



SUMMATIVE (FORMAL) ASSESSMENT: MODULE 2A

THE UNCITRAL MODEL LAWS RELATING TO INSOLVENCY

Commented [BB1]: TOTAL = 39 MARKS

78% - 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.**
5. **Before you will be allowed to upload / submit your assessment via the portal on the Foundation Certificate web pages, you will be required to confirm / certify that you are the person who completed the assessment and that the work submitted is your own, original work. Please see the part of the Course Handbook that deals with plagiarism and dishonesty in the submission of assessments. Please note that copying and pasting from the Guidance Text into your answer is prohibited and constitutes plagiarism. You must write the answers to the questions in your own words.**
- 6.1 **If you selected Module 2A as one of your compulsory modules (see the e-mail that was sent to you when your place on the course was confirmed), the final time and date for the submission of this assessment is 23:00 (11 pm) GMT on 1 March 2023. The assessment submission portal will close at 23:00 (11 pm) GMT on 1 March 2023. No submissions can be made after the portal has closed and no further uploading of documents will be allowed, no matter the circumstances.**
- 6.2 **If you selected Module 2A as one of your elective modules (see the e-mail that was sent to you when your place on the course was confirmed), you have a choice as to when you may submit this assessment. You may either submit the assessment by 23:00 (11 pm) GMT on 1 March 2023 or by 23:00 (11 pm) BST (GMT +1) on 31 July 2023. If you elect to submit by 1 March 2023, you may not**

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

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

**ANSWER ALL THE QUESTIONS**

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

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

Commented [SL2]: SUBTOTAL = 9 MARKS

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

Question 1.1

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

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

Question 1.2

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

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

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

Question 1.3

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

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

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

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

Question 1.4

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

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

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

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

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

Question 1.5

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

*(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.**

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

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

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

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

Question 1.8

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

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

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

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

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

Question 1.9

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

**(a) Court proceedings.**

**(b) Arbitral Tribunals.**

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

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

Question 1.10

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

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

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

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

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

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

**Question 2.1** [maximum 3 marks]

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

*The Model Law does not explicitly provide for a date for determining the COMI of a debtor (para. 157 of the UNCITRAL Guide to Enactment and Interpretation of the UNCITRAL Model Law on Cross-Border Insolvency (the "UNCITRAL Guide to Enactment"))).*

*However, in determining the COMI of a debtor, the appropriate date is generally accepted to be the date on which the relevant foreign proceedings commenced, on the basis that Article 17(2)(a) of the Model Law uses language in the present tense to indicate that at the time that recognition of a foreign proceeding is to be granted, such foreign proceeding must be current or pending (para. 158 of the UNCITRAL Guide to Enactment).*

*In light of the fact that the COMI of a director can move, the question of the appropriate date for determining the COMI of a debtor may be complicated in circumstances where a change to a debtor's COMI occurs shortly before or after the commencement of the relevant foreign proceedings. This is particularly the case because one of the requirements for determining the COMI of a debtor is that it be readily ascertainable by the debtor's creditors (amongst other third parties).*

**Question 2.2** [maximum 3 marks]

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

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

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

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

**Commented [SL4]:** SUBTOTAL = 7 MARKS

**Commented [SL5]:** 2 marks

US courts, chap 15, *Morning Mist Holdings Ltd v. Krys (Matter of Fairfield Sentry Ltd)*.

**Commented [SL6]:** 2 marks

Statement 2 = Art 10



*Statement 1 relates to Article 14 of the Model Law, which requires notice (known as "timely notice") to be given to foreign creditors of a debtor – on an individual basis – in relation to the commencement of local proceedings regarding that debtor and of the time period, in relation to those proceedings, during which any claims must be filed.*

*Statement 2 relates to Article 13 of the Model Law, which incorporates the "safe conduct" rule into the Model Law. The "safe conduct" rule seeks to ensure that the court of the enacting state will not unilaterally declare that it has jurisdiction over the entirety of the debtor's assets only by virtue of the relevant foreign representative having made an application for a foreign proceeding to be recognised by the court of the enacting state.*

*Statement 3 relates to Article 16 of the Model Law, pursuant to which the court of an enacting state is permitted to make certain presumptions, for recognition purposes, in relation to the COMI of a debtor. COMI is a concept that is not defined in the Model Law, but refers to the centre of main interests of a debtor. The COMI of a debtor (which, pursuant to Article 16(3) of the Model, is presumed to be the debtor's registered office or habitual residence, in the absence of proof to the contrary) has consequences for recognition of a foreign proceeding.*

**Question 2.3 [2 marks]**

**Commented [SL7]:** 2 marks

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

*In the /BA case appeal, the English Court of Appeal centred its analysis on the jurisdictional issues that were at stake, and in particular whether the court should refrain from exercising its power to grant an indefinite extension of the automatic moratorium that resulted from a recognition order made in respect of the debtor's foreign proceedings.*

*In the first instance (i.e., prior to the judgment being appealed), the English court found that it was not permissible to grant such an extension because it would contravene the English law doctrine that a debt governed by English law should not be capable of being discharge or compromised by a foreign insolvency proceeding – known as the Gibbs Rule following a judgment published in relation to an 1890 case.*

*In the appeal, the English Court of Appeal upheld that decision, having considered whether as a matter of practice it should refrain from exercising its power to grant such an extension and whether granting an indefinite extension of the automatic moratorium would (i) in substance prevent the debtor's English*

*creditors from enforcing their rights in relation to the Gibbs Rule and (ii) prolong the existing stay beyond the duration of the foreign (restructuring) proceedings.*

*In relation to point (i) above, the Court of Appeal concluded that it should not grant the indefinite extension sought because, on the relevant evidence, it was not satisfied that to do so was necessary to protect the interests of the debtor's creditors and was not satisfied that the extension sought would have been an appropriate way to produce such protection. The relief sought would have prevented the debtor's English creditors from enforcing their rights in relation to the Gibbs Rule and it was not appropriate as a result.*

*In relation to point (ii) above, the Court of Appeal found that, once a foreign proceeding has ended and the relevant foreign representative is no longer in office, there is no cause for further orders to be granted in support of such foreign proceeding and any relief previously granted should also terminate. The court reached that conclusion on the basis that the information obligation set out at Article 18 of the Model Law requires the foreign proceeding to remain in existence for the obligation to continue, and considered that fact analogous to the relief available in relation to foreign proceedings. The relief sought would have prolonged the existing stay beyond the duration of the foreign proceedings and that was not appropriate.*

*For those reasons, the Court of Appeal elected not to grant an indefinite extension to the automatic moratorium and dismissed the appeal.*

**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.***

*Article 29(a) of the Model Law provides that, where domestic insolvency proceedings and foreign proceedings exist concurrently, and thereafter an application for recognition of the foreign proceedings in the enacting state is sought and granted, any relief that has been granted — whether on an interim basis pursuant to Article 19 of the Model Law, or post-recognition based on Article 21 of the Model Law — must be consistent with the relevant domestic insolvency proceedings. Furthermore, where the relevant foreign insolvency proceedings are foreign main proceedings, the automatic relief given pursuant to Article 20 of the Model Law is not applicable. Finally, pursuant to Article 29(c) of the Model Law, if relief is to be granted to a foreign representative of a foreign non-main proceeding, the court in the enacting state must satisfy itself that: (i) the relevant relief relates to assets that, pursuant to the law of the enacting state, should be dealt with in the*

**Commented [SL8]:** 1 mark

Art 18 and art 29(a) (discussed)

foreign non-main proceeding (as opposed to the domestic insolvency proceeding); or (ii) the relevant relief relates to information that is required in that foreign non-main proceeding.

**Pursuant to Article 25(2) of the Model Law, the court in the relevant enacting state is entitled to request information or assistance directly from foreign representatives of foreign insolvency proceedings. The foreign representative therefore has an obligation to provide information and assistance directly to the court in the relevant enacting state, where requested to do so.**

**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 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.**

**State A's implementation of the Model Law, and in particular the provisions of the Model Law that relate to access and co-operation, may be of benefit to the foreign representative for the following reasons:**

- **Article 9 of the Model Law provides for the foreign representative to have standing in the courts of State A, providing the foreign representative with direct access in relation to any proceedings occurring or commencing in State A. That access right will allow the foreign representative to appear before the court to make submission in relation to the debtor's business and affairs, including its assets. The foreign representative may make use of such standing to make representations to the court in protection of the debtor's assets. No prior recognition of the foreign proceedings opened in State B is required in order for the foreign representative to exercise that standing. [1]**
- **Article 11 of the Model Law provides for the foreign representative to have standing in the courts of State A to request, in relation to the debtor, the commencement of domestic insolvency proceedings in State A. Pursuant to Article 11, the domestic law requirements for the insolvency proceedings to commence will remain applicable. [1] The foreign representative may benefit from such standing to request the commencement of domestic insolvency proceedings in State A in relation to the debtor and, depending on the**

insolvency proceeding options available (which is a matter of domestic law in State A), there may be protections that would prevent, for instance, enforcement against the assets of the debtor that are in State A (for example, a stay or moratorium on any legal proceedings against the debtor in State A). No prior recognition of the foreign proceedings opened in State B is required in order for the foreign representative to exercise that standing.

- Article 12 of the Model Law provides for the foreign representative to have standing to make submissions, petitions, or requests, in State A, in relation to (i) the realisation, distribution, and/or protection of assets, and (ii) the co-operation of the court with the foreign proceedings in State B. Prior recognition of the foreign proceedings opened in State B is required in order for the foreign representative to exercise that standing but, if recognition was obtained, the foreign representative would be able to bring actions in the courts of State A to protect the debtor's assets.
- the foreign representative is entitled to the co-operation of the courts of State A, which is not dependent on the recognition of the foreign proceedings in State B – meaning that such co-operation can begin at an early stage. Pursuant to Article 25 of the Model Law, the courts of State A must co-operate to the maximum extent possible with the foreign representative, who is entitled to the courts' co-ordination and communication pursuant to Article 27 of the Model Law. [1] These rights can be exercised by the foreign representative to understand the nature of the debtor's assets, the parties who may have an interest in relation to those assets, and any relevant proceedings or claims – obtaining that fuller understanding would allow the foreign representative to more comprehensively and cohesively exercise its rights as to standing (as set out above).

**For full marks you should have discussed the key benefits of both the access provisions and the cooperation provisions which is to save time and costs, as a result of which value destruction can be avoided and value enhancement is promoted.**

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

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

Pursuant to Article 15 of the Model Law, in order to obtain recognition in State A of the foreign proceedings in State B, the foreign representative will need to meet the relevant recognition requirements. [½] The application for recognition must include (i) a certified copy of the decision(s), in State B, that commenced the

foreign proceeding and appointed the foreign representative, or (ii) a certificate from the courts of State B that affirms the existence of the proceedings in State B and the appointment of the foreign representative in relation to those proceedings, or (iii) failing either of those, such other evidence as may be required that is deemed acceptable by the courts of State A to demonstrate the existence of the foreign proceedings in State B and the appointment of the foreign representative in relation to those proceedings. Article 15 of the Model Law also requires that the application for recognition be accompanied by a list of foreign proceedings in respect of the debtor of which the foreign representative is aware and, if so required by the courts of State A, the foreign representative must provide translation of all documents that have been enclosed in the application for the recognition into an official language of State A. [½]

In deciding whether or not to grant recognition, Article 16 of the Model Law prescribes that the courts of State A may presume that the documents enclosed in the application are authentic and, if there is no proof to the contrary, may presume that the debtor's registered office is representative of the debtor's centre of main interests (COMI). This is relevant for State A's courts determining whether the foreign proceedings will be recognised as foreign main proceedings (if the debtor's registered office is in State B) or foreign non-main proceedings (if the debtor's registered office is not in State B). Other factors that will be considered in relation to the debtor's COMI will include the locations of the debtor's: books and records; financing; cash management system; principal assets and/or operations; primary bank; employees; commercial policy; management policies; and similar administrative, organisational and legal factors. [1] also refer to Article 17 in this discussion

However, recognition in State A of the foreign proceedings in State B may not be granted if the court refuses to so grant on the basis that doing so would be manifestly contrary to the public policy of State A (which it would be entitled to do pursuant to Article 6 of the Model Law). Article 6 of the Model Law caters for the overall sovereignty of implement states, including State A; the courts of State A will consider whether recognition of the foreign proceedings is manifestly contrary to public policy in State A (taking into account that the use of the word 'manifestly' is typically taken to mean that the exception should apply very narrowly). [1]

There is no reciprocity element to the Model Law (as far as recognition is concerned), so whether or not State B has implemented the Model Law is irrelevant for these purposes. Equally, it is not for the courts of State A to consider whether the foreign proceedings were commenced correctly under the laws of State A.

Taking into account all of the factors above, Article 17 of the Model Law provides for the courts of State A to make a decision in relation to an application for recognition. The recognition should be granted as a matter of course, if the

requirements above are met and there is no reason for the recognition to be excluded on public policy grounds.

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

- 1. Exclusions:** *If the debtor is an entity that is subject to a special insolvency regime in State B, the foreign representative should first check if the foreign proceedings regarding that type of a debtor are excluded in State A based on Article 1(2) of the implemented Model Law in State A.*
- 2. Restrictions:** *Existing international obligations of State A: Based on Article 3 of the Model Law, the court in State A should also check if there are no existing international obligations of State A (under a treaty or otherwise) that may conflict with granting the recognition application under the implemented Model Law in State A.*

Question 3.3 [maximum 5 marks] [2 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.**

*In the context of the Model Law, the courts of State A have the power to grant interim relief (at the foreign representative's request) prior to recognition of the foreign proceedings in State B – pursuant to Article 19 of the Model Law. Interim relief may be ordered if it is urgently required in order to protect the debtor's assets or the interests of the debtor's creditors. Any interim relief granted is provisional in nature, encompassing only the period from the foreign representative's filing of the recognition application in State A until the point at which the courts of State A have made a judgment in relation to that recognition application, thereby affording protection prior to the court's judgment as to recognition. For that reason, interim relief may be granted both in relation to foreign main proceedings and foreign non-main proceedings.*

*The interim relief that may be granted includes (i) a moratorium as against the debtor's assets, (ii) the delegation of the administration or realisation of those of the debtor's assets (whether in whole or in part) located in State A to the foreign representative, as a means to protecting and preserving the value of assets that might otherwise be regarded as perishable, susceptible to value destruction, or otherwise in danger, and (iii) any of the post-recognition relief that may be conferred pursuant to Article 21 of the Model Law (as set out in greater detail below).*

*Following a recognition of foreign proceedings, whether they be foreign main proceedings or foreign non-main proceedings, pursuant to Article 21 of the*

*Model Law the courts in the enacting state have a discretionary power (to be deployed upon the request of the relevant foreign representative and where necessary to protect the debtor's assets or the interests of the debtor's creditors) to grant any of the following post-recognition relief:*

- *a stay, in relation to individual actions or proceedings that concern the debtor's liabilities, obligations, rights, or assets;*
- *a stay in relation to execution against the debtor's assets;*
- *a suspension of any transfers of, encumbrances to, or dispositions of, the debtor's assets;*
- *provision for witnesses to be examined, evidence to be taken, or information to be delivered, in relation to the debtor's business and affairs;*
- *the delegation of the administration or realisation of those of the debtor's assets (whether in whole or in part) located in State A to the foreign representative;*
- *the extension of any interim relief granted pursuant to Article 19 of the Model Law; and*
- *any further relief available to a domestic representative under the laws of State A.*

*The court in State A may also (at its discretion and upon the foreign representative's request) hand over the debtor's assets (in whole or in part) to the foreign representative on the proviso that it must be satisfied that the interests of the debtor's domestic creditors are sufficiently protected. Where relief is granted to a foreign representative in a foreign non-main proceeding, the court must be satisfied that the relief is given in relation to assets that should be taken care of in the foreign non-main proceeding.*

*Pursuant to Article 20 of the Model Law, where a foreign main proceeding is recognised, the recognition has three automatic and mandatory effects: (i) there is a stay in relation to individual actions or proceedings that concern the debtor's liabilities, obligations, rights, or assets; (ii) there is a stay in relation to execution against the debtor's assets; and (iii) there is a suspension of any transfers of, encumbrances to, or dispositions of, the debtor's assets. The stay at (i) includes a stay in relation to arbitral proceedings, although it should be noted that this may be difficult to enforce where the arbitration is in a jurisdiction other than State A or State B. This inclusion may also be rescinded where it is in the interests of the relevant parties that it should be.*

*In discrete instances, limits have been found to the scope of relief that may be granted by the courts of an enacting state. In a series of cases before the English courts, for instance, it has variously been held that it was not possible to grant interim relief with the effect of (i) providing for the enforcement of a default judgment, (ii) apply foreign insolvency law to a contract stated to be governed by English law, and (iii) grant an indefinite moratorium*

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

1. **Adequate protection:** Pursuant to Article 22 of the Model Law any interim relief under Article 19 of the Model Law or any post-recognition relief under Article 21 of the Model Law require the court in State A to be satisfied that the interests of the creditors and the other interested persons, including the debtor, are adequately protected and any relief may be subject to conditions as the court considers appropriate.
2. **Existing international obligations of State A:** Based on Article 3 of the Model Law, the court in State A should again verify that there are no existing international obligations of State A (under a treaty or otherwise) that may conflict with granting the requested relief under the implemented Model Law in State A.
3. **Public policy exception:** The court in State A should, based on Article 6 of the Model Law, also again verify that the relief application is not manifestly contrary to public policy of State A.

Question 3.4 [maximum 1 mark] [1 mark]

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

*A worldwide freezing order granted as pre-recognition interim relief pursuant to Article 19 of the Model Law is unlikely to continue post-recognition, under Article 21 of the Model Law, because the design of the Model Law is intended so as to give a foreign representative an equal position as that which domestic officeholders find themselves in.*

*In the English law case Igor Vitalievich Protasov and Khadzi-Murat Derev [2021] EWHC 392 (Ch), it was held that a post-recognition freezing order would need to be justified by some exceptional reason — absent that, it was not appropriate for such an order to be granted, because it would put a foreign representative in an arguably stronger position than a domestic officeholder would be in equivalent circumstances.*

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

Commented [BB10]: SUB TOTAL = 14 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 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 [9.5 out of 10]**

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

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

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

**1. Introduction**

**The English court has received an application for recognition (the "Application") from the Deposit Guarantee Fund of Country A (the "DGF") and the DGF's authorised officer, Ms G, (the DGF and Ms G together the "Applicants") in respect of the**

*liquidation (the "Liquidation") in Country A of The Commercial Bank for Business Corporation (the "Bank"), pursuant to the UNCITRAL Model Law on Cross-Border Insolvency (the "MLCBI") (as implemented in English law by the Cross-Border Insolvency Regulations 2006 (the "CBIR").*

*In considering the Application, the English court should be mindful of the following points (set out in no particular order):*

- *there is no requirement for reciprocity in terms of the implementation of the MLCBI (i.e., the fact that Country A has not implemented the MLCBI is not relevant for the purposes of considering the application);*
- *although it is of course entitled to consider historic judicial interpretation of the MLCBI (as implemented in various states and considered by the court of various states), outside of English case law the historic judicial interpretation of the MLCBI by states other than England and Wales is not binding on the English court (although it may of course be persuasive);*
- *the English court may have reason to consider and apply the information set out in the UNCITRAL Guide to Enactment (the "GEI"), as most recently published in 2013, and The Judicial Perspective (the "JP"), as most recently published in 2022;*
- *at Article 2 of Schedule 1 to the CBIR, the definitions of "foreign proceeding" and "foreign representative" are as set out in the MLCBI (with the exception that the spelling is in British, rather than American, English); and*
- *pursuant to Article 11 of the MLCBI, the English court has the discretion to: (a) request translations of any relevant documentation, communications, and suchlike issued in relation to the proceedings in Country A; and (b) presume the authenticity of any such foreign documents.*

## **2. "Foreign proceeding"**

*(a) Definition and approach*

**Article 2(a) of the MLCBI defines "foreign proceedings" as follows:**

*"Foreign proceeding" means a collective [element 1] judicial or administrative [element 2] proceeding [element 3] in a foreign State [element 4], including an interim proceeding, pursuant to a law relating to insolvency [element 5] in which proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign court [element 6], for the purpose of reorganization or liquidation [element 7];*

**Although the characteristics set out in that definition may be discussed separately, the question of whether a proceeding meets the definition of "foreign proceeding" is one in relation to which all of the characteristics in that definition should be taken cumulatively and considered as a whole (per paragraph 73 of the JP).**

Furthermore, the relevant proceeding (and whether or not it meets the definition above) should be "assessed at the time the application for recognition is considered by reference to the date of commencement of the foreign proceeding" (per paragraph 73 of the JP).

Having noted that the proceeding (i.e., the Liquidation) is indeed in a foreign State (being Country A), the English court may elect to follow the approach set out in paragraphs 74 to 95 (inclusive) of the JP when considering, in relation to the Application, whether the Liquidation constitutes a "foreign proceeding" – pursuant to which the elements of the definition may be considered as follows:

- (i) is the Liquidation a "collective judicial or administrative proceeding"?
- (ii) is the Liquidation occurring "pursuant to a law relating to insolvency"?
- (iii) is the Liquidation "subject to control or supervision by a foreign court"?
- (iv) is the Liquidation "for the purpose of liquidation or reorganisation"?

(b) Is the Liquidation a "collective judicial or administrative proceeding"?

When considering whether the Liquidation is a collective judicial or administrative proceeding for the purposes of the MLCBI, the English court ought to consider whether "substantially all of the assets and liabilities of the debtor are dealt with in the proceeding" (per paragraph 70 of the GEI).

In that regard, it is instructive that when the Bank entered into the Liquidation all powers of the bank's management and control bodies were terminated and that the DGF alienates the bank's property and funds. The Affidavit specifies that the DGF has extensive powers as to investigation of the Bank's history and control of the Bank's management, assets, claims, and suchlike – including the power to 'compile a register of creditor claims and to seek to satisfy those claims'.

The court may consider that the Liquidation is not inherently collective in nature because there is a *power* to compile a register of creditor claims and to seek to satisfy those claims (but not an *obligation* to do so). The court may have regard to the case of Gold & Honey, Ltd (In re) 410 B.R. 357 (Bankr. E.D.N.Y. 2009), CLOUT 1008, in which a receivership commenced under Israeli law was held (in a United States court) not to be a collective proceeding because it was not necessary for the receivers to 'consider the rights and obligations of all creditors and was designed primarily to allow a certain party to collect its debts' (per paragraph 78 of the JP).

In the United States case British American Ins. Co Ltd (In re) 425 B.R. 884 (Bank. S.D. Fla. 2010), CLOUT 1005, the court considered whether the proceedings contemplated both 'the eventual treatment of claims of various types of creditors' (per paragraph 78 of the JP). In Stanford International Bank Ltd [2010] EWCA Civ. 137, CLOUT 1003, was held by an English court not to be

*collective because the relevant order was made in prevention of ongoing fraud and to halt any detriment to investors, rather than for the purpose of reorganising the debtor or realising assets for the benefit of all creditors (per paragraph 79 of the JP).*

*It is not clear whether the Liquidation (and the statutory framework and the DGF's powers in relation to the Liquidation) is collective in nature. However, the English court is more likely than not to deem the Liquidation to be collective in nature (and, therefore, a collective judicial or administrative proceeding) because (i) it relates to substantially all of the Bank's assets, (ii) it is contemplated that the DGF may exercise its powers for the creditors of the Bank as a whole, and (iii) the DGF has in fact resolved to approve an amended list of creditors' claims.*

**Please briefly also separately address the "judicial or administrative" element**

*(c) Is the Liquidation occurring "pursuant to a law relating to insolvency"?*

*The statutory framework for the Liquidation is Country A's Law of Country A on Banks and Banking Activity (the "LBBA"). When considering whether the LBBA is a law relating to insolvency, the English court may note that the relevant law need not be labelled as insolvency law but must in substance address insolvency or severe financial distress (per paragraph 82 of the JP). Paragraph 73 of the GEI specifies that this formulation is intentionally broad and that it does not exclude laws that relate to topics beyond only insolvency.*

*Given the Affidavit makes clear that the LBBA provides for the National Bank of Country A (the "NB") to classify a bank as insolvent (and begin a liquidation in respect of it) if it fails to meet 2% or more of its obligations to depositors or creditors, it is likely that the English court will find that the Liquidation is occurring pursuant to a law relating to insolvency.*

*(d) Is the Liquidation "subject to control or supervision by a foreign court"?*

*Per paragraph 74 of the JP, the MLCBI does not specify the 'level of control or supervision required to satisfy this aspect of the definition [of "foreign proceeding"]'. Furthermore, the control may be potential, rather than in progress, at the time of the application for recognition.*

*The definition of 'foreign court', at Article 2(e) of the MLCBI is 'a judicial or other authority competent to control or supervise a foreign proceeding'.*

*It is clear that the DGF (and not the NB) is in control of the Liquidation because of the powers it has in relation to the Bank, as set out above.*

*As to whether it falls within the MLCBI definition of 'foreign court', it is pertinent that:*  
*(i) the DGF is a governmental body of Country A; and (ii) the DGF's*



*independence is enshrined in the LBBA, which confirms that it is economically independent and that no public authority nor the NB have any right to interfere in the exercise of its functions and powers.*

*For the above reasons, the DGF is an authority competent to control the Liquidation (meaning that it does fall within the MLCBI definition of 'foreign court') and does in fact exercise control in relation to the Liquidation – and so the English court is likely to find that this element of the definition of 'foreign proceedings' is met.*

(e) *Is the Liquidation "for the purpose of liquidation or reorganisation"?*

*It is clear that the Liquidation is for the purpose of liquidating the Bank; the NB has resolved for the Bank to be liquidated. It is doubtful that the English court will place much weight on the Bank's liquidation having been extended to an indefinite date; the proceeding is nevertheless for the liquidation of the Bank.*

(f) *Conclusion*

*In conclusion, the Liquidation is likely to satisfy all elements required by the definition of 'foreign proceeding'.*

### **3. "Foreign representative"**

(a) *Definition and approach*

**Article 2(d) of the MLCBI defines "foreign representative" as follows:**

*"Foreign representative" means a person or body, including one appointed on an interim basis, authorized in a foreign proceeding to administer the reorganization or the liquidation of the debtor's assets or affairs or to act as a representative of the foreign proceeding*

**The elements of that definition are that the person or body appointed must be authorised to administer the reorganisation or liquidation of the debtor's assets or affairs or to act as the representative in the proceeding. It is not a requirement that the relevant person must be authorised by the foreign court.**

**The English court will consider these criteria in relation to each of the Applicants (being DGF and Ms G).**

(b) *Is the DGF a foreign representative in relation to the Liquidation?*

**The DGF is a body which is authorised by the LBBA, pursuant to which it automatically became the liquidator of the Bank on the date it received confirmation of the**

*NB's decision to revoke the Bank's licence, in the Liquidation (which is a foreign proceeding).*

*The authorisation of the DGF includes the administration of the liquidation of the Bank's assets or affairs.*

*For those reasons, DGF is likely to be characterised by the English court as a foreign representative in relation to the Liquidation.*

*(c) Is Ms G a foreign representative?*

*Ms G is a person who is appointed by the DGF (as catered for in the LBBA). However, the scope of that authorisation is limited in certain respects (including in relation to claiming damages from a related party of the Bank, the power to make a claim against a non-banking financial institution, and the power to arrange for the sale of the Bank's assets). Each of those excluded powers remains vested in the DGF as the Bank's formally appointed liquidator.*

*The issue that arises, therefore, is whether Ms G is authorised to administer the Liquidation — which is doubtful, on the basis of the excluded powers listed above.*

*However, even if Ms G does not fall within the definition of 'foreign representative' by virtue of being authorised to administer the Liquidation she may fall within that definition by being authorised to act as a representative in the foreign proceeding.*

*The question of whether the person is authorised to act as a representative is 'determined by the applicable law of the State in which the insolvency proceedings began' (per paragraph 35 of the JP). In this instance, it is clear that Ms G is appropriately authorised because DGF has appointed her pursuant to a Decision of its Executive Board of Directors, as catered for in the LBBA.*

*For that reason, Ms G is likely to be characterised by the English court as a foreign representative in relation to the Liquidation.*

#### **4. Conclusion**

*In summary, the Liquidation is likely to be regarded by the English court as a foreign proceeding and each of DGF and Ms G are likely to be regarded by the English court as foreign representatives in relation to the Liquidation.*

*Provided that all other relevant requirements are satisfied, the Application will be granted in relation to the Liquidation and the foreign representatives will obtain recognition in respect of the Liquidation.*

*As the Liquidation is taking place in the same country (Country A) as the registered office of the Bank, it is likely the case that the Liquidation will be characterised as a foreign main proceeding on the basis of the Bank's COMI being in Country A and, pursuant to the MLCBI, there will be certain automatic consequences of that characterisation — including the automatic relief provided for in Article 20 of the MLCBI as relates to a stay.*

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

\* End of Assessment \*