



SUMMATIVE (FORMAL) ASSESSMENT: MODULE 2A

THE UNCITRAL MODEL LAWS RELATING TO INSOLVENCY

Commented [BB1]: TOTAL = 36.5 MARKS

73%

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

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

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

## INSTRUCTIONS FOR COMPLETION AND SUBMISSION OF ASSESSMENT

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

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

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

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

**ANSWER ALL THE QUESTIONS**

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

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

Commented [SL2]: SUBTOTAL = 5 MARKS

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

Question 1.1

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

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

Question 1.2

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

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

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

Question 1.3

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

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

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

Question 1.4

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

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

Question 1.5

Commented [SL4]: Correct answer is (c).

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

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

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

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

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

Question 1.6

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

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

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

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

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

Question 1.7

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

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

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

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

(d) All of the above.

Question 1.8

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

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

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

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

(d) All of the above.

Question 1.9

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

**(a) Court proceedings.**

(b) Arbitral Tribunals.

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

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

Question 1.10

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

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

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

Commented [SL5]: Correct answer is (d).

Commented [SL6]: Correct answer is (c).

Commented [SL7]: Correct answer is (a).

(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 the commencement of the foreign proceedings. If the COMI of a debtor changes close in time to the commencement of the foreign proceedings, it may be challenging to establish the change in COMI as it should be readily ascertainable by third parties, such as creditors of the debtor.*

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. This contains the requirements that foreign creditors be individually notified of the commencement of the local proceedings regarding the debtor under the insolvency law of the enacting state, the time limit to file claims in the proceedings, and any address on conflict with treaty obligations of the enacted stated and clarification on what the creditor needs to do, without need for formality.*

*Statement 2: Article 10. The 'Safe Conduct Rule' ensures that the court in the enacting state does not assume jurisdiction over all the assets of the debtor for the only reason that the foreign representative has made an application for the recognition of a foreign proceeding.*

*Statement 3: Article 16(3). It provides that the debtor's registered office or habitual residence is presumed to be the debtor's centre of main interest (or "COMI"), which is a key concept undefined in the Model Laws.*

Commented [SL8]: SUBTOTAL = 7.5 MARKS

Commented [SL9]: 1.5 marks

1. 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. [see also pages 28/29 of the Guidance Text]
2. However, US courts may take a slightly different approach based on the *Morning Mist Holdings Ltd v. Krys (Matter of Fairfield Sentry Ltd)* (2nd Cir Appeals April 16, 2013) (which was recently followed in the UK in *Re Toisa Limited* – see footnote 94 on page 28 of the Guidance Text). The US court will most likely consider the date of the recognition application pursuant to the US Chapter 15 as the appropriate date for determining the COMI or the existence of an establishment.

Commented [SL10]: 3 marks



**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.***

*On appeal, IBA argued that there should be an indefinite stay of English proceedings to prevent certain creditors from enforcing their claims in English law against it notwithstanding its restructuring plan in Azeri. The Court of Appeal refused this, holding that the permanent stay was not necessary to protect the interests of IBA's creditors for the grant of appropriate relief (the requirement under the Cross-Border Insolvency Regulations 2006 (the "CBIR 2006"), which implemented the UNCITRAL Model Law on Cross-Border Insolvency (the "MLCBI") in the UK). Further, the Court held that the scope of the MLCBI was limited to procedural aspects of cross-border insolvency cases - there was nothing in the CBIR 2006 to suggest that the procedural power to grant a stay could be used to extinguish the substantive rights guaranteed by *Antony Gibbs & Sons v La Société Industrielle et Commerciale des Métaux (1890) LR 25 QBD 399*. The principle of universalism could not be used to justify the disregard of English law to assist a foreign insolvency process (*Rubin v Eurofinance SA [2012] UKSC 46*). Finally, the Court observed that it would be inconsistent with the MLCBI's procedural and supporting role for a stay granted under the CBIR 2006 to outlast the foreign proceedings to which the stay related.*

**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.***

*The court in an enacting state should consider reliefs under Article 29(a) after recognition of a foreign main proceeding (where a domestic proceeding has already been opened in respect of the debtor). This features two limbs: (i) any relief granted under Articles 19 or 21 must be consistent with the domestic proceeding; and (ii) Article 20 does not apply (since the proceeding is a foreign main proceeding).*

*The ongoing duty of information for the foreign representative in a foreign main proceeding owed to the court of the enacting state is in Article 18. The foreign representative must inform the court promptly of any substantial change in the status of the recognised foreign proceeding or the status of the foreign representative's*

**Commented [SL11]:** 1 mark

- In respect of each issue, the English Court of Appeal held that:
1. The UK court would need to be convinced that (a) the indefinite stay is necessary to protect the interests of IBA's creditors and (b) an indefinite stay is the appropriate way of achieving such protection.
  2. Based on Article 18 of the MLCBI, the English Court of Appeal in the IBA case appeal held that had the MLCBI ever contemplated the continuance of relief after the end of the relevant foreign proceeding, it would have addressed the question explicitly and provided appropriate machinery for that purpose.

**Commented [SL12]:** 2 marks

*appointment and any other foreign proceedings regarding the same debtor that becomes known to the foreign representative.*

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

Commented [BB13]: SUB TOTAL = 10 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.***

*The provisions on access and cooperation codified in Chapter II and IV of the UNCITRAL Model Law on Cross-Border Insolvency (the "MLCBI") grants the foreign representative access to the courts of State A (i.e. standing and rights) and facilitates communication between the courts of State A with State B and the foreign representative himself.*

#### Access

*Article 9 entitles a foreign representative to file a direct application to a court in State A. This confers standing on the representative without any prior recognition of the foreign proceedings in State B [1]. Article 11 allows a foreign representative to commence a proceeding where the conditions for commencing such a proceeding is met, without any prior recognition of foreign proceedings. [1] More importantly, pursuant to Article 10, the 'safe conduct' rule ensures that the courts in State A do not assume jurisdiction over all assets of the debtor on the sole basis that the foreign representative has made an application for recognition - thereby confining the scope of the court's jurisdiction to the application. Upon recognition of the foreign proceedings in State B, the foreign representative may participate in a proceeding regarding the debtor under the laws of State A per Article 12. Article 13 contains the anti-discrimination principle, under which the foreign creditors in State B hold the same rights as domestic creditors in the State A regarding the commencement of and participation in local proceedings involving the debtor under the insolvency laws of State A.*

#### Cooperation

Further, under Article 25, the courts of State A are to cooperate to maximum extent and may communicate directly with the foreign representative. The judicial/scheme manager or liquidator may similarly communicate directly with the foreign representative and extend full cooperation with the foreign representative pursuant to Article 26. Article 27 defines and provides the various forms of cooperation, but this is a non-exhaustive list. [1]

**For full marks you should include a discussion on the key benefits of both the access provisions and the cooperation provisions and that they save time and therefore also costs, as a result of which value destruction can be avoided and value enhancement is being promoted.**

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

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

First, the requirements under Article 15(2) must be satisfied before a foreign proceeding may be recognised (Article 17(1)(c)). The application for recognition shall be accompanied by evidence of the existence of the foreign proceedings and the appointment of the foreign representative - under Article 15(2), there are three ways to satisfy the evidential requirement: (a) certified copy of the decision commencing the foreign proceeding and appointing the foreign representative; (b) a certificate from the foreign court affirming the existence of the foreign proceeding and of the appointment of the foreign representative; or (c) in the absence of evidence referred to in (a) and (b), any other evidence acceptable to the court of the existence of the foreign proceeding and of the appointment of the foreign representative. [1] An application for recognition shall also be accompanied by a statement identifying all foreign proceedings in respect of the debtor that are known to the foreign representative (Article 15(3)). If the decision or certificate in Article 15(2) indicates that the foreign proceeding and the foreign representative fulfil the definitions in Article 2, the court is entitled to presume the same (Article 16(1)). Pursuant to Article 16(2), the court is entitled to presume that documents submitted in support of the application for recognition are authentic, whether or not they have been legalised. Article 16(3) provides that the COMI is presumed as the debtor’s registered office or habitual residence in absence of proof.

Second, it is necessary to consider evidence regarding the nature of the debtors’ business to define its centre of main interests is to determine whether it is a foreign

main proceeding, or if it has an establishment which would buttress its classification as a foreign non-main proceeding (Article 17(2)). [1] The distinction must be made because of the different consequences flowing from recognition of the two types of proceeding (see *Loy* 380 B.R. 154, 162 (Bankr. E.D.Va. 2007), CLOUT 924; *Batty (as trustee in bankruptcy of Reeves) v Reeves* [2015] NZHC 908, CLOUT 1801; *Leeds v Richards* [2016] NZHC 2314, CLOUT 1800).

Third, Article 6 provides that recognition should not be granted where it would be contrary to the public policy of State A. [1] Yet Courts have indicated that the parties objecting to an action to be taken should identify the fundamental policies that would allegedly be violated by the action (see *lida v Kitahara (In re lida)* 377 B.R. 243, 259 (B.A.P. 9th Cir. 2007), CLOUT 761). Owing to the qualification of “manifestly”, the threshold to meet before a public policy exception is successfully relied on is high, and three principles have been identified to guide courts in analysing whether an action taken in a recognition proceeding is manifestly contrary to the public policy of State A: (a) the mere fact of a conflict between foreign law and local law is alone insufficient to support the successful invocation of the public policy exception; (b) where the procedural fairness of the foreign proceeding is in doubt or cannot be cured by the adoption of additional protections, there should be no deference to a foreign proceeding in a recognition proceeding; and (c) an action should not be taken in a recognition proceeding where taking that action would frustrate the ability of the courts to administer the recognition proceeding and/or cause it to abrogate from a local constitutional or statutory right.

Finally, although there is no provision in the MLCITB which pertains to the abuse of process - there is similarly no provision preventing the courts of State A from applying domestic law pertaining to an abuse of process. Such a situation may include corruption in the foreign proceeding, the breach of the continuing obligation to keep the court apprised of matters in Article 18, or where false representations are made regarding the centre of main interest.

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

- 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] [3 out of 5 marks]

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

For pre-recognition relief, Article 19 contains the various interim reliefs that may be granted upon the foreign representative's application for recognition of a foreign proceeding. These reliefs include: (a) staying execution against the debtor's assets (Article 19(1)(a)); (b) entrusting the administration or realisation of all or part of the debtor's assets located in State A to the foreign representative or another person designated by the court so as to protect the value of assets that are perishable, susceptible to devaluation or otherwise in jeopardy (Article 19(1)(b)); and (c) relief under Art 21(c), (d) and (g) (*ie*, the suspension of the right to transfer, encumber or dispose of any assets of the debtor, or for the examination of witnesses) (Article 19(1)(c)). The list of reliefs in Article 19 is non-exhaustive (*Williams v Simpson (No. 1)* [2011] NZHC 1631). Such pre-recognition relief can only be granted where it is shown that it is "urgently needed" to protect the assets of the debtor or the interests of creditors when concern exists that the assets may perish, be susceptible to devaluation or otherwise in jeopardy in the period before the hearing of the recognition application (see *Chow Cho Poon (Private Limited)* [2011] NSWSC 300 [para. 64], CLOUT 1218; *Yu v STX Pan Ocean Co Ltd (South Korea)* [2013] FCA 680 [para. 17], CLOUT 1333). Ultimately, the relief is provisional and it terminates upon recognition unless extended under Article 21(f) (Article 19(3)). Finally, the court may refuse to grant relief if it interferes with a foreign main proceeding (Article 19(4)).

For post-recognition relief, there are reliefs which are automatic following the recognition of foreign main proceedings and those which are available on application after the recognition of foreign non-main and main proceedings. The recognition of foreign main proceedings automatically confers a stay against: (a) the commencement or continuation of individual actions or proceedings concerning the debtor's assets, rights, obligations and liabilities; (b) the execution against the debtor's assets; and (c) the right to transfer, encumber or dispose of any assets of the debtor (Article 20(1)). This automatic moratorium may be subject to any provisions in domestic law relating to insolvency law (Article 20(2)). Further, this is subject to the caveat that the right to commence individual actions to the extent necessary to preserve a debtor's claim (Article 20(3)) and the right to request the commencement of a proceeding or file claims under domestic insolvency law (Article 20(4)) are not affected by the automatic stay. Turning to reliefs which are available to both foreign main and non-main proceedings on application of the foreign representative after recognition, the representative may seek reliefs including those listed under Article 21(10)(a) to (g) that will be considered and granted based on the exercise of the court's discretion. The court may, on the request of the foreign representative, also entrust the distribution of all or part of the debtor's assets located in the state to the foreign representative or another appointed person provided that it is satisfied that the interests of the creditors in the state are adequately protected (Article 21(2)).

*As a final point, the court has an overarching assessment to make on whether the interests of the creditor and other interested persons such as the debtor are adequately protected, and may grant subject the reliefs granted under Articles 19 and 21 to conditions and/or modify the reliefs to ensure adequate protection (Article 22).*

**Your answer should have also included a brief discussion on the following:**

- 1. Existing international obligations of State A:** Based on Article 3 of the Model Law, the court in State A should again verify that there are no existing international obligations of State A (under a treaty or otherwise) that may conflict with granting the requested relief under the implemented Model Law in State A.
- 2. Public policy exception:** The court in State A should, based on Article 6 of the Model Law, also again verify that the relief application is not manifestly contrary to public policy of State A.

Question 3.4 [maximum 1 mark] [1 mark]

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

*A pre-recognition interim relief ex article 19 MLCBI is not likely to continue post recognition ex article 21 MLCBI because the need to protect the status quo in the interim, or prior to the recognition order, is extinguished and the court's decision on recognition replaces that status quo. In *Igor Vitalievich Protasov v Khadzhi-Murat Derev* [2021] EWHC 392 (Ch), the English High Court refused the application seeking to extend the injunction granted pursuant to Article 19 as the recognition order was made. It held that the interim injunction was extinguished and replaced by the permanent suspension of the bankrupt's rights pursuant to Article 20(1) of the MLCBI.*

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

Commented [BB14]: 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.**

Question 4.1.1

**On the issue of whether the Bank's liquidation comprises a foreign proceeding within the meaning of Article 2(a) of the MLCBI, the following sub-issues are relevant to determining whether the bank's liquidation comprises a "foreign proceeding":**

- (1) Whether the bank's liquidation is a "proceeding";**
- (2) Whether the proceeding is "judicial or administrative";**
- (3) Whether it is "collective" in nature;**

- (4) Whether it is in a “foreign state”;
- (5) Whether the proceeding is one authorised or conducted under a law relating to insolvency;
- (6) Whether the proceeding is one where the assets of the debtor are subject to the control or supervision by a foreign court; and
- (7) Whether the proceeding is for the purpose of reorganisation or liquidation.

The court approaches the review of the sub-issues in a holistic manner (see *Stanford International Bank Limited* [2010] EWCA Civ 137).

First, as the MLCBI’s Guide to Enactment and Interpretation has made it plain that “proceeding” generally refers to “proceedings involving debtors that are in severe financial distress or insolvent”. The proceeding involving the Bank which is in serious financial difficulty thus falls within this definition. To bring the proceeding against the Bank pursuant to Art 34 of the DGF Law, the Bank was classified as “insolvent” as a pre-requisite under Art 76 of the LBBA.

Second, whether the proceeding was “judicial or administrative” pursuant to an insolvency law in which “the assets and affairs of the debtor are subject to control by a foreign court”. However, the definition of “foreign court” could include non-judicial authorities such as the DGF since a foreign proceeding can be recognised where the control or supervision is undertaken by a non-judicial administrative body (*Re Sanko Steamship Co Ltd* [2015] EWHC 1031 (Ch)). In this case, the applicants Ms G (a representative of DGF) and DGF had control of all of the assets and the liquidation. Its role was to perform special functions including the withdrawal of insolvent banks and the liquidation of these banks. The Bank’s liquidation was therefore “administrative” because it was subject to the DGF’s control, being an official body independent from the government and public authorities which had no right to interfere in the exercise of its functions and therefore should be considered a “foreign court”.

Third, the requirement of “collective” insolvency proceedings is based on achieving a coordinated and global solution to all stakeholders within the insolvency proceedings, rather than as being descriptive of the method of collecting sums for a particular group of creditors (see MLCBI’s Guide to Enactment and Interpretation). The main consideration is therefore whether all, or substantially all, assets and liabilities are dealt with in that proceeding. As the Bank’s liquidation was a collective process and the list of the creditors’ claims amounting to USD1.3bn was wide-ranging, this requirement is met.

Fourth, the proceeding commenced in Country A, which is a foreign state.

Fifth, the proceeding is conducted pursuant to laws relating to insolvency, *ie*, the LBBA Law and DGF Law. The LBBA Law deals with “insolvency or severe financial distress” and Articles 34, 35, 36 and 77 of the DGF Law relate to insolvency.

*Sixth, while there is no real illustration of the level of court supervision in the proceedings, this is a low burden (Re Ashapura Minechem Ltd 480 BR 129 (2012)) and it suffices that it is a potential form of control or supervision. Although the NB is involved in some level of oversight, this does not affect nor preclude the court's ability to oversee proceedings (see Re Agrokor DD and in the matter of the Cross-Border Insolvency Regulations 2006 [2017] EWHC 2791 (Ch)). Thus, this requirement is met.*

*Finally, there is no dispute that the proceeding commenced and are continuing with the purpose of liquidation.*

*Consequently, the Bank's liquidation comprises a foreign proceeding.*

Excellent response. For element 5 your response could have been improved by also referring to the following supportive guidance:

1. The Guide to Enactment provides at paragraph 48:

"Acknowledging that different jurisdictions might have different notions of what falls within the term "insolvency proceedings", the Model Law does not define the term "insolvency". However, as used in the Model Law, the word "insolvency" refers to various types of collective proceedings commenced with respect to debtors that are in severe financial distress or insolvent."

Further explanation is provided at paragraph 73:

"This formulation is used in the Model Law to acknowledge the fact that liquidation and reorganization might be conducted under law that is not labelled as insolvency law (e.g. company law), but which nevertheless deals with or addresses insolvency or severe financial distress. The purpose was to find a description that was sufficiently broad to encompass a range of insolvency rules irrespective of the type of statute or law in which they might be contained and irrespective of whether the law that contained the rules related exclusively to insolvency."

Question 4.1.2

*Moving to the question of whether the DGF or Ms G, its authorised officer for the PJSC liquidation, were "foreign representatives" in accordance with Article 2(d) of the MLCBI, the question should be answered in the affirmative. The DGF is empowered by Article 48(3) of the DGF Law to delegate its powers to an "authorised officer... or person". An "authorised officer... or person" is one who should possess "high professional and moral qualities, impeccable business reputation, complete higher education in the field of economics, finance or law...and professional experience necessary" pursuant to Article 35(1) of the DGF Law. Further, Ms G was appointed by a Decision of the Executive Board of the Directors of the DGF in Resolution 1513, which notes that she is a "leading bank liquidation professional". This includes the delegation of liquidation powers to her (in particular Articles 37, 38, 47-52, 521 and 53 of the DGF Law), save for certain excluded powers held by the DGF instead (for eg, power to claim damages from a related party of the Bank). Consequently, contingent on the nature and timing of the relief, either (or both) Ms G and DGF are foreign representatives within Article 2(d) of the MLCBI.*

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

\* End of Assessment \*