



**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]: 35 out of 50 = 70%. Well done!

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 = 10 marks

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

#### Question 1.1

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

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

#### Question 1.2

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

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

(d) All of the above.

### Question 1.3

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

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

### Question 1.4

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

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

### Question 1.5

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

- (a) The foreign main proceedings in South Africa will not be recognised in the UK because the UK is not a designated country under South Africa's principle of reciprocity, but the

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

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

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

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

#### Question 1.6

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

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

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

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

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

#### Question 1.7

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

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

(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 [BB3]: Sub-total = 7 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?

Although the COMI is essential for the recognition of a foreign proceeding, the COMI is not specifically defined in the Model Law. In many respects, the application of the COMI is made according to the standard as established in the EIR. Thus, the definition is also based on that of the EIR. With regard to the point in time for the determination of the COMI, the MLCBI focuses on the point in time of the initiation of the proceedings abroad. [1] This concrete determination of a point in time secures the implementation of the recognition procedure insofar as it counteracts the difficulties that arise if the debtor's COMI should shift shortly before the commencement of the foreign proceedings.

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] [3]**

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."*

Regarding statement 1:

Foreign creditors have a right to individual notification of, inter alia, the opening of local insolvency proceedings taking place abroad as well as the deadline for filing claims. This is regulated in Article 14. [1] The principle of equal treatment is also derived from this.

Regarding statement 2:

The Safe Conduct Rule ensures that the mere request of a foreign representative for recognition of insolvency proceedings does not result in that representative or the assets concerned, as well as the proceedings, being subject to the jurisdiction of the state in which the request is made. This is a limitation of jurisdiction governed by Article 10. [1]

Regarding statement 3

While the COMI is a key term for working with the MLCBI, it is not defined in the Model Law. However, the rebuttable presumption on which COMI is based is mentioned in Art. 16(3), [1] according to which, in the absence of evidence to the contrary, the debtor's domicile or, in the case of natural persons, habitual residence is deemed to be the centre of the debtor's main interests.

**Question 2.3 [2 marks] [1]**

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

According to the judge in charge of the case, Mr Justice Hildyard, a further stay by extending the current moratorium cannot be used as a means of circumventing the Gibbs



rule. The Gibbs rule that a claim governed by English law cannot be affected by foreign insolvency proceedings has, in practice, limited effect in a foreign liquidation. Even though the IBA case was a restructuring, precedent suggests that the strict definition of legal claims and their enforcement are also distinguished in this case. Mr Hildyard found that in the IBA case the remedy sought, while procedural, was in fact designed to have a substantive effect, namely to permanently prevent the application of English law. The Model Law and the CBIR would not authorise the substantive English law granted to be limited by procedural applications.

#### Suggested answer

- According to the English Court of Appeal, the real issue was whether as a matter of settled practice the UK court should not exercise its power to grant the indefinite moratorium where to do so would (i) in substance prevent the English creditors (that is the Challenging Creditors) from enforcing their English law rights in accordance with the Gibbs Rule ("Issue 1") and / or (ii) prolong the stay after the Azeri reconstruction has come to an end ("Issue 2").
- In respect of each issue, the English Court of Appeal held that:
  1. Issue 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. The factual evidence that can be brought before the court will ultimately decide Issue 1.
  2. Issue 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.

#### Question 2.4 [2 marks] [2]

In terms of relief, what should the court in an enacting State, where a domestic proceeding has already been opened in respect of the debtor, do after recognition of a foreign main proceeding? In your answer you should **mention the most relevant article of the MLCBI**. What (ongoing) duty of information does the foreign representative in the foreign main proceeding have towards the court in the enacting State? Here too you are required to **mention the most relevant article of the MLCBI**.

In principle, according to Art. 29 of the Model Law, in the event of competition between domestic and foreign insolvency proceedings, the domestic proceedings shall have priority. The case where the domestic insolvency proceedings have already been opened and subsequently foreign proceedings are recognised is governed by Art. 29 lit. a) of the Model Law. Here, any remedy granted either provisionally on the basis of Article 19 of the Model Law or after recognition on the basis of Article 21 of the Model Law must be compatible with the domestic insolvency proceedings. In addition, when granting relief to a foreign representative of a foreign non-main proceeding, the court must be satisfied (Article 29(c) of the Model Law) that the relief relates to assets that should be administered

in the foreign non-main proceeding under the law of the issuing state or that the relief relates to information that is required in the foreign non-main proceeding.

With regard to the ongoing information obligations of the representative of foreign main proceedings vis-à-vis the court of the recognising state, Article 18 lit. a) of the Model Law requires the representative to inform the court without delay of any material change in the status of the recognised foreign proceedings or the appointment of the foreign representative. In addition, under Article 18 lit. b) of the Model Law, the court must be informed without delay of any other foreign proceedings concerning the same debtor of which the representative is aware.

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

Commented [BB4]: Sub-total = 7 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] [0]**

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 cooperation, explain how these rights in State A can benefit the foreign representative.

Since the debtor is a corporate debtor, it must be taken into account where this debtor has its corporate seat. According to the facts of the case, it can be assumed that the debtor is domiciled in state B, so that the COMI is also to be assigned to state B and consequently the main insolvency proceedings are conducted there. This determination has an impact on, among other things, the legal protection granted to the foreign representative under Articles 20, 21 of the Model Law.

The fact that it is a main insolvency proceeding that is to be recognised in State A provides significant protection for the assets located in State A.

Firstly, according to Article 20 of the Model Law in favour of the foreign main proceedings, the moratorium automatically comes into effect. Consequently, the representative of the proceedings does not have to actively bring about the moratorium. Article 20(2) of the Model Law also provides, inter alia, for the possibility of including appropriate protection clauses in the law of the State of enforcement to give the court of the State of enforcement the power to modify or terminate the automatic stay or termination if this is in the legitimate interest of an affected party. Otherwise, under Article 21 of the Model Law, it would be at the discretion of the court of the recognising state whether to grant relief on the application of the representative. To the extent that certain measures are not already covered by Article

20 of the Model Law, the representative may also apply for a stay of enforcement measures under Article 21(1)(a) of the Model Law in this case.

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] [3]

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.

If the jurisdictional requirements of Article 2(a) of the Model Law are met, the evidentiary requirements for recognition are governed by Article 15 of the Model Law. If, in turn, these

requirements are met, recognition of the foreign insolvency proceedings may be granted in accordance with Article 17 of the Model Law. [1]

Pursuant to Article 15(2)(a) to (c) of the Model Law, the application must be accompanied by (a) a certified copy of the decision opening insolvency proceedings abroad and of the appointment of the foreign representative or (b) a certificate of the foreign court confirming the insolvency proceedings and the appointment of the foreign representative or (c) in case of doubt, any other proof of the existence of the foreign proceedings and the appointment of the foreign representative. [1]

Pursuant to Article 15(3) of the Model Law, the application must also be accompanied by a statement listing all foreign proceedings in relation to the debtor of which the foreign representative is aware.

Finally, it should be borne in mind that under Article 15(4) of the Model Law the court may also require a translation of these documents to be submitted into the language of the recognising state.

With regard to the documents provided under Article 15(2) of the Model Law, the Court shall presume them to be authentic under Article 16(2) of the Model Law.

The recognition of the procedure is then further governed by Article 17 of the Model Law. If there are no grounds of public policy in the recognising state that speak against recognition, recognition is granted ex officio if the aforementioned requirements are met. [1]

Your answer should also include a discussion on the following:

1. 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.
2. 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.
3. 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] [3]**

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.

The court of the recognising state may first grant interim relief on the basis of Article 19 of the Model Law already before the decision on the application for recognition. This is typically done if the protection of the debtor's assets or interests of the creditors is urgently required. [1]

As explained above, the recognition of the foreign main insolvency proceedings already triggers the moratorium under Article 20 of the Model Law, which otherwise must be applied for under Article 21 of the Model Law to the competent court with discretionary jurisdiction. [1] To the extent that required relief is not covered by Article 20 of the Model Law, further relief may also be sought in this case under Article 21 of the Model Law.

The "appropriate" legal protection is not granted indefinitely under Article 21(1) of the Model Law. Various case scenarios in practice define the limits of the legal protection to be granted, such as in the case "Rubin v Eurofinance SA", "Fibria Celulose S/A v Pan Ocean Co Ltd" or in the "IBA case". [1]

Your answer should also include 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]**

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

The question of whether a worldwide freezing order granted as interim relief under Article 19 of the Model Law can continue as foreign main proceedings after recognition of foreign insolvency proceedings in the United Kingdom arose in the case between Igor Vitalievich Protasov and Khadzi-Murat Derev.

While the court assumed that it would have jurisdiction to grant such recognition in principle, it also noted that there were limitations that hindered the proper exercise of such jurisdiction.

Thus, the court found that in this case, divergent relief can already be granted from English law, so that a corresponding freezing order is not even necessary.

In conclusion, the court stated that one of the main aims of the Model Law was to put a trustee or insolvency administrator from abroad on an equal footing with one from the country in terms of their rights and powers. As a result, the same comprehensive infrastructure of insolvency law comes into play.

A worldwide freezing order therefore does not continue to exist after recognition under Article 21 of the Model Law, since in the course of recognition the legal remedies arising from the law of the recognising state must always be invoked precisely to ensure that the parties in this cross-border situation are afforded the same rights and powers.

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

Commented [DDB5]: 11 out of 15

**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.

Task 4.1.1:

According to Art. 2 lit. a) of the Model Law, "foreign proceedings" means collective judicial or administrative proceedings in a foreign state, including preliminary proceedings, under an insolvency law in which the assets and affairs of the debtor are subject to the control or supervision of a foreign court for the purpose of reorganisation or liquidation. **Yes**

First of all, it should be noted that in the initial situation with proceedings in State A we are already dealing with another state, a "foreign state". **Yes**

The question is whether the proceedings in State A are collective judicial or administrative proceedings governed by an insolvency law, as required by Article 2 lit. a) of the Model Law. **Yes**

The requirement for a law relating to insolvency is addressed in the UNCITRAL Guide to the Statutory Instrument, p. 41, para. 73. The aim was to find a description that is broad enough to cover a range of insolvency provisions, regardless of the type of law or legislation in which they are contained and regardless of whether the law containing the provisions relates exclusively to insolvency. In this regard, the Model Law does not require the law to be called "insolvency law"; it is sufficient if the law deals with insolvency or serious financial difficulties. The requirement of "insolvency law" is met if insolvency is one of the grounds on which the proceedings could be initiated, even if insolvency could not actually be proven and there was another basis for initiating the proceedings. **Good**

The element of the collective proceedings is dealt with in the UNCITRAL Guide to the Statutory Instrument, pp. 39-40, paras. 69-70. An important consideration is whether substantially all of the debtor's assets and liabilities are dealt with in the proceedings. **Yes**

Based on these definitions, it must be stated that the liquidation of the bank is a collective administrative procedure governed by a law with references to insolvency law. First of all, it is an "administrative procedure", since the essential checks and decisions for the respective next liquidation steps are made by the National Bank and not by the courts. Then the procedure concerning the determination of the bank's "difficulties", the bank's "insolvency" up to the handing over of the "administrative and disposal power" and finally the "liquidation" is determined by the Law of Country A on Banks and Banking Businesses

(LBBA). It is irrelevant that the law does not explicitly speak of "insolvency" in its title, as it in any case sets out clear criteria for insolvency and thus regulates the insolvency of a bank. Thus, for insolvency, the equity capital must have fallen to 1/3 of the minimum level, the bank must not be able to service at least 2% of its obligations to its customers over a period of 5 working days, and the bank must not have initiated measures for improvement despite the identified "non-performing" condition. Okay

Since the LBBA thus presupposes insolvency as the cause of such proceedings for insolvency and, in case of doubt, the subsequent liquidation, it is, in summary, a law that also regulates insolvency. Okay

Finally, Article 2 lit. a) of the Model Law requires the LBBA to subject the assets and affairs of the debtor to the control or supervision of a foreign court for the purpose of reorganisation or liquidation. This requirement is addressed in the UNCITRAL Guide to Enactment, pp. 41-42, paras 74-76. The Model Law does not specify the extent of control or monitoring or the point in time at which such control or monitoring should occur. The Model Law provides for only a relatively low level of judicial supervision. Under the CBIR, it may be potential rather than actual and indirect rather than direct. Yes

According to Article 2 lit. e) of the Model Law, a "foreign court" is a judicial or other authority that is competent to control and supervise the foreign proceedings. Despite the term "foreign jurisdiction", it does not necessarily have to be a court. Rather, supervision can also be carried out by an "authority". Okay

According to the LBBA of country A, the condition of an economic "difficulty" is examined by the National Bank. It is also the National Bank that subsequently determines insolvency. If the insolvency of a bank is determined, the responsibility for the next passes to the state institution of the Deposit Guarantee Fund (DGF). They can take over the provisional or provisional administration and also initiate the liquidation. According to Article 77 of the LBBA, the DGF automatically becomes the bank's liquidator after the bank's licence is revoked. The DGF acts fully independently, as follows from Article 3(3) and (7) of the LBBA.

As a state institution, the DGF is to be understood as an authority of the government, so that supervision with regard to both insolvency and liquidation proceedings is carried out by a "foreign court" in accordance with Article 2 lit. e) and a) of the Model Law.

In conclusion, it must be stated that the proceedings concerning the bank in state A are "foreign proceedings" within the meaning of Article 2 lit. a) of the Model Law.

A bit of repetition here, but generally a decent answer. I would like to have seen some case law mentioned (Agrokor and Sanko Steamship). 7 out of 10

Task 4.1.2:

According to Article 2(d) of the Model Law, a "foreign representative" is a person or entity authorised in a foreign proceeding to direct the reorganisation or liquidation of the debtor's assets or business or to act as a representative in the foreign proceeding. **Yes**

"Foreign representative" is also a key term in the Model Law, which includes the following elements: 1. a person or entity; 2. a power of attorney in a foreign proceeding; and 3. the power to manage or act as a representative in a foreign proceeding in the reorganisation or liquidation of the debtor's assets.

As liquidator, the DGF has broad powers, including the power to investigate the history of the bank and to bring claims against parties believed to have caused the bank's demise. Article 48(3) of the DGF Act empowers the DGF to delegate its powers to an "authorised officer" or "authorised person". The "authorised person of the Fund" is defined in Article 2(1), paragraph 17 of the DGF Law as: "an employee of the Fund acting on behalf of the Fund and under the powers provided for in this Law and/or delegated by the Fund to ensure the withdrawal of the Bank from the market during the provisional administration of the insolvent Bank and/or the liquidation of the Bank". **Okay**

Article 35(1) of the DGF Act states that an authorised person must meet the following requirements "...high professional and moral qualities, an impeccable business reputation, a completed university education in economics, finance or law...and the requisite professional experience." An authorised person must not be a creditor of the bank concerned, must not have a criminal record, must not have any obligations to the bank concerned and must not have any conflict of interest with the bank. Once appointed, the authorised representative is accountable to the DGF for his or her actions and may exercise the powers conferred on him or her by the DGF in the liquidation of the bank. **Okay**

Ms C. was the first of DGF's authorised representatives to be replaced by Ms G., who was appointed as authorised representative by Resolution No. 1513 of the Executive Committee of DGF's Board of Directors. The resolution states that Ms G. is a "leading bank resolution professional". It confers on her all the resolution powers in relation to the bank set out in the DGF Act and in particular Articles 37, 38, 47-52, 521 and 53 of the DGF Act, including the power to sign all agreements in relation to the sale of the bank's assets in the manner prescribed in the DGF Act. **Yes**

It is true that the resolution specifically excludes the power to seek damages from a party connected with the bank, the power to bring an action against a financial institution, other than a bank, which has borrowed money from individuals in the form of loans or deposits, and the power to order the sale of the bank's assets. However, I cannot see that these excepted powers prevent Ms G from seeking recognition in the United Kingdom of the bank's proceedings in the State of A. **Okay**

Ms G. is the "person" meeting the qualification requirement, the representative of the DGF in the bank's proceedings and thus the agent of the foreign proceedings. For its part, the

DGF, as a state institution qua law, is responsible for both the insolvency and the liquidation as a whole. As an authority, the DGF is to be subsumed under the term "body" according to Art. 2 lit. d) of the Model Law, which incidentally has unlimited powers in the liquidation of the bank. Thus, each of Ms G's excluded powers remains with the DGF as the formally appointed liquidator of the bank. Consequently, the applicants are "foreign representatives" of the bank's proceedings in Country A for the purposes of the Model Law. The essential requirements for an application for recognition in the UK are therefore satisfied. **So both Ms G and DGF?**

4 out of 5

**\* End of Assessment \***