



**SUMMATIVE (FORMAL) ASSESSMENT: MODULE 2A**

**THE UNCITRAL MODEL LAWS RELATING TO INSOLVENCY**

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

Commented [DDB1]: 26/50 = 52%

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 [BB2]: Sub-Total = 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

Commented [BB3]: The correct answer is (c)

foreign non-main proceedings in Argentina will be recognised in the UK despite Argentina not having implemented the Model Law.

- (b) Both the foreign main proceedings in South Africa and the foreign non-main proceedings in Argentina will not be recognised in the UK because the UK has no principle of reciprocity and Argentina has not implemented the Model Law.
- (c) Both the foreign main proceedings in South Africa and the foreign non-main proceedings in Argentina will be recognised in the UK.
- (d) None of the statements in (a), (b) or (c) are correct.

#### Question 1.6

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

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

#### Question 1.7

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

- (a) The court must be satisfied that the interests of the creditors and other interested parties, excluding the debtor, are adequately protected.
- (b) The court should consider whether the relief requested is necessary for the protection of the assets of the debtor or the interests of the creditors and strike an appropriate balance between the relief that may be granted and the persons that may be affected.

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

(d) All of the above.

**Question 1.8**

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

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

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

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

(d) All of the above.

**Question 1.9**

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

(a) Court proceedings.

(b) Arbitral Tribunals.

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

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

**Question 1.10**

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

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

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

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

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

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

**Commented [BB4]:** Sub-total = 6 marks

**Question 2.1 [maximum 3 marks] [1]**

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 would be the date of commencement of the foreign proceeding. [1] This is set out in Article 16 of the Model Law, which provides that:

*"The determination of the centre of the debtor's main interests shall be made at the time the foreign proceeding was commenced, unless the centre of main interests has shifted to another State thereafter."*

This means that the COMI is determined at the time when the foreign insolvency proceeding is initiated, and this determination will be binding on all other courts and authorities involved in the insolvency proceedings.

However, it is also important to note that the Model Law recognizes that the COMI may shift to another jurisdiction after the insolvency proceeding has commenced. In such cases, the court or authority overseeing the proceedings may need to re-evaluate the COMI to determine whether the main proceeding should be shifted to another jurisdiction.]

**Suggested answer**

1. The MLCBI does not expressly indicate the relevant date for determining the COMI of the debtor. The same is true with respect to determining the existence of an establishment. However, the UNCITRAL Guide to Enactment suggests that the date of commencement of the foreign proceedings is the appropriate date for determining the existence of the COMI or an establishment of the debtor (see paragraph 143 of The Judicial Perspective).
2. The UNCITRAL Guide to Enactment explains (see paragraphs 159 and 160) that the date of commencement of the foreign proceeding is the appropriate date for determining the existence of the COMI of the debtor as well as an establishment of the debtor. 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]

3. However, US courts may take a slightly different approach based on the *Morning Mist Holdings Ltd v. Krys (Matter of Fairfield Sentry Ltd)* (2<sup>nd</sup> 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.

**Question 2.2 [maximum 3 marks] [2]**

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 UNCITRAL Model Law on Cross-Border Insolvency (1997) [1] sets out the requirements for notice to be given to creditors, other interested persons, and courts of the commencement of foreign proceedings. The notice must include information about the identity and contact details of the foreign representative, the date of commencement of the proceedings, and the time limit for filing claims. The notice must be given in a manner that is likely to bring it to the attention of the creditors, such as by mail or publication.

The purpose of the notice is to inform the creditors and other interested parties about the foreign proceedings and to allow them to file claims against the debtor's assets located in the foreign jurisdiction.

Statement 2: Article 10 of the UNCITRAL Model Law on Cross-Border Insolvency (1997) [1] provides a "safe conduct" rule that prevents a court in the enacting State from assuming jurisdiction over all of the debtor's assets solely because the foreign representative has made an application for recognition of a foreign proceeding. This provision was added to address concerns of foreign representatives and creditors who may be exposed to a broad jurisdictional scope triggered by an application under the Model Law. The "safe conduct" rule ensures that certain actions taken by foreign representatives and creditors in connection with the debtor's assets will not be subject to challenge or liability under the laws of the enacting State. The orders issued by some courts have reiterated the immunity provided by Article 10.



- Statement 3: Statement 3 refers to Article 31 of the Model Law on Cross-Border Insolvency. This provision establishes a rebuttable presumption that the debtor is insolvent for the purpose of initiating a domestic insolvency proceeding in the enacting state, based on the recognition of a foreign main proceeding. However, the concept of insolvency itself is not explicitly defined in the Model Law, and therefore can be considered an "undefined key concept" in this context.]
- **Correct answer: Article 16(3) MLCBI (key concept is COMI and this provision contains a rebuttable presumption that the registered office or habitual residence of the debtor is also its COMI).**

### Question 2.3 [2 marks] [2]

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.**

[In the *IBA* case appeal, the English Court of Appeal decided that the court should not exercise its power to grant the indefinite Moratorium Continuation requested by the foreign representative. The court focused on the jurisdictional question raised in the case, which was in what sense it may be said that the English court lacked jurisdiction to grant the indefinite Moratorium Continuation. The Court of Appeal concluded that the case did not involve an issue of jurisdiction in the strict sense, but instead, the real issue was whether the court should exercise its power to grant the indefinite Moratorium Continuation where doing so would prevent English creditors from enforcing their rights or prolong the stay after the foreign reconstruction has come to an end.

The Court of Appeal considered both factors and found that an English court could only properly grant the indefinite Moratorium Continuation if it satisfied two conditions: first, the stay would have to be necessary to protect the interests of *IBA*'s creditors, and secondly, the stay would have to be an appropriate way of achieving such protection. The Court of Appeal held that neither of these conditions had been satisfied based on the evidence presented to the court.

The court further found it relevant that *IBA* could have promoted a parallel scheme of arrangement in the UK, but chose not to do so. The Court of Appeal noted the existence of a new "Restructuring Plan" in the UK that also provides for a "cross-class cram-down" feature, which may have been an attractive option for *IBA*. The court also held that if the power to grant a stay under article 21 of the Model Law had been intended to override the substantive rights of creditors under the proper law governing their debts, one would expect this to have been made explicit or at least discussed at the preparatory stage.

Regarding the information obligation on the foreign representative contained in article 18 of the Model Law, the Court of Appeal considered that it requires the foreign proceeding to still be in existence and the foreign representative to still be in office. Once the foreign proceeding has come to an end and the foreign representative no longer holds office, the court held that there is no scope for further orders in support of the foreign proceeding to be made, and any relief previously granted under the Model Law should terminate.]

**Question 2.4 [2 marks] [1]**

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**.

[Regarding relief, the court in an enacting State, where a domestic proceeding has already been opened in respect of the debtor, should grant any additional relief that may be available under the domestic law of the enacting State upon recognition of a foreign main proceeding. These will be studied from the request from the foreign representative. This is in accordance with Article 21 of the MLCBI, which provides that upon recognition of a foreign main proceeding, the court of the enacting State must grant relief that is available under its domestic law to the extent it does not conflict with the foreign proceeding.]

Furthermore, the foreign representative in the foreign main proceeding has an ongoing duty of information towards the court in the enacting State. This is set out in Article 25 of the MLCBI, which requires the foreign representative to provide the court and any other interested persons with information concerning the foreign proceeding and its progress. The foreign representative must also notify the court of any significant developments in the foreign proceeding that may affect the rights and interests of creditors or other interested parties in the enacting State.]

**Suggested answer:**

- Article 29(a) MLCBI (“(i) any relief granted under article 19 or 21 must be consistent with the domestic proceeding in the enacting State and (ii) if the foreign proceeding is recognised in the enacting State as a foreign main proceeding, article 20 does not apply”)
- Article 18 MLCBI (Subsequent Information) - The foreign representative has an ongoing information duty towards the court in the enacting State about (a) substantial changes to the status of the recognized foreign proceeding or the status of the foreign representative’s appointment and (ii) any other foreign proceeding regarding the same debtor that becomes known to the foreign representative.

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

Commented [BB5]: Sub-total = 7

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] [2]**

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.

[When a foreign representative of a corporate debtor is considering making a recognition application under the Model Law of State A, it is important to understand the potential benefits of doing so. One significant benefit is the access and co-operation rights granted to the foreign representative by State A. [1]

Under Article 21 of the Model Law on Cross-Border Insolvency (MLCBI), a foreign representative has the right to apply to the court in State A for appropriate relief. This may include requesting the court to grant an injunction or any other appropriate relief to preserve the value of the debtor's assets in State A. Furthermore, the foreign representative has the right to access information that may be relevant to the foreign proceeding.

Additionally, articles 25, 26 and 27 clearly states the importance of cooperation between the different parties involved that ensure the correct application of the given relief. [1]

Overall, by making a recognition application under the Model Law in State A, the foreign representative of the corporate debtor can benefit from the access and co-operation rights granted by the Model Law. These rights can assist the foreign representative in securing the value of the debtor's assets located in State A, as well as in obtaining relevant information and evidence to support the foreign proceeding.]

**Suggested answer:**

- **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 automatically 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]

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.

[To successfully obtain recognition of a foreign proceeding opened in State B in State A under the Model Law, the foreign proceeding must meet the requirements of Article 2(a) and the foreign representative must meet the requirements of Article 2(d) of the MLCBI. Additionally, the Model Law imposes certain restrictions and limitations, such as the Article 17 of the MLCBI, which sets out the grounds for refusing recognition of a foreign proceeding, [1] and the ability of the court to refuse recognition if it is against the public policy of the State (Article 6). The Model Law also requires the foreign representative to provide evidence of the foreign proceeding, such as an authenticated copy of the decision opening the proceeding and evidence of the appointment of the foreign representative (Article 15). [1] Judicial scrutiny will be required to ensure that the foreign proceeding meets the requirements of the Model Law and that the relief sought is appropriate.]

Suggested answer:

1. Exclusions: If the debtor is an entity that is subject to a special insolvency regime in State B, the foreign representative should first of all 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. Sufficient evidence: Article 15 of the Model Law sets forth in paragraph 2 what evidence in respect of the commencement of the foreign proceedings and the appointment of the foreign representative must accompany the recognition application. A statement identifying all foreign proceedings in respect of the debtor that are known to the foreign representative must also accompany the recognition application (Article 15(3) of the Model Law).
4. 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.
5. Public policy exception: Finally, the court in State A should also ensure based on Article 6 of the Model Law that the recognition application is not manifestly contrary to public policy of State A.

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

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.

[As far as relief is concerned under the Model Law, pre-recognition relief can be granted in exceptional circumstances under Article 19, provided that such relief is urgently needed to protect the assets of the debtor or the interests of the creditors. [1] However, such relief must be provisional in nature and subject to modification or termination upon recognition.

Post-recognition relief can be granted if certain conditions are met. While Article 21 grants the court discretionary power to provide post-recognition relief, Article 20

mandates automatic relief if the foreign proceeding qualifies as a foreign main proceeding [1]. The court must ensure that the interests of the debtor's creditors and other interested parties are adequately protected before granting or denying relief under Article 19 (interim pre-recognition relief) or Article 21. The court is given the power to impose appropriate conditions for the relief granted (Article 22, paragraph 2) and can modify or terminate the relief at the request of the foreign representative or an affected person (Article 22, paragraph 3)]

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

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

#### **Question 3.4 [maximum 1 mark] [1]**

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

[A worldwide freezing order granted as pre-recognition interim relief under Article 19 of the MLCBI is unlikely to continue post-recognition under Article 21 of the MLCBI as it was previously stated in English case between Igor Vitalievich Protasov and Khadzhi-Murat Derev. If given the worldwide freezing, such decision would affect principle of comity. Comity refers to the practice of respecting the laws and judicial decisions of other countries, and it is an important consideration in international insolvency proceedings.

In the cited case, the court held that while it had the jurisdiction to grant post-recognition discretionary relief, restrictions and limitations existed which inhibited the proper exercise of that jurisdiction. The court stated that the purpose of the Model Law was to put the foreign trustee or bankruptcy manager in the same position as an officeholder appointed under domestic law, and the effect of recognition of a foreign main proceeding is to bring into play the same infrastructure of the insolvency legislation. It also stated that the English bankruptcy regime offers other

forms of protection. The court found that absent exceptional reasons, a freezing order or similar order would not be required or justified, and in that particular case, no special or exceptional reasons existed to warrant the granting of a freezing order.]

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

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**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]**

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
- 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].

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

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

[4.1.1. As the judge in the English court considering the recognition application of the liquidation of the Bank, I must determine whether the Bank's liquidation constitutes a "foreign proceeding" under Article 2(a) of the Model Law on Cross-Border Insolvency (MLCBI), which is incorporated into English law through the Cross-Border Insolvency Regulations 2006 (CBIR). (1) Article 2(a) of the MLCBI defines a "foreign proceeding" as "a judicial or administrative proceeding in a foreign State, including an interim proceeding, pursuant to a law relating to insolvency in which proceedings are commenced with respect to any debtor concerning the financial affairs, assets, liabilities, or affairs of the debtor." Based on the information provided, it's clear that the liquidation of the Bank is being carried out in Country A, which is a foreign state to England. Furthermore, it is clear that the liquidation proceedings relate to the financial affairs, assets, and liabilities of the Bank. Therefore, it is likely that the Bank's liquidation constitutes a "foreign proceeding" within the meaning of Article 2(a) of the MLCBI. (1)

Although the Country has not adopted the MLCBI, it's not necessary reciprocity taking into account that England has adopted the model law.

4.1.2. Article 2(d) of the MLCBI defines "foreign representatives" as a person or body authorized in a foreign proceeding to administer the reorganization or liquidation of the debtor's assets or affairs or to act as a representative of such a person. (1)

Upon the question, Ms G, in her capacity as an authorized officer of the Deposit Guarantee Fund (DGF) of Country A, applied for recognition of the liquidation of the Commercial Bank for Business Corporation (the Bank) before the English court based on the Cross-Border Insolvency Regulations 2006 (CBIR). (1) Therefore, it can be argued that Ms G and the DGF fall within the description of "foreign representatives" as defined by article 2(d) of the MLCBI, since they were authorized in a foreign proceeding to administer the liquidation of the Bank's assets or affairs, and are acting as representatives of such persons.] (1)

**\* End of Assessment \***