



SUMMATIVE (FORMAL) ASSESSMENT: MODULE 2A

THE UNCITRAL MODEL LAWS RELATING TO INSOLVENCY

Commented [BB1]: TOTAL = 37 MARKS

74%

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?**

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

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

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

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

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

Question 1.7

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

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

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

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

(d) All of the above.

Question 1.8

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

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

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

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

(d) All of the above.

Question 1.9

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

(a) Court proceedings.

(b) Arbitral Tribunals.

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

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

Question 1.10

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

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

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

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

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

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

Question 2.1 [maximum 3 marks]

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

The appropriate date for determining the COMI of a debtor is the date of commencement of the foreign proceeding. Even though the US judicial forum in the matter of *Morning Mist Holding Ltd. V. Kryz (Matter of Fairfield Sentry Ltd.)* took a different approach wherein they held that the appropriate date for determining the COMI would be the date on which the recognition petition is filed before the US judicial forum. The period between the commencement of the foreign proceeding and the filing of the recognition petition may be considered by the judicial forum to determine the COMI of the debtor. UK judicial forum has also adopted this principle in the matter of *Re Toisa Limited* judgement.

Question 2.2 [maximum 3 marks]

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

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

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

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

Statement 1:

Article 14 of the MLCBI deals with the Notification to foreign creditors of a proceeding under the domestic insolvency regime. Article 14 stipulates that the whenever a notification is to be given to the creditors under the domestic insolvency regime, such notification shall also be given to the foreign creditors and the court shall give appropriate direction and take

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Commented [SL5]: 2 marks

Where the business activity of the debtor ceases after the commencement of the foreign proceeding, all that may exist at the time of the application for recognition to indicate the debtor's COMI or establishment is that foreign proceeding and the activity of the foreign representative in administering the insolvency estate. In such a case, determination of the COMI or an establishment by reference to the date of the commencement of those proceedings would produce a clear result. The same reasoning may also apply in the case of reorganisation where, under some laws, it is not the debtor that continues to have a COMI, but rather the reorganised entity. In such a case, the requirement for a foreign proceeding that is taking place in accordance with article 17(2)(a) is clearly satisfied and the foreign proceeding should be entitled to recognition. Moreover, taking the date of commencement to determine COMI provides a test that can be applied with certainty to all insolvency proceedings.

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appropriate steps to notify the creditors whose address is not yet known. Article 14 also stipulates the contents of the notification of commencement and the mode of delivery of the notification.

Statement 2:

Article 10 (Limited Jurisdiction) of the MLCBI declares that the application made by a foreign representative to a court does not make the foreign representative or the assets and affairs of the debtor does not become subject to the jurisdiction of such court for any purpose other than the application. Article 10 constitutes a 'safe conduct rule' under the MLCBI to the foreign representatives ensuring that the court in the enacting state while entertaining the application for recognition or interim relief does not assume jurisdiction over the foreign representative or the assets and affairs of the debtor. This Article acts as a shield for the foreign representative but is not an absolute immunity.

Statement 3:

Clause 3 of Article 16 (Presumptions concerning recognition) deals with a rebuttable presumption in determining the Centre of Main Interest (COMI) of the debtor. It says that in the absence of any proof to the contrary, the debtor's registered office (in case of a legal person), or habitual residence (in case of an individual), is presumed to be the COMI of the debtor. This rebuttable presumption speeds up the proceeding and removes conflicts of interpretation. It also gives adequate leeway to the courts to determine the COMI on a case to case basis.

Question 2.3 [2 marks]

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

IBA case Appeal was a classic case of conflict between the creditors of the enacting state (in this case UK) and the creditors of state in which the foreign proceeding (in this case Azerbaijan Proceeding) is initiated and recognised by the enacting state. In the said case, the foreign representative approached the English court under Article 21 of the MLCBI seeking relief of indefinite continuation of automatic moratorium. The English Court rejected the said application under Article 21 and held that the court in exercise of its power in granting reliefs under Article 21 should not grant an indefinite moratorium continuation.

The IBA Case Appeal did not rule that the English Court does not have the jurisdiction to grant an indefinite moratorium continuation rather it only held that as a matter of practice, the court should not exercise its power to grant an indefinite moratorium continuation based on two main following reasons:

- a) Such a relief would prevent the English Creditors from enforcing their rights under the English law in accordance with the Gibbs Rule; and
- b) Such a relief would continue even after the restructuring has come to an end in the foreign proceeding.

The English court held that it has to satisfy that the interest of the creditors and other interested parties are balanced while granting the reliefs under Article 21. In its opinion, indefinite moratorium continuation was not necessary for protecting the interest of the creditors.

Question 2.4 [2 marks]

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Commented [SL8]: 1.5 marks

art 29(a)

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**.

The reliefs after the recognition of a foreign proceeding in the MLCBI are discussed mainly under Two Articles, viz. Article 20 and 21. Article 20 is the most important Article among them, which deals with an automatic mandatory relief once the foreign main proceeding is recognised by an enacting state, which includes moratorium on initiating individual actions, stay on execution against debtor's assets, and suspension of right to transfer, encumber, or dispose of the assets of the debtor. Article 21 however, deals with the discretionary reliefs that the courts in the enacting state may grant considering the scenario post the recognition of the foreign proceeding (both main and non-main proceeding). The reliefs under Article 21 includes the ones that are already covered under Article 21 and additionally includes providing examination of witnesses, taking evidence or delivery of information regarding the debtor's assets, rights, affairs, obligations, liabilities etc. (ii) Entrusting the administration or realisation of all or part of the debtor's assets (iii) Extending the interim reliefs granted under Article 19 (iv) any other relief that may be available to the domestic insolvency / liquidation professional. Further, it is pertinent to note that Article 22 clarifies that the courts in the enacting state while granting reliefs under Article 21 must be satisfied that the interest if the creditors and other interested parties are adequately protected.

Article 18 MLCBI deal with the duty of the foreign representative to inform the court in the enacting state which recognised the foreign proceeding promptly, after the time of filing the application for recognition of the foreign proceeding, of "any substantial change in the status of the recognized foreign proceeding or the status of the foreign representative's appointment". Under Article 18 of MLCBI, the foreign representative is also obligated to inform the court of any foreign proceeding regarding the same debtor that he/she may have known.

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

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

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

Question 3.1 [maximum 4 marks] [1 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.

First of all, the foreign representative must make an application to the appropriate forum under State A under Article 15 of the Model Law (and its respective domestic adoption) for recognition of the proceeding initiated in State B. **no recognition is required, there is automatic standing** If the State B is a COMI of the Corporate Debtor, the State A shall recognise the proceedings initiated in State B as a foreign main proceeding and the automatic reliefs under Article 20 shall be granted. The automatic reliefs under Article 20 includes stay of the commencement or continuation of individual actions or proceedings concerning the Corporate Debtor's assets, stay of execution against the Corporate Debtor's assets, and suspension of

the right to transfer, encumber, otherwise dispose of any asset of the Corporate Debtor. This itself will protect the rights of the creditors of the Corporate Debtor which the foreign representative is intending to protect.

Further, the recognition itself allows the foreign representative to access certain tools and protections available to a local insolvency representative in State A. It includes examination of witnesses, taking of evidence, delivery of information on debtor's assets, liabilities and affairs in State A which may be granted by the appropriate forum in State A. These powers help the foreign representative in ascertaining avoidance / vulnerable transactions and protect the interests of the creditors of the Corporate Debtor.

Even if the no recognition granted for the foreign proceeding is of a non-main foreign proceeding, the recognition enables the foreign representative to seek certain interim reliefs under Article 21 which even includes the reliefs that is normally granted as automatic relief upon recognition of a foreign main proceeding. Even though the reliefs under Article 21 is discretionary in nature, the best efforts that the foreign representative can take to protect the assets of the Corporate Debtor lying at the State A is to approach the appropriate forum for the interim reliefs.

Moreover, even before the recognition is granted and after filing an application for recognition, the foreign representative has the right to approach the appropriate forum of State A for pre-recognition reliefs under Article 19. The reliefs under Article 19 can only effective till the order of recognition.

All the three provisions i.e., Article 19 (pre-recognition reliefs), Article 20 (automatic relief), and Article 21 (post-recognition reliefs) contains enabling provisions for foreign representative to seek direction for stay of the commencement or continuation of individual actions or proceedings concerning the Corporate Debtor's assets, stay of execution against the Corporate Debtor's assets, and suspension of the right to transfer, encumber, otherwise dispose of any asset of the Corporate Debtor, which will secure the value of the Corporate Debtor's assets in State A. The foreign representative may use any of the above provisions as the situation enables him/ her.

In addition to the above, Article 27 prescribes an indicative list of types of co-operation. This includes co-ordination of the administration and supervision of the debtor's asset and affairs and coordination of concurrent proceedings, if any. This shall also enable the foreign representative to coordinate, cooperate and communicate in order to protect of the value of assets of the Corporate Debtor. [1]

Your article should have contained a discussion on the following:

- **Legal standing (Article 9 MLCBI): The key access for the foreign representative is set forth in Article 9 MLCBI. In the capacity of foreign representative, the foreign representative has automatic standing before the courts in State A without having to meet any formal requirements such as a license or any consular action. In other words, the "status" in State B of the foreign representative is automatically recognised in State A for the purpose of granting the foreign representative standing before the courts in State A. This allows the foreign representative to safeguard and pursue assets of the debtor estate in State A before its courts.**
- **Opening domestic insolvency proceedings (Article 11 MLCBI): The foreign representative is further specifically entitled to apply for the opening of domestic insolvency proceedings in State A, as reflected in Article 11 of the MLCBI. Whether or not the foreign representative would wish to do this will depend on what the**

requirements are for opening such domestic proceedings. Can these requirements be met? On the other hand, it will depend on what the foreign representative believes he/she can get in terms of (interim) relief for the foreign proceedings in State B. In other words, are domestic insolvency proceedings really needed, or just additional time and costs that should be avoided?

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

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

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

Article 15 of the MLCBI indicates that an application for recognition by the foreign representative shall be accompanied by a certified copy of the decision commencing the foreign proceeding and appointing the foreign representative; or a certificate from the foreign court affirming the existence of the foreign proceeding and of the appointment of the foreign representative; or any other evidence acceptable to the court of the existence of the foreign proceeding and the appointment of the foreign representative. [1]

Article 16 of the MLCBI prescribes that the court is entitled to presume as authentic, if the evidence mentioned under Article 15 of MLCBI indicates the compliance of Article 2(a) and Article 2(d) of the MLCBI.

Thus, if the abovementioned requirements are met, and the application is made for recognition before the competent court of State A, the court cannot deny the request of the recognition of a foreign proceeding unless restricted by the public policy ground. The recognition application shall also be scrutinised based on the public policy grounds of State A.

Article 6 of the MLCBI deals with the public policy exception. [½] This concept under MLCBI gives the enacting state a comfort and ultimate safeguard to its sovereignty. However, the word '*manifestly*' used in Article 6 means that even though MLCBI respect the public policy of the each enacting state, the same must be interpreted restrictively and must only applied in exceptional scenarios which concerns the fundamental policies of the enacting state like the sovereignty. Thus, as a general rule, the public policy exception should rarely be the basis for refusing the recognition application. [½]

In the *Agrikor Case*, the English Court rightly interpreted the term ‘manifestly’ used in the Article 6 of the MLCBI in the scenario of a recognition application and held that only if the recognition application is an abuse of process that a denial of recognition application based on public policy exception can be justified. An abuse of process in this context can be interpreted as the breach of obligation to full and frank disclosure to the court in State A or ulterior motives for recognition.

In the absence of any public policy exception, the recognition application if complaint under Article 15 read with Article 2(a) and Article 2(d) of the MLCBI shall be allowed by the Competent Court in State A.

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.*
- 3. Judicial scrutiny:** *While the court in State A is able to rely on the rebuttable presumptions set forth in Article 16 of the Model Law, in the context of Article 17 of the Model Law the court will have to assess whether either the COMI or at least an establishment of the debtor is located in State B where the foreign proceedings were opened. If the COMI of the debtor is in State B the foreign proceedings should be recognised as foreign main proceedings and if only an establishment of the debtor is in State B the foreign proceedings should be recognised as foreign non-main proceedings. Without a COMI or at least an establishment of the debtor in State B, recognition cannot be granted by the court in State A.*

Question 3.3 [maximum 5 marks] [4 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.

If State B is a COMI of the Corporate Debtor, upon the State A recognise the proceedings initiated in State B as a foreign main proceeding, the automatic reliefs under Article 20 of MLCBI shall be granted. The automatic reliefs under Article 20 includes stay of the commencement or continuation of individual actions or proceedings concerning the Corporate Debtor’s assets, stay of execution against the Corporate Debtor’s assets, and suspension of the right to transfer, encumber, otherwise dispose of any asset of the Corporate Debtor. This automatic relief is not applicable to foreign non-main proceedings. Article 20 (3) says that the automatic relief does not affect the right to commence individual actions or proceedings to the extent necessary to preserve a claim against the Corporate Debtor. Further it also does not affect the right to commence domestic insolvency proceedings, or right to file claims in such proceedings. These automatic reliefs are intended to allow time for steps to be taken to organise an orderly and fair cross-border insolvency proceeding, in effect gives the ‘breathing

space' before taking appropriate measures for reorganisation or liquidation of the assets of the Corporate Debtor or resolution of the Corporate Debtor.

Moreover, even before the recognition is granted and after filing an application for recognition, the foreign representative has the right to approach the competent court of State A for pre-recognition interim reliefs under Article 19 of MLCBI. The reliefs under Article 19 can only be effective till the order of recognition. This provision is applicable to both foreign main and non-main proceedings and includes all the reliefs available under Article 20 of the MLCBI as mentioned above. In addition to such reliefs the competent court can also grant any additional relief that may be available to a domestic insolvency professional under the laws of State A.

In case of a foreign non-main proceeding, automatic reliefs under Article 20 of the MLCBI are not available. However, Article 21 of MLCBI prescribes the same reliefs as concerned under Article 20 of MLCBI as a discretionary relief for any foreign proceeding (main and non-main). In addition to the above, Article 21 of MLCBI also prescribes provision for the examination of assets, taking of evidence or delivery of information concerning the debtor's assets, affairs, rights, obligations or liabilities in favour of the foreign representative. It also enables the court to entrust the administration or realisation of all or part of the Corporate Debtor's assets in State A to the foreign representative or any designated person. Further, any interim reliefs granted under Article 19 of MLCBI shall also be extended and any additional relief that may be available to a domestic insolvency professional under the laws of State A shall also be granted.

The main objective of such reliefs is to protect the interests of the creditors of the Corporate Debtor and other interested parties. While granting the reliefs under Article 21, the court must be satisfied that the relief relates to assets lying in State A which must be administered or is concerned with the foreign proceeding. This safeguard is enshrined under Article 21(4) to ensure that such reliefs shall not interfere with the administration of another insolvency proceeding, in particular the foreign main proceeding.

Even though the appropriate reliefs that the court of the enacting state can grant under Article 21 are broadly drafted to empower the court to grant anything, the same cannot be considered as unlimited and without any restrictions. The English Courts have through various case laws formulated certain restrictions or limitations on granting the reliefs under Article 21 without curtailing the jurisdiction or power to grant such reliefs beyond the limits and restrictions imposed therein. The following are some:

In the matter of *Fibra Celulose S/A v. Pan Ocean Co Ltd*, the English first instance court held that applying foreign insolvency law to an English Law governed contract is outside the scope of appropriate relief the English Court can grant.

In the matter of *Igor Vitalievich Protasov v. Khadzi-Murat Derev* the English Court had considered the issue of granting a continuation of worldwide freezing order which already granted as pre-recognition interim relief under Article 19 as a post recognition relief under Article 21. The said case, English Court held that even though it has jurisdiction to grant the same, the power to grant discretionary relief under Article 21 must be exercised cautiously and the English Bankruptcy Regime offers other forms of protection which means that a worldwide freezing order is not warranted unless there is an exceptional reason.

In the IBA Case Appeal, the English court held that it must satisfy that the interests of the creditors and other interested parties are balanced while granting the reliefs under Article 21. In its opinion, indefinite moratorium continuation was not necessary for protecting the interests of the creditors.

In addition to the above limits, the MLCBI itself puts certain safeguards in granting the reliefs. Article 22 of MLCBI stipulates that enacting state must strike an appropriate balance between the relief and the interest of the persons affected by the relief.

For full marks you could have included a brief discussion on Article 3 and the existing international obligations of State A as well as Article 6 and public policy exceptions.

Question 3.4 [maximum 1 mark] [1 mark]

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

In the matter of *Igor Vitalievich Protasov v. Khadzhi-Murat Derev* the English Court had considered the issue of granting a continuation of worldwide freezing order which already granted as pre-recognition interim relief under Article 19 as a post recognition relief under Article 21. The said case, English Court held that even though it has jurisdiction to grant the same, the power to discretionary relief under Article 21 must be exercised cautiously and the English Bankruptcy Regime offers other forms of protection which means that a worldwide freezing order is not warranted unless there is an exceptional reason.

Moreover, Article 19 is an interim relief which are only applicable until the recognition of the foreign proceeding (for a limited time) unlike Article 21 which is not an interim relief and thus will have a more effect if such a drastic measure of worldwide freezing order is granted.

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

Commented [BB10]: SUB TOTAL = 11.5

Read the following facts very carefully before answering the questions that follow.

(1) Background

The Commercial Bank for Business Corporation (the Bank) has operated since 1991. The Bank's registered office is situated in Country A, which **has not** adopted the MLCBI. As of 13 August 2015, the Bank's majority ultimate beneficial owner was Mr Z, who held approximately 95% of the Bank's shares through various corporate entities (including some registered in England).

The Bank entered provisional administration on 17 September 2015 and liquidation on 17 December 2015. Investigations into the Bank have revealed that it appears to have been potentially involved in a multi-million dollar fraud resulting in monies being sent to many overseas companies, including entities incorporated and registered in England. Proceedings were commenced in the High Court of England and Wales (Chancery Division) against various defendants on 11 February 2021 (the English Proceedings).

An affidavit (the Affidavit) sets out a detailed summary of the legislation of Country A's specific insolvency procedure for Banks. The procedure involves initial input from the National Bank (the NB) and at the time that the Bank entered liquidation, followed by a number of stages:

Classification of the bank as troubled

The NB may classify a bank as "troubled" if it meets at least one of the criteria set down by article 75 of the Law of Country A on Banks and Banking Activity (LBBA) or for any of the reasons specified in its regulations.

Once declared “troubled”, the relevant bank has 180 days within which to bring its activities in line with the NB’s requirements. At the end of that period, the NB must either recognise the Bank as compliant, or must classify it as insolvent.

Classification of the bank as insolvent

The NB is obliged to classify a bank as insolvent if it meets the criteria set out in article 76 of the LBBA, which includes:

- (i) the bank’s regulatory capital amount or standard capital ratios have reduced to one-third of the minimum level specified by law;
- (ii) within five consecutive working days, the bank has failed to meet 2% or more of its obligations to depositors or creditors; and
- (iii) the bank, having been declared as troubled, then fails to comply with an order or decision of the NB and / or a request by the NB to remedy violations of the banking law.

The NB has the ability to classify a bank as insolvent without necessarily needing to first go through the troubled stage. Article 77 of the LBBA accordingly provides that a bank can be liquidated by the NB directly, revoking its licence.

Provisional administration

The Deposit Guarantee Fund (DGF) is a governmental body of Country A tasked principally with providing deposit insurance to bank depositors in Country A. However, the Affidavit explained that the DGF is also responsible for the process of withdrawing insolvent banks from the market and winding down their operations via liquidation. Its powers include those related to early detection and intervention, and the power to act in a bank’s interim or provisional administration and its ultimate liquidation.

Pursuant to article 34 of the DGF Law, once a bank has been classified as insolvent, the DGF will begin the process of removing it from the market. This is often achieved with an initial period of provisional administration. During this period:

- (i) the DGF (acting via an authorised officer) begins the process of directly administering the bank’s affairs. Articles 35(5) and 36(1) of the DGF Law provide that during provisional administration, the DGF shall have full and exclusive rights to manage the bank and all powers of the bank’s management.
- (ii) Article 36(5) establishes a moratorium which prevents, *inter alia*: the claims of depositors or creditors being satisfied; execution or enforcement against the bank’s assets; encumbrances and restrictions being created over the bank’s property; and interest being charged.

Liquidation

Liquidation follows provisional administration. The DGF is obliged to commence liquidation proceedings against a bank on or before the next working day after the NB’s decision to revoke the bank’s licence.

Article 77 of the LBBA provides that the DGF automatically becomes liquidator of a bank on the date it receives confirmation of the NB's decision to revoke the bank's licence. At that point, the DGF acquires the full powers of a liquidator under the law of Country A.

When the bank enters liquidation, all powers of the bank's management and control bodies are terminated (as are the provisional administrators' powers if the bank is first in provisional administration); all banking activities are terminated; all money liabilities due to the bank are deemed to become due; and, among other things, the DGF alienates the bank's property and funds. Public encumbrances and restrictions on disposal of bank property are terminated and offsetting of counter-claims is prohibited.

As liquidator, the DGF has extensive powers, including the power to investigate the bank's history and bring claims against parties believed to have caused its downfall. Those powers include:

- (i) the power to exercise management powers and take over management of the property (including the money) of the bank;
- (ii) the power to compile a register of creditor claims and to seek to satisfy those claims;
- (iii) the power to take steps to find, identify and recover property belonging to the bank;
- (iv) the power to dismiss employees and withdraw from/terminate contracts;
- (v) the power to dispose of the bank's assets; and
- (vi) the power to exercise "such other powers as are necessary to complete the liquidation of a bank".

The DGF also has powers of sale, distribution and the power to bring claims for compensation against persons for harm inflicted on the insolvent bank.

However, article 48(3) of the DGF Law empowers the DGF to delegate its powers to an "authorised officer" or "authorised person". The "Fund's authorised person" is defined by article 2(1)(17) of the DGF Law as: "*an employee of the Fund, who on behalf of the Fund and within the powers provided for by this Law and / or delegated by the Fund, performs actions to ensure the bank's withdrawal from the market during provisional administration of the insolvent bank and/or bank liquidation*".

Article 35(1) of the DGF Law specifies that an authorised person, must have: "*...high professional and moral qualities, impeccable business reputation, complete higher education in the field of economics, finance or law...and professional experience necessary.*" An authorised person may not be a creditor of the relevant bank, have a criminal record, have any obligations to the relevant bank, or have any conflict of interest with the bank. Once appointed, the authorised officer is accountable to the DGF for their actions and may exercise the powers delegated to them by the DGF in pursuance of the bank's liquidation.

The DGF's independence is addressed at articles 3(3) and 3(7) of the DGF Law which confirm that it is an economically independent institution with separate balance sheet and accounts from the NB and that neither public authorities nor the NB have any right to interfere in the exercise of its functions and powers.

Article 37 establishes that the DGF (or its authorised person, insofar as such powers are delegated) has extensive powers, including powers to exercise managerial and supervisory

powers, to enter into contracts, to restrict or terminate the bank's transactions, and to file property and non-property claims with a court.

(2) The Bank's liquidation

The Bank was formally classified by the NB as "troubled" on 19 January 2015. The translated NB resolution records:

"The statistical reports-based analysis of the Bank's compliance with the banking law requirements has found that the Bank has been engaged in risky operations."

Those operations included:

- (i) a breach, for eight consecutive reporting periods, of the NB's minimum capital requirements;
- (ii) 10 months of loss-making activities;
- (iii) a reduction in its holding of highly liquid assets;
- (iv) a critically low balance of funds held with the NB; and
- (v) 48% of the Bank's liabilities being dependent on individuals and a significant increase in "adversely classified assets" which are understood to be loans, whose full repayment has become questionable.

Despite initially appearing to improve, by September 2015 the Bank's financial position had deteriorated further with increased losses, a further reduction in regulatory capital and numerous complaints to the NB. On 17 September 2015, the NB classified the Bank as insolvent pursuant to article 76 of the LBBA. On the same day, the DGF passed a resolution commencing the process of withdrawing the Bank from the market and appointing Ms C as interim administrator.

Three months later, on 17 December 2015, the NB formally revoked the Bank's banking licence and resolved that it be liquidated. The following day, the DGF initiated the liquidation procedure and appointed Ms C as the first of the DGF's authorised persons to whom powers of the liquidator were delegated. Ms C was replaced as authorised officer with effect from 17 August 2020 by Ms G.

Ms G's appointment was pursuant to a Decision of the Executive Board of the Directors of the DGF, No 1513 (Resolution 1513). Resolution 1513 notes that Ms G is a "leading bank liquidation professional". It delegates to her all liquidation powers in respect of the Bank set out in the DGF Law and in particular articles 37, 38, 47-52, 521 and 53 of the DGF Law, including the authority to sign all agreements related to the sale of the bank's assets in the manner prescribed by the DGF Law. Resolution 1513 expressly excludes from Ms G's authority the power to claim damages from a related party of the Bank, the power to make a claim against a non-banking financial institution that raised money as loans or deposits from individuals, and the power to arrange for the sale of the Bank's assets. Each of the excluded powers remains vested in the DGF as the Bank's formally appointed liquidator.

On 14 December 2020, the Bank's liquidation was extended to an indefinite date, described as arising when circumstances rendered the sale of the Bank's assets and satisfaction of creditor's claims, no longer possible.

On 7 September 2020, the DGF resolved to approve an amended list of creditors' claims totalling approximately USD 1.113 billion. The Affidavit states that the Bank's current, estimated deficiency exceeds USD 823 million.

QUESTION 4.1 [maximum 15 marks] [11.5 out of 15]

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

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

- 4.1.1 whether the Bank's liquidation comprises a "foreign proceeding" within the meaning of article 2(a) of the MLCBI [maximum 10 marks]; and [7 out of 10]
- 4.1.2 whether the Applicants fall within the description of "foreign representatives" as defined by article 2(d) of the MLCBI [maximum 5 marks]. [4.5 out of 5]

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

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

Answer:

For deciding the matter at hand, it is important to look into the ingredients of the foreign proceeding and foreign representative under MLCBI and Cross-Border Insolvency Regulations 2006 (CBIR)

For a proceeding to qualify as a foreign proceeding within the meaning ascribed under Article 2(a) of MLCBI, it needs to meet the following ingredients:

- (a) Judicial or Administrative nature of proceeding: the nature of insolvency proceeding must be that of judicial or Administrative; [two additional separate elements are: the "proceeding" element and the "of a foreign State" element. Therefore, the total number of elements to specifically address in your response is 7, not 5]
- (b) Collective nature: nature of action / proceeding initiated must be a collective action (action in rem) and not an individual recovery action;
- (c) Law relating to insolvency: The proceeding must be conducted under a law related to insolvency;
- (d) Subject to control or supervision by a foreign court: The assets and affairs of the debtor must be subject to control or supervision by a court; and
- (e) Purpose: The proceeding must be for the purpose of reorganisation or liquidation.

For a proceeding to qualify as a foreign proceeding within the meaning ascribed under Article 2(d) of MLCBI, it needs to meet the following ingredients:

- (a) Person or Body: the foreign representative can be a person (individual or corporate) or body (professional agency, government body, or specialised private agency);
- (b) Appointment and authorisation: the foreign representative need to be appointed or authorised (permanent or on an interim basis) by appropriate forum/court/committee/person under the insolvency and bankruptcy law of the foreign country; and
- (c) Purpose: the purpose of appointment or authorisation of the foreign representative must be administering the reorganisation of liquidation process of the debtor's business, its asset, or affairs or the foreign representative must be appointed or authorised to act as representative of the foreign proceeding.

On the perusal of the Affidavit submitted by the Applicant it is clear that:

The Deposit Guarantee Fund (DGF) is a governmental body of Country A tasked principally with providing deposit insurance to bank depositors in Country A. 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.

The liquidation of the Commercial Bank for Business Corporation (the Bank) under the laws of Country A was initiated on 17th December 2015 and it is understood that the same has been initiated / declared by the National Bank of Country A under the provision of Law of Country A on Banks and Banking Activity (LBBA).

As per Article 3(3) and 3(7) of the DGF Laws, the DGF is economically independent institution with separate balance sheet and accounts from the National Bank and that neither public authorities nor the National Bank have any right to interfere in the exercise of its functions and powers.

Ms. G is the authorised officer of DGF duly appointed by valid board resolution under which certain powers are delegated in compliance with the DGF Laws with respect to the liquidation of the Bank.

After careful perusal of the laws stipulated in the Affidavit and ingredients of the definition of the foreign proceeding and foreign representative under MLCBI and CBIR the following are the analysis:

Foreign Proceeding:

Judicial or Administrative nature of proceeding: The liquidation proceeding under is an administrative action by the National Bank.

Collective nature: The liquidation proceeding initiated under the LBBA is a collective action and not an individual recovery action as it deals with substantially all of the assets and liabilities of the debtor.

Law relating to insolvency: The law relating to insolvency of the Bank is enshrined under LBBA and hence the proceeding is conducted under valid insolvency law of

country A. In order to establish the same it is important to look at the decision of the US Bankruptcy Court while interpreting Article 2(a) of MLCBI in the matter of *In re Betcorp Limited (In Liquidation)*, in which it was held that a law need not be termed specifically for insolvency law to be considered as insolvency law under Article 2(as) MLCBI. A statute which regulates the whole of the life-cycle of an establishment (LBBA in the present case) which includes provisions for insolvency could also be considered as valid insolvency law under Article 2(a) of MLCBI.

Purpose: The purpose of liquidation proceeding under LBBA is clear from the affidavit and provisions reproduced therein. The same is reorganisation and liquidation of the assets of the Bank.

Subject to control or supervision by a foreign court: It has been specifically mentioned under Article 3(7) and Article 3(7) of the DGF Laws that neither public authorities nor the National Bank have any right to interfere in the exercise of its functions and powers. On the first reading of the provisions it could be said that there is no element of foreign court in the liquidation proceedings under LBBA. However, DGF itself could be considered as a court and thus, the main question of law herein is whether DGF can be considered as 'foreign court' as per the definition of Article 2 (d) of MLCBI and CBIR.

For full marks your response must address in sufficient detail each of the 7 separate elements of the definition of "foreign proceeding" as set forth in article 2(a) of the MLCBI, provide guidance and source references as appropriate and apply the facts. Not all 7 elements have been specifically addressed in your response and for those elements that have been specifically addressed, the level of detail, the supporting guidance and the application of the facts are not sufficient for full marks.

For example, as for the "subject to control or supervision of a foreign court" element, your response should also have considered the following:

1. The term "foreign court" is defined at article 2(e) of the MLCBI and means: "a judicial or other authority competent to control or supervise a foreign proceeding".
2. The Guide to Enactment notes: "87) A foreign proceeding that meets the requisites of article 2, subparagraph (a), should receive the same treatment irrespective of whether it has been commenced and supervised by a judicial body or an administrative body. Therefore, in order to obviate the need to refer to a foreign non-judicial authority whenever reference is made to a foreign court, the definition of "foreign court" in subparagraph (e) includes also non-judicial authorities."
3. In *Re Sanko Steamship Co Ltd* [2015] EWHC 1031 (Ch) Simon Barker QC, noted that a foreign proceeding may be recognised where the control or supervision of the proceeding is undertaken by a non-judicial administrative body.
4. The Guide to Enactment states: "74) The Model Law specifies neither the level of control or supervision required to satisfy this aspect of the definition nor the time at which that control or supervision should arise. Although it is intended that the control or supervision required under subparagraph (a) should be formal in nature, it may be potential rather than actual. As noted in paragraph 71, a proceeding in which the debtor retains some measure of control over its assets, albeit under court supervision, such as a debtor-in-possession would satisfy this requirement. Control or supervision may be exercised not only directly by the court but also by an insolvency representative where, for example, the insolvency representative is subject to control or supervision by the court. Mere supervision of an insolvency representative by a licensing authority would not be sufficient."
5. In this case the DGF has control of all of the Bank's assets and overall control of the liquidation.
6. The DGF's independence is addressed at articles 3(3) and 3(7) of the DGF Law which confirm that it is an economically independent institution with separate balance sheet

and accounts from the NB and that neither public authorities nor the NB have any right to interfere in the exercise of its functions and powers.

7. Article 37 establishes that the DGF (or its authorised person, insofar as such powers are delegated) has extensive powers, including powers to exercise managerial and supervisory powers, to enter into contracts, to restrict or terminate the bank's transactions, and to file property and non-property claims with a court.
8. The assets and affairs of the Bank are subject to the control of the DGF, an official body which exercises its powers in the liquidation free from intervention by government or the NB and which should be considered, for the purposes of the definition set out in article 2(e) of the MLCBI, as a "foreign court".

Article 2(e) of MLCBI states the following:

"Foreign court means a judicial or other authority competent to control or supervise a foreign proceeding"

The wider interpretation of the term Foreign Court may be considered as this point and the United States District Court in upholding the decision of US Bankruptcy Court in the matter of *In re Ashapura Minechem Ltd.* (480 B.R. 129 (S.D.N.Y. 2012), CLOUT 1313) held that India's Board for Industrial and Financial Reconstruction (BIFR) established under India's Sick Industrial Companies Act of 1985 (SICA) could be considered as a court under Article 2(e) of the MLCBI citing that *"it was an administrative board exercising powers similar to a court, and that it held sufficient control over the debtor's assets and affairs because it could divest the insolvency representative and the debtor's board of directors of their control."*

A similar analogy may be drawn here and DGF could be considered as the foreign court and thus the liquidation proceeding under LBBA initiated against the Bank is a foreign proceeding under Article 2(a) of the MLCBI and also under CBIR.

Foreign Representative:

Person or Body: as per Black's Law Dictionary, a Body means *"an artificial person created by a legal authority"*. DGF is an artificial person created by the DGF Laws and thus is a body authorised under LBBA and DGF Laws to act as liquidation professional and administer the management of the Bank under liquidation.

Appointment and authorisation: The DGF is authorised under the LBBA and DGF to conduct the liquidation of the Bank and upon cancellation of license by National Bank, automatically, DGF shall be authorised to conduct the liquidation by operation of law.

Purpose: the purpose of the authorising the DGF as a representative is to conduct the reorganisation or liquidation of the Bank's asset or take over the management of the Bank.

Hence, the DGF is eligible to be a foreign representative if the liquidation proceeding initiated against the Bank at Country A is considered as a foreign proceeding.

Ms. G is also eligible to be considered as a foreign representative, and she has authorised by the Executive Board of DGF through a valid Board Resolution which is as per possible as per the DGF Laws.

Thus, to conclude, it is decided that the liquidation proceeding under LBBA initiated against the Bank at Country A is a foreign proceeding and hence the application filed herein can be

considered. It is hereby decided that recognition can be granted by this court under CBIR to liquidation proceeding under LBBA initiated against the Bank at Country A.

Moreover, since the registration of the Bank is at Country A unless there is anything to be proven otherwise, the presumption is that the liquidation proceeding initiated against the Bank under LBBA is a foreign main proceeding under the CBIR.

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

*** End of Assessment ***