elements of the definition of a foreign proceeding is satisfied, the Bank's liquidation comprises a "foreign proceeding" within the meaning of article 2(a) of the MLCBI.

Excellent response!

4.1.2 *In terms of the definition of a "foreign representative" as found in Article 2(d), various elements must be considered when the question as to whether a representative is a "foreign representative" within the meaning of the Model Law. These elements are the following*

1. *a person or body, including one appointed on an interim basis:*

- 1.1. *The Model Law does not specify that the foreign representative must be authorised by the foreign court;*
- 1.2. *The DGF is authorised in terms of Article 77 of the LBBA to act as liquidator;*
- 1.3. *The DGF is in turn authorised in terms of Article 48(3) of the DGF Law to delegate its powers to an "authorised officer" who complies with the definition of and "authorised person" in Article 2(1)(17) of the DGF Law and has the qualities and qualifications as determined by Article 35(1) of the DGF Law;*
- 1.4. *Ms. G is a "leading bank liquidation professional" and she was appointed pursuant to a Decision of the Executive Board of Directors of the DGF.*
- 1.5. *The DGF is therefore a governmental body appointed and Ms. G is a person authorised by the DGF with all liquidation powers in respect of the Bank as set out in the DGF Law.*

2. *authorised in a foreign proceeding:*

- 2.1. *As confirmed above, the Bank's liquidation comprises a "foreign proceeding" within the meaning of article 2(a) of the MLCBI*

Please include in this context a reference to the assumption of article 16(1) MLCBI

3. *to administer the reorganisation or liquidation of the debtor's assets or affairs or to act as representative of the foreign proceeding:*

- 3.1. *The DGF has powers of sale, distribution and any such powers that are necessary to complete the liquidation of the Bank;*
- 3.2. *Ms. G, by way of delegation, is authorised by the DGF with all liquidation powers in respect of the Bank as set out in the DGF Law;*

3.3. *The purpose of the appointment of the DGF, and Ms. G by way of delegation, is therefore to administer the liquidation of the Bank's assets or affairs and to act as representative of the foreign proceeding.*

As all of the elements of the definition of a foreign representative is satisfied, the Applicants (the DGF and Ms. G) fall within the description of "foreign representatives" as defined by article 2(d) of the MLCBI.

Another excellent response.

* End of Assessment *