



**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: 202122-336.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 2022**. The assessment submission portal will close at 23:00 (11 pm) GMT on 1 March 2022. 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 2022** or by **23:00 (11 pm) BST (GMT +1) on 31 July 2022**. If you elect to submit by 1 March 2022, you **may not** submit the assessment again by 31 July 2022 (for example, in order to achieve a higher mark).
7. Prior to being populated with your answers, this assessment consists of **12 pages**.

## **ANSWER ALL THE QUESTIONS**

Total: 38 out of 50 marks

**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] 5**

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 **incorrectly** reflects the main purpose of the Model Law?

- (a) The Model Law provides effective mechanisms for dealing with cases of cross-border insolvency so as to promote a number of objectives, including the protection and maximisation of trade and investment.
- (b) The Model Law provides effective mechanisms for dealing with cases of cross-border insolvency so as to promote a number of objectives, including the fair and efficient administration of cross-border insolvencies that protects the interests of all creditors and other interested persons, not including the debtor.**
- (c) The Model Law is a substantive unification of insolvency law so as to promote co-operation between courts of the enacting State and foreign States and facilitation of the rescue of financially troubled businesses.
- (d) All of the above.**

#### **Question 1.2**

Which of the following statements is **unlikely** to be a reason for the development of the Model Law?

- (a) The existence of a statutory basis in national (insolvency) laws for co-operation and co-ordination of domestic courts with foreign courts or foreign representatives.**
- (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) None 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

“Cross-border insolvencies are inherently chaotic and value evaporates quickly with the passage of time”. Which of the following rules or concepts set forth in the Model Law **best addresses** this feature of cross-border insolvencies?

- (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 Brazil, foreign main proceedings are opened in South Africa and foreign non-main proceedings are opened in Brazil. Both the South African foreign representative and the Brazilian 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), Brazil 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 Brazil will be recognised in the UK despite Brazil not having implemented the Model Law.
- (b) Both the foreign main proceedings in South Africa and the foreign non-main proceedings in Brazil will not be recognised in the UK because the UK has no principle of reciprocity and Brazil has not implemented the Model Law.

(c) Both the foreign main proceedings in South Africa and the foreign non-main proceedings in Brazil 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 consider both (a) and (b).

(d) Neither (a) nor (b) must be considered by the court.

#### Question 1.8

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

(a) COMI is 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) While (for purposes of the Model Law) the COMI of a debtor can move, the closer such COMI shift is to the commencement of foreign proceedings, the harder it will be to establish that the move was "ascertainable by third parties".

(d) None of the above.

### Question 1.9

Which of the following types of relief have, prior to the adoption of the Model Law on Recognition and Enforcement of Insolvency-Related Judgments, been declared beyond the limits of the Model Law?

(a) Enforcement of insolvency-related judgments.

(b) An indefinite moratorium continuation.

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

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

### Question 1.10

When for the interpretation of the Model Law “its original origin” is to be considered in accordance with article 8 of the Model Law, which of the following texts is likely to be of relevance?

(a) The UNCITRAL Guide of Enactment and the Practice Guide.

(b) The UNCITRAL Guide of Enactment and the Legislative Guide – Parts One, Two, Three and Four.

(c) The UNCITRAL Guide of Enactment and the Judicial Perspective.

(d) All of the above.

## QUESTION 2 (direct questions) [10 marks in total] 6 marks

### Question 2.1 [maximum 3 marks] 3 marks

Under the MLCBI, explain what the appropriate date is for determining the COMI of a debtor, or whether an establishment exists.

[The appropriate date for determining the Centre of Main Interest for a debtor or whether an establishment exist was not however expressly stated under the Model Law. This is because the Model Law is concerned only with existing foreign proceedings and when they commenced.<sup>1</sup>

However, under the UNCITRAL MLCBI with Guide to Enactment and Interpretation,<sup>2</sup> with regards to the date at which the Centre of Main Interest of the debtor should be determined, the appropriate date is the date of commencement of the foreign proceedings. The reason for this approach is that the business activity of the debtor

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<sup>1</sup> See, UNCITRAL Model Law, Art. 17; UNCITRAL Model Law on Cross-Border Insolvency with Guide to Enactment and Interpretation, p 75, n 34.

<sup>2</sup>See, p 75, para 159.

would have ceased upon the commencement of the foreign insolvency proceeding, and all that may exist thereafter is the foreign insolvency proceeding and the activity of the foreign representative in administering the insolvent estate.<sup>3</sup>

The views however, differ with regards to the appropriate date for determination of COMI of a debtor. In the US judgment of *Morning Mist Holdings Ltd v. Krys (Matter of Fairfield Sentry Ltd)*<sup>4</sup>, the US Court held that; “a debtor’s COMI should be determined based on its activities at or around the time the Chapter 15 petition ( i.e, the US implementation of the Model Law) is filed, as the statutory text suggest”<sup>5</sup>

The above approach is a reflection of the European Insolvency Regulation and the UK orthodox position before Brexit. In *Susanne Staubitz- Schreiber Case*,<sup>6</sup> the European Court of Justice was faced with issue of interpreting Article 3(1) in the context of a debtor which had shifted its COMI after the filing of the request to open insolvency proceedings, but before the proceedings had actually been opened. The ECJ clarified that the relevant date for determining jurisdiction under Article 3(1) of the Recast European Insolvency Regulation should be the date when the request to open insolvency proceedings is lodged (ie the date of commencement of the purported main proceeding). This position was followed in a similar COMI case of *Interdil Srl Case*.<sup>7</sup>

In the case of *Re Videology Ltd*,<sup>8</sup> which is a reflection of the orthodox UK position, on a recognition application under the Cross-Border Insolvency Regulations (which implement the Model Law in the UK), the Court held that COMI for recognition purposes was indeed determined by reference to the date when the request to open the insolvency proceedings, the subject of the recognition applications is first made. The Judge was largely guided by the jurisprudence on the Recast EIR (citing *Interdil* in particular), although the UNCILTRAL Guide to Enactment was cited.<sup>9</sup>

Similarly, in the 2019 decision of the yet to be published Judgment in the case of *Re Toisa Limited* in the English Court, the ICC Judge Burton held that the appropriate date on which COMI should be determined was the date of the recognition application. By the decision of *Re Toisa Limited*’s case, it appears that the UK has followed the US approach for determining the appropriate date for the COMI of a debtor. *Toisa* was the subject of Chapter 11 proceedings during which time the company had been managed from New York. It was clear that following the initiation of Insolvency proceedings, *Toisa*’s COMI was in the US. However, *Toisa*’s registered office remained in Bermuda, and as a business it had assets and employees all over the world. Accordingly, there appeared to be some doubt whether the company’s COMI was in the US at the commencement of the Chapter 11 proceedings.<sup>10</sup>

It has however been argued that the decision of ICC Judge Burton rejecting the argument that the date of the initiation of the underlying Insolvency proceedings was the appropriate time, will significantly simplify the process of obtaining recognition orders before the

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<sup>3</sup> Herman Jeremiah and Kia Jeng Koh, “*Singapore: Timing is Everything; Different Approaches to the Relevant Date for Determining COMI in Cross-Border Recognition Proceeding*”, 15 August, 2019.

<sup>4</sup> (2<sup>nd</sup> Cir Appeals Apr. 16, 2013).

<sup>5</sup> Module 2A Guidance Text, n 88; This case is a follow up of the decision of the US Court of Appeal case for the Fifth Circute in *Re Ran* 607 F 3d 1017 ( 5<sup>th</sup> Cir, 2010) which held that the relevant date for determining COMI is as at the filing of the recognition application.

<sup>6</sup> C-104 [2006] ECR I- 701.

<sup>7</sup> C-369/09 [2011] ECR I-9939: See also, n 3.

<sup>8</sup> [2018] EWHC 2186 (Ch).

<sup>99</sup> *Ibid*.

<sup>10</sup> *Ibid*, n 3.

English Courts, particularly in circumstances where a period of time has elapsed between the overseas insolvency proceedings commencing and the seeking of recognition.<sup>11</sup>

By paragraph 160 of the UNCITRAL Guide to enactment, the same considerations in paragraph 159 of the guide to enactment, apply to the date at which any determination with respect to the existence of an establishment of the debtor should be made. Accordingly, the date of commencement of the foreign proceeding is the relevant date to be considered in making that determination.]

## **Question 2.2 [maximum 3 marks] 1**

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 provides guidance in case of concurrence of two foreign non-main proceedings.”* **Art 30 (C)**

**Statement 2** *“The rule in this Article does not affect secured claims.”*

**Statement 3** *“This Article contains a rebuttable presumption in respect of an undefined key concept in the MLCBI.”* **Art 16(3)**

[With Regards to Statement 2; ‘The rule in this Article does not affects secured claims,’ The statement relates to the provision of Article 32 of the Model Law. The Section sets out the Rule of payment in concurrent proceedings which is now sometimes referred to as the “hotchpot” rule, a concept intends to avoid situations in which a creditor might obtain more favourable treatment than the other creditors in the same class by obtaining payment of the same claim in insolvency proceedings in different jurisdictions.<sup>12</sup> For Instance, if a creditor has already received a 5% payment on its claim in a foreign proceeding regarding the debtor and the rate of distribution is for example 15% in the debtor’s domestic insolvency proceeding in the enacting State, then, in order to place this creditor in the same position as the other creditors of the same class in the domestic insolvency proceeding, this creditor would receive a rate of distribution of 10% instead of 15%.<sup>13</sup> The principle of “hotchpot” is based on fairness and equality.<sup>14</sup> Article 32 does not affect the ranking of claims as established by the law of the enacting State and is solely intended to establish the equal treatment of creditors of the same class. To the extent that claims of secure creditors or creditors with rights *in rem* are paid in full, those claims are not affected by the provision.<sup>15</sup> The words “secured claims” are used to refer generally to claims guaranteed by particular assets<sup>16</sup>. Article 32 provide as follows: “Without prejudice to secured claims or rights in rem, a creditor who has received part payment in respect of its claim in a proceeding pursuant to a law relating to insolvency in a foreign State may not receive a payment

<sup>11</sup> Charlotte Moller, Helena Clarke and Harry Rudkin, “Clarity on Cross-Border Conundrum ( Re Toisa Ltd) Lexis - Nexis update.

<sup>12</sup> See, Model Law on CBI: The Judicial Perspective, p 53, para 184: Model Law on CBI with Guide to Enactment and Interpretation, p 107, para 239.

<sup>13</sup> See, Module 2A Guidance Text, p 45: Idem.

<sup>14</sup> Digest of Case Law on the Model Law, p 89: See also Model Law on CBI with Guide to Enactment and Interpretation, p 107, para 240.

<sup>15</sup> Idem.

<sup>16</sup> Model Law on CBI with Guide to Enactment and Interpretation, p 107, para 241.



for the same claim in a [domestic proceeding in the enacting State] regarding the same debtor, so long as the payment to the other creditors of the same class is proportionally less than the payment the creditor has already received.”<sup>17</sup> ]

### Question 2.3 [2 marks] 1 mark

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.**

[The *IBA* case appeal which the English Court of Appeal upheld the decision that the Court should not exercise its power to grant the indefinite Moratorium Continuation, is an appeal denying the grant of indefinite Moratorium under Article 21 CBIR in the English Court of Appeal based on the rule established in the case of *Anthony Gibbs & Sons v. La Socié'te' Industrielle et Commerciale des Me'taux*<sup>18</sup> known and referred to as the “Gibbs Rule”, which stands for the general proposition that a debt governed by English law cannot be discharged or compromised by a foreign Insolvency proceeding. As discharge of a debt under the Insolvency law of a foreign country is only treated as a discharge therefrom in England if it is a discharge under the Law applicable to the contract,<sup>19</sup> except the relevant Creditor submits to the foreign Insolvency proceedings. The rationale of the latter is that the Creditor will be taken to have accepted that the law governing the foreign insolvency proceeding should determine the contractual rights that a Creditor has elected to vindicate in that proceeding.

The position of the English Court of Appeal upholding the decision that the court should not exercise its power to grant the indefinite Moratorium Continuation shows that the *IBA* case appeal is a justification of the fact that even though Article 21(1) of the Model Law is drafted broadly, the appropriate relief the Court of the enacting State can grant is not unlimited, especially in the English Court.<sup>20</sup> This is against the backdrop that Article 21 has been described by some Courts as providing a very broad reservoir of power that enables courts to grant any appropriate relief to effectuate the purpose of the MLCBI and to protect assets of the debtor or the interests of Creditors.<sup>21</sup> In *Atlas Shipping A/S*,<sup>22</sup> quoting Lief M. Clark, “Ancillary and other cross-border Insolvency cases under Chapter 15 of the Bankruptcy Code” (2008) at 70, the Court said there is every reason to give Article 21 a broad scope.<sup>23</sup>

The facts of the *IBA* Case Appeal,<sup>24</sup> which is presently on appeal to the English Supreme Court is as follows; an Azeri foreign representative, Ms Gunel Bakhshiyeva following an earlier recognition order under the CBIR, requested appropriate relief under Article 21 of the Model Law in the form of an Indefinite Continuation of the automatic

<sup>17</sup> See, Module 2A Guidance Text, p 45.

<sup>18</sup> (1890) LR 25 QBD 399.

<sup>19</sup> In the Matter of the OJSC International Bank of Azerbaijan and the CBIR 2006- *Bakshiyeva v. Sberbank of Russia*, et al. (2018) EWHC 59 (Ch) (*The IBA case*) at 44; Guidance Text p 34 n 112.

<sup>20</sup> In *Rubin v. Eurofinance SA* (2010) UKSC 46, the English Supreme Court concludes that the enforcement of an Insolvency-related *in personam* default Judgment is not covered by the Model Law. In *Fibrira Celulose S/A v. Pan Ocean Co. Ltd* [2014] EWHC 2124 (Ch), the English first instance Court concludes that – in effect, applying foreign Insolvency Law to an English Law governed contract is outside the scope of appropriate relief the English Court can grant.

<sup>21</sup> Digest of Case law on the UNCITRAL Model Law on Cross-Border Insolvency, p 66.

<sup>22</sup> 404 B.R 726, 739 (Bankr. S.D.N.Y 2009), CLOUT 1277.

<sup>23</sup> See, Digest of Case Law, *ibid*, p 70, n 4: The outcome of the *IBA* Appeal Case may have however been different, if the case had been decided in a different jurisdiction outside the English Court.

<sup>24</sup> See, n 19.

Moratorium that resulted from the earlier recognition order (the “Moratorium Continuation Application”). This Moratorium Continuation Application was contested by two Creditors (the “Challenging Creditors”) of the OJSC International Bank of Azerbaijan (IBA), who had unpaid claims against IBA under debt instruments governed by English Law and had not submitted to the foreign insolvency proceedings in Azerbaijan to which IBA was subject, so the exception to the Gibbs Rule did not apply to the challenging Creditors. A restructuring of IBA had taken place in Azerbaijan and a restructuring plan was approved which- pursuant to Azeri law- was binding on all creditors of IBA (including the Challenging Creditors). The concern was that, once the Azeri restructuring proceeding for IBA had ended, the Challenging Creditors would go to the UK and enforce their English Law claims against IBA before an English Court arguing that, based on the Gibbs’ Rule, the Azeri restructuring plan of IBA cannot discharge the English law obligations of IBA towards the Challenging Creditors. In short, the Moratorium Continuation Application aimed to – in practice- prevent the Challenging Creditors from enforcing their English law claims while at the same time allowing the English Court to recognise ( pursuant to the Gibb’s Rule) that the English law claims of the Challenging Creditors still exist and were not discharged- from an English law perspective- under the Azeri restructuring plan of IBA.<sup>25</sup> ]

**Issue 2 of the following should also be addressed to receive full marks on this question:**

- 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] 1 mark**

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**.

[ Upon recognition of a foreign main proceeding, the Court in an enacting State, where a domestic proceeding has already been opened in respect of the debtor, in terms of relief, will grant the appropriate relief set out in Article 21 of the MLCBI upon the request of the foreign representative and the automatic relief set out in Article 20 of the MLCBI.

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<sup>25</sup> Module 2A Guidance Text, p 35.

The relief set out in Article 21 of the MLCBI which may be granted upon the recognition of a foreign main proceeding by the discretionary power of the Court in an enacting State, where a domestic proceeding has already been opened in respect of the debtor include the following;

1. Staying the commencement or continuation of individual actions or individual proceedings concerning the debtor's assets, rights, obligations or liabilities, to the extent they have not been (automatically) stayed under Article 20(1)(a) of the Model Law;
2. Staying execution against the debtor's assets to the extent it has not been stayed (automatically) under Article 20(1)(b) of the Model Law;
3. Suspending the right to transfer, encumber or otherwise dispose of any assets of the debtor to the extent this right has not been (automatically) suspended under Article 20(1)(C) of the Model law;
4. Providing for the examination of witnesses, the taking of evidence or the delivery of information concerning the debtor's assets, affairs, rights, obligations or liabilities;
5. Entrusting the administration or realisation of all or part of the debtor's assets in the enacting State to the foreign representative or another person designated by the Court;
6. Extending any interim relief granted pursuant to Article 19 (1) of the Model Law; and
7. Granting any additional relief that maybe available to a domestic liquidation/office holder under the laws of the enacting State.<sup>26</sup>

Also, paragraph 2 of Article 21 provides the Court in the enacting State with further discretionary power at the request of the foreign representative to hand over all or a part of the debtor's assets located in the enacting State to the foreign representative (or another person designated by the Court), provided that the Court is satisfied that the interests of the local Creditors in the enacting State are adequately protected.<sup>27</sup>

The automatic relief set out for the Court of enacting State, in terms of relief to grant, upon recognition of a foreign main proceeding, where a domestic proceeding has already been opened in the respect of the debtor is provided in Article 20 of the MLCBI. Article 20 of the MLCBI has the following three automatic effects;

1. A stay of the commencement or continuation of individual actions or individual proceedings concerning the debtor's assets, rights, obligations or liabilities;<sup>28</sup>
2. a stay of execution against the debtor's assets;<sup>29</sup>
3. a suspension of the right to transfer, encumber or otherwise dispose of any assets of the debtor.<sup>30</sup>

These automatic consequences are however intended to allow time for steps to be taken to organise an orderly and fair Cross-Border Insolvency proceeding.

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<sup>26</sup> The UNCITRAL Guide to Enactment, *ibid*, pp 87-88, para 189 clarifies that; "(...) The types of relief listed in Article 21 (1) are typical of the relief most frequently granted in Insolvency proceedings; however, the list is not exhaustive and the court is not restricted unnecessarily in its ability to grant any type of relief that is available under the law of the enacting State and needed in the circumstances of the case". See, note 94 of the Module 2A Guidance Text at p 29: Digest of Case law on the UNCITRAL Model law on Cross-Border Insolvency, p 65.

<sup>27</sup> Some States have broadened the Article 21 to enable relief to be granted at the request of other parties. For example, in Japan, the Law on Recognition of and Assistance to Foreign Insolvency Proceeding 2001, Article 25 (relief similar to Article 21 of the MLCBI), enables the court to grant relief upon or after recognition on its own initiative or on the petition on any interested Party. See, Digest of Case law, *ibid*, p 70, n 3.

<sup>28</sup> See MLCBI, Article 20(1)(a).

<sup>29</sup> *Ibid*, Article 20(1)(b).

<sup>30</sup> *Ibid*, Article 20(1)(c).

Furthermore, it should be noted that paragraph 2 of Article 20 allows for appropriate protections to be included in the law of the enacting State so as to provide the Court in the enacting State with authority to modify or terminate the automatic stay or suspension contemplated by paragraph 1 of Article 20 if it would be contrary to legitimate interests of a party in interest (including the debtor itself).<sup>31</sup> Article 20 further Clarifies, in paragraph 3, that the automatic stay and suspension contained in paragraph 1 (a) does not affect the right to commence individual actions or proceedings to the extent necessary to preserve a claim against the debtor. Paragraph 4 of Article 20 further clarifies, that the automatic stay and suspension contained in paragraph 1 does not affect the right to request the commencement of certain domestic insolvency proceedings, or the right to file claims in such a proceeding.

Article 20 of the MLCBI has however, been said to provide a state of affairs applicable by law, not by order of the court, and that flows automatically from recognition of a foreign main proceeding.<sup>32</sup>

### The correct answer is in art. 29 (a) on concurrent proceedings

The (ongoing) duties of information the Foreign Representative in the foreign main proceeding have toward the Court in the enacting State are set out in Article 18 of the MLCBI. Under the Article 18, the Foreign Representative is required from the time of filing the application for recognition of the foreign proceeding, to promptly inform the Court in the enacting State of;

- (a) any substantial change in the status of the recognised foreign proceeding or the status of the foreign representative's appointment; and
- (b) any other foreign proceeding regarding the same debtor that becomes known to the foreign representative.

It has however been argued, that it is possible that, after the application for recognition or the decision on recognition has been made, changes may occur in the foreign proceeding that would have affected a decision on relief or recognition, had those facts been known at the time the application or decision was made.<sup>33</sup> To ensure the Court is kept fully informed of such changes when they are of a substantial nature, Article 18 imposes a duty on the Foreign Representative to advise of those changes, including to the status of the proceeding or the Foreign Representative's duty required to be made to the Court under Article 15, paragraph 3.<sup>34</sup> The obligation under paragraph (b) of Article 18 would allow the Court to consider whether relief already granted should be coordinated with any Insolvency proceedings commenced after the decision on recognition is made<sup>35</sup>and would facilitate cooperation under Chapter IV.<sup>36]</sup>

### QUESTION 3 (essay-type questions) [15 marks in total] 12 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

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<sup>31</sup> For example, the interest of the parties maybe a reason for allowing an arbitral proceeding to continue.

Other exceptions that may exist in the law of the enacting State are, for instance, the enforcement of claims by secured parties, initiation of Court action for claims that have arisen after the commencement of the Insolvency proceedings (or after recognition of a foreign main proceeding) or the completion of open financial-market transactions. See, n 25, p 31.

<sup>32</sup> See, n 27, p 60.

<sup>33</sup> Ibid, n 31, p 56.

<sup>34</sup> Idem.

<sup>35</sup> See, Article 30 MLCBI.

<sup>36</sup> Ibid, n 34.

addition, the foreign representative is also considering what (if any) relief may be appropriate to request from the court in State A.

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

**Question 3.1 [maximum 4 marks] 3,5 marks**

Prior to making a recognition application in State A, explain how access and co-ordination rights in State A can benefit the foreign representative?

[ Prior to making a recognition application in State A, a Foreign representative can benefit in the following ways from the access and coordination rights in State A:

1. The foreign representative can apply directly to the Court of State A for interim collective relief without preliminary formalities in the Court of State A. This benefit provided under Article 19 of the MLCBI, affords the foreign representative, where relief is urgently needed, to protect the assets of the debtor or the interests of the creditors to apply directly to the Court of State A to grant relief of a provisional nature prior to making a recognition application in State A. The said interim relief which is applicable to both foreign main and foreign non-main proceedings can include the following as set out in Article 19 of the MLCBI;
  - (a) Application for a stay of execution against the debtor's assets in State A.<sup>37</sup>
  - (b) Application entrusting the administration or realisation of all or part of the debtor's assets located in State A to the foreign representative or another person designated by the Court of State, in order to protect and preserve the value of assets that, by their nature or because of other circumstances, are perishable, susceptible to devaluation or otherwise in jeopardy.<sup>38</sup>
  - (c) Application to the Court of State A on any of the following post-recognition relief provided for in Article 21 of the Model Law which include;
    - (i) Suspending the right to transfer, encumber or otherwise dispose of any assets of the debtor, or
    - (ii) Providing for the examination of witnesses, the taking of evidence or the delivery of information concerning the debtor's assets, affairs, rights, obligations or liabilities,
    - (iii) Granting any additional relief that may be available to a domestic Liquidator/office holder under the laws of State A.<sup>39</sup>

However, the benefit to the foreign representative of access and coordination rights of State A with respect to the interim relief prior to recognition application under Article 19(1)(a)-(c) of the MLCBI is subject to paragraph 2 and 4 of Article 19 of the MLCBI.

2. The foreign representative can benefit from direct access to the Court of the State A as provided by the Model law in Article 9 of the MLCBI. This is aimed at avoiding the need to rely on cumbersome and time-consuming or wasting forms of diplomatic or consular communications that might sometimes be used and enhance speedy actions.
3. The foreign representative can benefit from the right and entitlement to commence a proceeding under the laws of State A relating to insolvency as provided under Article 11 of the MLCBI and the conditions for commencing such

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<sup>37</sup>See, Article 19(1)(a) MLCBI.

<sup>38</sup>See, Article 19(1)(b) MLCBI.

<sup>39</sup>See, Article 19(1)(c) MLCBI.

a proceeding are met. This benefit is without the need of prior recognition application in State A.

4. The foreign representative can also benefit from the right to apply for recognition of the foreign proceedings in State A in which the foreign representative has been appointed. This is provided under Article 15(1) of the MLCBI subject to Article 15(2), (3) and (4) of the MLCBI.<sup>40</sup>
5. Benefit of cooperating with the Court and Insolvency representative of State A is also authorised by the Model Law. Cooperation is not dependent upon recognition and may thus occur at an early stage and before an application for recognition is made.<sup>41</sup>
6. The foreign representative enjoys the benefit of entitlement to the safe conduct Rule provided under Article 10 MLCBI. This rule ensures that the Court in State A does not assume jurisdiction over all the assets of the debtor on the sole ground of the fact that the foreign representative has made an application for the recognition of a foreign proceeding. The Article responds to concerns of foreign representatives and creditors about exposure to an all-embracing jurisdiction triggered by an application under the Model law.<sup>42</sup>

The above access and coordination rights in State A can benefit the foreign representative by saving time and expenses, which in turn avoid value destruction and, in certain cases may even facilitate value creation. They also provide comfort and transparency, which should make it easier for the foreign debtor (and other companies) to do business in State A without counter parties of the foreign debtor becoming concerned that the foreign debtor does this.]

**For full mark on this question, reference should be made to art. 25-27.**

### **Question 3.2 [maximum 5 marks]**

For a recognition application in State A to be successful, the foreign proceeding opened in State B must qualify as a “foreign proceeding” within the meaning of article 2(a) of the MLCBI and the “foreign representative” must qualify as a foreign representative within the meaning of article 2(d) of the MLCBI. Assuming 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.

[ For a recognition application to be successful in State A, apart from the fact that the foreign proceeding opened in State had qualified as a “foreign proceeding” within the meaning of Article 2 (a) of the MLCBI and the “foreign representative” had qualified as a foreign representative within the meaning of Article 2 (d) of the MLCBI, other evidence, restrictions, exclusions and limitations that must be considered as well as the judicial scrutiny that must be overcome for the recognition application to be successful are as set out below;

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<sup>40</sup> See generally, *ibid*, n 2, p 27 para 25.

<sup>41</sup> *Ibid*, p 30, para 40; Module 2A Guidance Text, p 41.

<sup>42</sup> *Ibid*, p 21, para 73.

1. In terms of other evidence that must be considered, for a recognition application to be successful, Article 15 (2) MLCBI provided that the application for recognition shall be accompanied by;
  - (a) A certified copy of the decision commencing the foreign proceeding and appointing the foreign representative; or
  - (b) A certificate from the foreign court affirming the existence of the foreign proceeding and of the appointment of the foreign representative; or
  - (c) In the absence of evidence referred to in sub-paragraphs (a) and (b), any other evidence acceptable to the Court of the existence of the foreign proceeding and of the appointment of the foreign representative.

Paragraph 3 of Article 15, further states such an application shall also be accompanied by a statement identifying all foreign proceedings in respect of the debtor that are known to the foreign representative.<sup>43</sup>

By paragraph 4 of Article 15 MLCBI, the Court may also require a translation of documents supplied in support of the application for recognition into an official language of State A. This paragraph does not however compel the court to require a translation of some or all of the documents accompanying the application for recognition. If it is compatible with the procedures of the Court for it to proceed without translation, that may facilitate a decision being made on the application at the earliest possible time.<sup>44</sup>

Similarly, “any other evidence” referred to in paragraph 2 (c) of Article 15 of MLCBI has been held to include;

- (a) Verified copies of minutes, court orders, reports to creditors and company searches in relation to the appointment and activities of the foreign representative of the debtor;
  - (b) Relevant correspondence with the registrar of companies and the relevant court registry and company searches in relation to a change in the status of the foreign proceeding, verified copies of the notices relating to that change; and
  - (c) Registration of the foreign representative as the Liquidator of the debtor. A document from the foreign corporate regulator showing that Liquidators had been appointed to the debtor pursuant to the applicable legislation has also been relied upon under Article 15, paragraph 2 on the basis that the regulator was an “authority” within the meaning of Article 2 (c) of the MLCBI.<sup>45</sup>
2. With respect to restrictions that must be considered, the Judicial Perspective provided that the court of State A is restricted from embarking on a consideration of whether the foreign proceeding opened in State B for which recognition is requested was correctly commenced under the applicable law of State B.<sup>46</sup> This is so because the MLCBI makes no provision for the receiving court to embark on a consideration of whether the foreign proceeding was correctly commenced under the applicable law; provided the foreign proceeding satisfies the requirements of Article 15, recognition should follow in accordance with Article 17.<sup>47</sup>
  3. Regarding to exclusions that must be considered, the MLCBI provided under Article 1 (2) of the MLCBI that the Model law does not apply to a proceeding concerning certain entities such as banks or insurance companies, that are subject to a special insolvency

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<sup>43</sup> The information required under paragraph 3 is intended to assist the court in appropriately tailoring relief in support of the foreign proceeding to ensure consistency with other proceedings concerning the same debtor. See, Digest of case law, Ibid, p 35.

<sup>44</sup> Idem.

<sup>45</sup> Ibid, p 36.

<sup>46</sup> See, p 15, para 41 MLCBI: The Judicial Perspective.

<sup>47</sup> Ibid, p 35.

regime in State A or proceedings relating to entities that the laws of State A has excluded or provided special insolvency regime for.<sup>48</sup> The rationale is that the insolvency of the types of entity cited are typically administered under a special regulatory regime because of the need to protect vital interests of a large number of individuals...<sup>49</sup> Enacting legislation includes a variety of exclusions from application of the MLCBI, including specially regulated entities such as banking, credit and insurance institutions; financial and investment institutions; commodity exchange members, clearing houses; certain licensed financial service providers; consumers; and stock and commodity brokers.<sup>50</sup>

4. With respect to limitations that must be considered, the MLCBI is said to have been directed at individual entities, and not at enterprise groups as a single entity.<sup>51</sup> For the purpose of the Model law, the focus is on each and every member of an enterprise group as a distinct legal entity.<sup>52</sup> For a recognition application to be successful, it must be satisfied that the foreign proceeding is not directed against an enterprise groups as a single entity. The proceeds must be limited to individual entities.
5. With regards to judicial scrutiny that must be considered for a recognition application to be successful, the court must satisfy itself that the proceeding is not against public policy of State A. This is provided under Article 6 of the MLCBI. For instance, proceedings that will deprive the creditors fundamental rights to be heard may constitute a proceeding contrary to public policy.<sup>53</sup> Similarly, the court with respect to judicial scrutiny must also satisfy itself that the foreign proceeding meets the requirements of Article 2 and 15 (2) of the MLCBI. Upon being satisfied that the requirements in Article 15 (2) have been met, it can the presume that the documents submitted in support of the application for recognition are authentic, whether or not they have been legalised under Article 16 (2) MLCBI to grant the recognition application by virtue of Article **17 (11)** of the MLCBI. ]

For full marks on this question, reference should also be made to art. 3 (international obligations) and more on the judicial scrutiny when establishing COMI

### Question 3.3 [maximum 5 marks] 4 marks

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

[ A basic principle of the MLCBI is that the relief considered necessary for the orderly and fair conduct of a cross -border insolvency should be available to assist foreign proceedings, whether on an interim basis or as a result of recognition. Accordingly, the Model law specified the relief that is available in both of those instances.<sup>54</sup>

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<sup>48</sup> See, Article 1 (2) MLCBI.

<sup>49</sup> Ibid, p 3.

<sup>50</sup> Ibid, p 4.

<sup>51</sup> The Judicial Perspective, ibid, p 19, para 64.

<sup>52</sup> Idem.

<sup>53</sup> Article 26 of the EIR has been said to also contains a public policy exception along the lines of Article 6. The ECJ has held that recognition of insolvency proceedings commenced in another European Union member State may be refused where the decision to commence was taken in flagrant breach of the fundamental right to be heard, which a person concerned by such proceedings enjoyed. See, n 37, p 20.

<sup>54</sup> See, n 2, p 29, para. 35.



Pre-recognition relief are set out in Article 19 of the MLCBI, and they are available even prior to a decision on the recognition application. The court in the enacting State is entitled to grant urgently needed interim relief upon application for the recognition of a foreign proceeding based on Article 19 of the MLCBI. The pre-recognition relief which applies to both foreign main and foreign non-main proceeding that can be granted under Article 19 of the MLCBI include;

- (a) A stay of execution against the debtor's assets;
- (b) Entrusting the administration or realisation of all or part of the debtor's assets located in the enacting State to the foreign representative or another person designated by the court, in order to protect and preserve the value of assets that, by their nature or because of other circumstances, are perishable, susceptible to devaluation or otherwise in jeopardy;
- (c) Any of the following post-recognition relief provided for in Article 21 of the Model law;
  - (i) Suspending the right to transfer, encumber or otherwise dispose of any assets of the debtor;
  - (ii) Providing for the examination of witnesses, the taking of evidence or the delivery of information concerning the debtor's assets, affairs, rights, obligations or liabilities; and
  - (iii) Granting any additional relief that may be available to a domestic liquidation/office holder under the laws of the enacting State.

The pre-recognition relief are in the nature of discretionary relief that the Court may tailor to the case at hand.<sup>55</sup> In granting the pre-recognition relief in Article 19 of the MLCBI, Article 22 (2) of the MLCBI authorised the Court to be satisfied that the interests of the creditors and other interested persons, including the debtor, are adequately protected. Failure of the application for the pre-recognition relief to fulfil this condition, the court will refuse to grant the relief.

Similarly, the grant of pre-recognition relief by the court under Article 19 of the MLCBI is restricted to the type of relief that is usually available only in collective insolvency proceedings as opposed to the "individual" type of relief that may be granted before the commencement of insolvency proceedings under domestic rules of civil procedure.<sup>56</sup> The restriction of interim relief to a "collective" basis is consistent with the need to establish, for recognition purposes, that a "collective" foreign proceeding exists.<sup>57</sup> Furthermore, the pre-recognition relief provided under Article 19 of the MLCBI are restricted to urgent and provisional measures;<sup>58</sup> subparagraph (a) restricts a stay to execution proceedings, and subparagraph (b) refers to perishable assets and assets susceptible to devaluation or otherwise in jeopardy. In *Williams v. Simpson* (17 September, 2010), following an application by the trustee of the English bankruptcy proceedings, the New Zealand Court made orders for interim measures, including the issue of a search warrant for a specific property, suspension of the debtor's ability to deal with his property in New Zealand and his examination by a court official. The Court observe that "it would be odd if the ability to grant such relief [under Article 19] extended only to property known to exist and readily locatable". It went on to say that "the flexibility inherent in Article 19 could justify the issue of a search warrant to ascertain whether there are assets that are being concealed that might be in jeopardy if some form of interim relief did not attach to them".<sup>59</sup>

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<sup>55</sup> See, n 51, p 37, para. 122.

<sup>56</sup> *Idem*.

<sup>57</sup> *Idem*.

<sup>58</sup> The urgency of the measures is alluded to in the opening words of Article 19, para. (1) of the MLCBI. See, *Ibid* 38.

<sup>59</sup> *Idem*.

Furthermore, the pre-recognition relief set out in Article 19 of the MLCBI and that may be granted in favour of a foreign non-main proceeding must be consistent (or should not interfere) with the foreign main proceeding.<sup>60</sup>

With respect to post-recognition relief, Article 21 MLCBI made provisions thereof. The reliefs are categorised as appropriate relief under Article 21 (1) of the MLCBI and they include;

- (a) Staying the commencement or continuation of individual actions or individual proceedings concerning the debtor's assets, rights, obligations or liabilities, to the extent they have not been (automatically) stayed under Article 20 (1) (a) of the MLCBI Law;
- (b) Staying execution against the debtor's assets to the extent it has not been stayed (automatically) under Article 20 (1) (b) of the Model Law;
- (c) Providing for the examination of witness, the taking of evidence or the delivery of information concerning the debtor's assets, affairs, rights, obligation or liabilities;
- (d) Entrusting the administration or realisation of all or part of the debtor's assets in the enacting State to the foreign representative or another person designated by the Court;
- (e) Extending any interim relief granted pursuant to Article 19 (1) of the Model Law; and
- (f) Granting any additional relief that may be available to a domestic liquidator / office holder under the laws of the enacting state.

The post-recognition relief set out by Article 21 is also discretionary. It is however also, not exhaustive, but tailored to the case at hand by the Court. Like the pre-recognition relief, the post-recognition relief under Article 22 (2) of the Model Law, is subject to conditions the Court may consider appropriate. The relief may also be granted on the condition that it addresses the need for the adequate protection of the interests of creditors and other interested persons.

The post-recognition relief considered under Article 21 are however limited, in a foreign non-main proceeding, to assets that are to be administered in that non-main proceeding. And if the foreign representative seeks information concerning the debtor's assets or affairs, the relief must concern information required in that non-main proceeding.<sup>61</sup> Post-recognition reliefs are not also granted in a matter of cause, but where necessary to protect the assets of the debtor or in the interests of the creditors. Post-recognition relief are also restricted and subjected to public policy provision under Article 6 of the MLCBI and insolvency proceedings.

In the need for the grant of post-recognition relief to protect local interest before assets are turned over to the foreign representative, the United States Court, in the case of Atlas Shipping, granted relief sought by the Danish Insolvency representative under the equivalent of Article 21, subparagraph (1) (e) and paragraph (21), with respect to funds held in United States bank accounts and subject to maritime attachment orders granted both before and after the commencement of insolvency proceedings in Denmark. The United States Judge indicated that the relief granted was without prejudice to the rights, if any, of Creditors to assert in the Danish bankruptcy Court their rights to the previously garnished funds. The Judge also observed that the turnover of the funds to the foreign representative would be more economical and efficient in that it would permit all of Atlas' creditors worldwide to pursue their rights and remedies in one court of competent jurisdiction.<sup>62</sup>

Note however, that while the post-recognition relief set out under Article 21 (1) of the MLCBI is drafted broadly, the appropriate relief the Court of the enacting State (in this case, State A) can grant is not unlimited. In *Rubin v. Eurofinance SA*<sup>63</sup> the English Supreme Court concludes that the enforcement of an Insolvency-related *in personam* default judgment is not covered by

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<sup>60</sup> See, Article 19 (4) MLCBI.

<sup>61</sup> See, Article 21(3) MLCBI.

<sup>62</sup> See, n 55, p 41.

<sup>63</sup> [2010] UKSC 46.

the Model Law. In the Pan Ocean Case,<sup>64</sup> the English Court considered that the service of a notice to terminate the contract is not the commencement or continuation of an individual action or proceedings. Therefore, the Court does not have the power under Article 21 (1) (a) of the Model Law to restrain the Brazilian Party from serving the termination Notice. In the IBA case,<sup>65</sup> the English Court determined that it did not have jurisdiction to grant the Azeri foreign representative of a foreign main proceeding opened in Azerbaijan an indefinite continuation of the automatic moratorium that resulted from an earlier recognition order.]

For full marks, again reference should be made to art. 3

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

Briefly explain 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 ex article 19 MLCBI, is unlikely to continue post-recognition ex article 21 MLCBI because upon the grant of recognition of the proceeding under the Model law, the pre-recognition interim relief (being the worldwide freezing order) ceases to operate, and from that time of the grant of the recognition, article 20 of the MLCBI would operate and if consequences additional to those accomplished by Article 20 were intended, additional Orders under article 21 of the MLCBI would be necessary. The Courts have confirmed that the purpose of article 19 is to provide a mechanism to enable the Court to Order “urgently needed” relief where an application for recognition has been made and is pending,<sup>66</sup> to protect assets or the interests of creditors when concern exists that the assets may perish, be susceptible to devaluation or otherwise in jeopardy in the period before the hearing of the recognition application. Another purpose of the interim relief, it is suggested, is to ensure that the effects of article 20, when recognition is granted, will not be rendered ineffective, especially where the relief sought concerns the right to transfer, encumber or otherwise dispose of any assets of the debtor.<sup>67</sup> ]

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

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.

<sup>64</sup> [2014] EWHC 2124 (Ch.)

<sup>65</sup> (2018) EWHC 59 (Ch.)

<sup>66</sup> See, Chow Cho Poon (Private Limited) [2011] NSWSC 300 [Para. 64], CLOUT 1218; Yu v. STX Pan Ocean Co Ltd (South Korea) [2013] FCA 680 [para. 17], CLOUT 1333; See, n 43, p 58-59.

<sup>67</sup> Idem.

Proceedings were issued 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 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]; 10 mark** 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].5 marks**

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

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

[ Answer to question 4.1.1.

In answering this question, regards must be accorded to the definition of "foreign proceeding" as provided under Article 2 (a) of the MLCBI. Article 2 (a) of the MLCBI has defined "foreign proceeding" to mean "a collective judicial or administrative proceeding in a foreign State, including an interim proceeding, pursuant to a law relating to Insolvency in which proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganization or liquidation".

The definition in Article 2 (a) MLCBI set out certain elements that can be said to be jurisdictional pre-conditions for recognition of a proceeding as a foreign proceeding under Article 2 (a) of the MLCBI. The elements that must be proved in Article 2 (a) MLCBI as jurisdictional pre-conditions to recognise a proceeding as foreign proceeding are as follows;

- (1) A proceeding (including an interim proceeding);
- (2) That is either judicial or administrative;
- (3) That is collective in nature;

- (4) That is in a foreign State;
- (5) That is authorised or conducted under a law relating to insolvency;
- (6) In which the assets and affairs of the debtor are subject to control or supervision by a foreign court; and
- (7) Which proceeding is for the purpose of reorganization or liquidation.<sup>68</sup>

We shall determine the question of whether the Bank's liquidation comprise a "foreign proceeding" within the meaning of Article 2 (a) of the MLCBI by applying the relevant facts to the seven elements of a foreign proceeding set out in Article 2 (a) of the MLCBI above.

In relation to element (1), it has been stated that in the context of corporate insolvencies, the hallmark of a "proceeding" was a statutory framework that constrains a company's actions and that regulates the final distribution of a company's assets.<sup>69</sup> In *Re Betcorp Ltd*,<sup>70</sup> the Court considering this element, was not persuaded by the lack of a petition to a court and held that "an Australian Voluntary Winding up is a 'proceeding' under section 101 (23) and, by extension, Chapter 15 of the United States Bankruptcy Code."<sup>71</sup> The facts of the Bank's liquidation reveal that there is a statutory framework that constrained the Bank's actions and that regulated the final distribution of the Bank's assets. That statutory framework was provided by the law of Country A on Banks and Banking Activity (LBBA) also known as the Banking law of Country A. Under country A's law, the LBBA governs specific insolvency procedure for Banks. The procedure involves initial input from the National Bank (the NB) and at the time that the Bank enters liquidation, followed a number of stages. Articles 75, 76 and 77 of the LBBA authorised the National Bank (NB) to classify a bank as "troubled", insolvent and the DGF to become an automatic liquidator of the Bank after the Bank entering liquidation under the law of Country A. All these were applicable in the Bank's liquidation in this case. In the case of *Agrokor*,<sup>72</sup> a Croatian Extraordinary proceeding carried out under the newly adopted "Law on Extra-Ordinary Administration proceeding in companies of systemic importance in Croatia" (*Lex Agrokor*) was recognised as a foreign proceeding by the English Court, under the UK Cross-Border Insolvency Regulation 2006 or (CBIR). Furthermore, the provisional administration of the Bank carried out by the DGF under the DGF law with its powers to also act as the Bank's interim or provisional administration and the Bank's ultimate liquidation pursuant to Articles 34, 35 and 36 of the DGF law also qualify as an "interim" proceeding for the purpose of a "proceeding" under Article 2 (a) of the MLCBI.<sup>73</sup>

In relation to element (2), on whether the proceeding is "judicial or administrative". A judicial proceeding is a proceeding involving the Court. While administrative proceeding is a proceeding concluded outside of the court process. The relevant proceeding may either be one of the two proceeding and not the both, although several courts have discussed this requirement and suggested that only one of those characteristics is required, even if some proceedings have both judicial and administrative elements.<sup>74</sup>

In *New Paragon Investment Limited*,<sup>75</sup> the Court found that "foreign proceeding" included an extra-judicial or administrative proceeding provided it is related to liquidation. In *Betcorp's*

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<sup>68</sup> See, Module 2A Guidance Text, p 13-14: Sandeep Gopalan and Michael Guihot, "*Recognition and Enforcement in Cross-Border Insolvency Law: A Proposal for Judicial Gap-Filling*", *Vanderbilt Journal of Transnational Law* [Vol 48: 1125] [2015] p 1251.

<sup>69</sup> See, n 43, p 6.

<sup>70</sup> 400 B.R. 266 (Bankr. D. Nev. 2009).

<sup>71</sup> See, n 68, *ibid*, p 1252.

<sup>72</sup> [2017] EWHC 2791 (Ch.).

<sup>73</sup> See, n 2, pp 42-43, paras. 79-80.

<sup>74</sup> See, n 69.

<sup>75</sup> (2012) BCC 371 [para 7], CLOUT 1272.



Case,<sup>76</sup> a Voluntary liquidation commenced under the Australian law was held by the Court in the United States to be an Administrative proceeding within the meaning of the Model Law under Chapter 15 of the US Bankruptcy Code.

In the present case, the facts of the Bank's liquidation in Country A reveal that all the processes and stages adopted by the National Bank and the DGF under the LBBA and DGF law leading to the Bank's liquidation in Country A were extra-judicial and administrative, and same are in compliance with the definition of a foreign proceeding under Article 2 (a) MLCBI; The processes adopted by the National Bank under the Banking law of Country A include the declaration of the Bank as 'troubled' under Article 75 of the LBBA, the classification of the Bank as 'insolvent' under Article 76 and the appointment of the DGF under Article 77 of the LBBA to liquidate the Bank under DGF Law. These processes were done administratively without the intervention of the Court in Country A and same led to the Bank's liquidation in Country A.

In relation to element (3), whether the proceeding "is collective in nature". The courts have identified "collective" proceedings as having various characteristics including:

- (a) Imposition of an orderly regime that affects the rights and obligations of all creditors and all of the assets of the debtors. A proceeding would "affect" all Creditors, if it realised assets for the general benefit of all Creditors. The rights and obligations of all Creditors must be taken into account, not just those of the petitioning Creditors.<sup>77</sup>
- (b) All creditors need not receive a share of the distribution, by addressing potential distribution to other creditors, a foreign representative could acknowledge their overall duty to creditors in general. Where assets are distributed, it should be in accordance with statutory priority.<sup>78</sup>
- (c) Interested parties should not be able to individually enhance their position by exploiting some fortuitous circumstance which may yield an unfair advantage.<sup>79</sup>
- (d) Creditor participation must be a reality; this requirement might be satisfied where, notwithstanding that the governing law did not provide for creditor participation, it could be shown that, in practice, unsecured creditors did have a voice and could object to any scheme that was put before the administrative authority to be confirmed or sanctioned.<sup>80</sup>
- (e) Adequate notice should be provided to creditors general unsecured creditors under the applicable foreign law.<sup>81</sup>

In *British-American Insurance Co. Ltd.*,<sup>82</sup> the Court considered the issue of notice and found that notwithstanding the relevant law had no requirement for notice to be given to general unsecured creditors of the appointment of the foreign representative or of actions brought before the court, they would receive notice of the commencement of the winding up phase and could be heard.

In evaluating whether a given proceeding is collective for the purpose of the Model law, a key consideration is whether substantially all of the assets and liabilities of the debtor are dealt with in the proceeding, subject to local priorities and statutory exceptions, and to local exclusions relating to the rights of secured creditors.<sup>83</sup>

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<sup>76</sup> Supra.

<sup>77</sup> See, n 74.

<sup>78</sup> Idem.

<sup>79</sup> Idem.

<sup>80</sup> Idem.

<sup>81</sup> Idem.

<sup>82</sup> 425 B.R. 884, 903 (Bankr. S. D. Fla. 2010) CLOUT 1005.

<sup>83</sup> See, n 2, p 40, para. 70.

Examples of the manner in which a collective proceeding for the purposes of Article 2 might deal with creditors include providing creditors that are adversely affected by the proceeding with a right (though not necessarily the obligation); to submit claims for determination and to receive an equitable distribution or satisfaction of those claims, to participate in the proceedings.<sup>84</sup>

The facts of the Bank's liquidation reveal that the DGF as the Bank's Liquidator under the LBBA has the power under Article 77 of the DGF law to compile a register of creditor claims and to seek to satisfy those claims. On 7 September, 2020, the DGF pursuant to the DGF law resolved to approve an amended list of creditors' claims totalling approximately USD 1.113 billion to be satisfied with the Bank's assets even though, by the facts available, was no longer possible, when the Bank's liquidation was extended to an indefinite date on 14, December, 2020. Creditors were indeed involved collectively,<sup>85</sup> making same to qualify as a collective proceeding under Article 2(a) of the MLCBI.

In relation to element (4), that proceeding is in a foreign State. A foreign State in the facts of the Bank's Liquidation is the Country A whose proceeding is sought to be recognised in the High Court of England and Wales (Chancery Division) the English proceedings. Under Article 2(a) of the MLCBI, the Bank's liquidation of Country A qualifies as a proceeding in a foreign State that can be recognised in the High Court of England and Wales (Chancery Division) the English proceedings. In *Re-Betcorp*,<sup>86</sup> a voluntary liquidation commenced under Australian law was held by a Court in the United States to be a foreign proceeding within the scope of Article 2(a) of the Model law.

With regards to element (5), that the proceeding is authorised or conducted under a law relating to insolvency. In the matter of *Agrokor DD*<sup>87</sup> the English Court granted the requested recognition and on the issue relating to element 5, herein stated that; "The Model law does not require "insolvency law" as a label; it is sufficient if the law deals with or addresses insolvency or severe financial distress, which the *lex Agrokor* does. The "law relating to insolvency" requirement is satisfied if insolvency is one of the grounds on which the proceeding could be commenced, even if insolvency could not actually be demonstrated and there was another basis for commencing the proceeding. At the commencement of the proceedings, there was unchallenged evidence that *Agrokor* and the wider group was in a state of serious financial distress".<sup>88</sup> In *Re-Betcorp*,<sup>89</sup> in relation to element (5), the Court relied upon two facts; "(1) the unified structure of external administration provisions of the Corporations Act; and (2) the Australian Parliament's own interpretation that Australia's company laws qualify under the Model law" "In relation to the first fact, the Court observed that: [S]everal sub-parts of Chapter 5 [ of the Australian Corporations Act] contain provisions that deal with corporae insolvency and allow for the adjustment of debts.<sup>90</sup> These facts, combined with the statutory ability to shift among various forms of dissolution given changing circumstances, demonstrate that winding up is achieved under a law relating to insolvency or the adjustment of debts". "With regards to the second fact, the Court quoted from the

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<sup>84</sup> *Idem*.

<sup>85</sup> In *British American Insurance*, the Court concurred with the courts in both *Betcorp* and *Gold & Honey* as to the meaning of "collective", noting that such proceedings contemplated both the consideration and the eventual treatment of claims of various types of creditors, as well as the possibility that creditors might take part in the foreign action. In *Agrokor's* case, the English Court held that the consolidated nature of the EAP made it (the proceeding) more collective rather than not collective enough. See, n 5, p 16.

<sup>86</sup> *Supra*.

<sup>87</sup> *Supra*.

<sup>88</sup> See, n 85. It should be however noted that an appeal has been lodged against this judgment, which at the time of this position, had not yet resulted in decision.

<sup>89</sup> *Supra*.

<sup>90</sup> See, Parts 5.3, 5.4A and 5.4B of Chapter 5 of the Australian Corporation Act.

Australian Explanatory Memorandum to the Model law's enacting legislation: many articles of the Model law require an insertion for 'laws of the enacting State relating to insolvency' (or similar). It is intended that the Model law will apply to collective judicial or administration proceedings pursuant to a law relating to bankruptcy or corporate insolvency. As such, the relevant Australian laws are the Bankruptcy Act and Chapter 5 (other than Parts 5.2 and 5.4A) of the Corporation Act, and also Section 601 CL of the Corporations Act [Part 2, Clause 8]". "The Court explained that: A voluntary Winding up is governed by Part 5.5 of Chapter 5 of the Corporations Act. It is telling that this is not one of the sub-parts excluded in the Explanatory Memorandum. Accordingly, based upon the Australian Legislature's interpretation of the UNCITRAL Model law and Australian domestic law, a company engaged in a Voluntary winding up is being administered under a law relating to insolvency".<sup>91</sup>

It has been suggested that the formulation used in the Model law is to acknowledge the fact that liquidation and reorganization might be conducted under law that is not labelled as insolvency law (e.g. company law), but which nevertheless deals with or addresses insolvency or severe financial distress. The purpose was to find a description that was sufficiently broad to encompass a range of insolvency rules irrespective of the type of Statute or law in which they might be contained and irrespective of whether the law that contained the rules related exclusively to insolvency.<sup>92</sup>

The relevant facts of the Bank's liquidation in this case reveal that the Law of Country A on Banks and Banking Activity (LBBA) which is the central legislation in Country A contained several articles that deals with Bank insolvency in Country A. Articles 75, 76 and 77 of the LBBA all deal with the various stages of specific insolvency procedure for Banks in Country A. Article 75 deals with the classification of the bank as troubled by the National Bank. Article 76 deals with the Classification of the Bank as insolvent while Article 77 deals with the appointment of the DGF for the liquidation of the Bank under DGF law. Consequently, the proceeding can be said to be conducted under a law relating to insolvency in Country A as required under Article 2 (a) of the MLCBI.

In relation to element (6), that the proceeding must be a proceeding, in which the assets and affairs of the debtor are subject to control or supervision by a foreign Court. In the Agrokor's case,<sup>93</sup> it was held that the level of Court supervision required by the Model law is relatively low. Under the CBIR, it can be potential, rather than actual and indirect rather than direct. The fact that the Lex Agrokor also gave some control to the Croatian government, did not negate the supervision of the Court.<sup>94</sup> However, no distinction is drawn, in the definition of "foreign court", between a reorganization or liquidation proceeding controlled or supervised by a judicial body or by an administrative body. That approach was taken to ensure that those legal systems in which control or supervision was undertaken by non-judicial authorities would still fall within the definition of "foreign proceeding".<sup>95</sup>

In Betcorp case,<sup>96</sup> notwithstanding that the type of proceeding for which recognition was sought was commenced, without any court involvement, by a vote of the company concerned, the court held that the "control and supervision" criterion under Article 2(a) MLCBI, was met, based on administrative or judicial oversight of the liquidators responsible for administering the collective proceeding on behalf of all Creditors, as opposed to control or supervision of the assets and affairs of the debtor. The judge held that the Australian Securities and Investment

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<sup>91</sup> See, Sandeep Gopalan and Michael Guihot, n 68, p 1252.

<sup>92</sup> See, n 2, p 41, para. 73

<sup>93</sup> Supra

<sup>94</sup> See, n 5, p 15; this position is also emphasised by the UNCITRAL MLCBI Guide to Enactment and Interpretation, p 41, para. 74.

<sup>95</sup> See, n 74, p 21, para. 71.

<sup>96</sup> Ibid, p 22, paras 72.

Commission had a responsibility to supervise liquidators in the performance of their duties, could require liquidators to obtain permission before undertaking certain actions (e.g destruction of books and records) and had the ability to remove or revoke the authority of any person to be a liquidator. On that basis, the judge considered that the Australian Securities and Investment Commission was “an authority competent to control and supervise a foreign proceeding” for the purposes of the definition of “foreign proceeding” under the UNCILTRAL Model law.<sup>97</sup> By the relevant facts of the Bank’s liquidation in Country A, the DGF who is the official liquidator under the LBBA has the supervisory power or control over the appointed liquidator under the DGF law. The control or supervision include the power to replace and reappoint a new authorised person acting as liquidator based on laid down qualification. The DGF exercised the power of control under the DGF law to replace Ms. C with Ms. G as liquidator. Articles 37, 38, 47-52, 521 and 53 of the DGF law laid down the power of the Liquidator. Failure to act within the laid down authority under the DGF law by Ms. G as Liquidator of the Bank would result to Ms. G being replaced by another Liquidator.

Consequently, the DGF qualify as an authority competent to control and supervise a foreign proceeding in Country A for the purpose of the definition of foreign proceeding under Article 2 (a) of the MLCBI, the proceeding of the Bank’s liquidation being an administrative proceeding controlled and supervised by a non-judicial authority under the LBBA and DGF laws of Country A.

In relation to element (7), of which proceeding is for the purpose of reorganization or liquidation, the court in Agrokor’s case<sup>98</sup> held that the purpose of the Lex Agrokor was to protect the stability of the economic system against systemic shocks by enabling the restructuring of companies of systemic importance that get into financial difficulty and, if a restructuring failed, by transforming it into a bankruptcy proceeding. This could be described as a law for the purpose of reorganization or liquidation within the meaning of the CBIR.<sup>99</sup>

The relevant facts in Country A’s Bank Liquidation reveal that the LBBA and DGF laws of Country A relating to Insolvency is for the purpose of taking over the assets and affairs of a troubled bank which has been classified insolvent in Country A for the purpose of withdrawing such insolvent banks from the market and winding down their operations via liquidation. The full powers of the DGF under Article 75 of DGF law as Liquidator include the powers to terminate all powers of the bank’s management and control bodies; all banking activities are terminated; all money liabilities due to the bank are deemed to become due, etc. The DGF also have the powers to compile a register of creditor claims and to seek to satisfy those claims. All of these powers were exercised after the NB formally revoked the Bank’s banking license and resolved that it be liquidated on 17 December, 2015, even though on 14 December, 2020, the Bank’s liquidation was extended to an indefinite date. Therefore, the proceeding can be said to meet the requirement of Article 2 (a) MLCBI as a proceeding meant for the purpose of reorganization or liquidation. In the present case, the proceeding is for the purpose of liquidation, and liquidation has been defined as a proceeding to sell and dispose of assets for distribution to creditors in accordance with the insolvency law.<sup>100</sup>

It is worthy of note that the above 7 elements have been held to be cumulative under Article 2(a) of the MLCBI and should be considered as a whole.<sup>101</sup> On the whole therefore, I hold that the Bank’s liquidation based on the relevant facts comprise a “foreign proceeding” within the meaning of Article 2 (a) of the MLCBI.

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<sup>97</sup> Supra.

<sup>98</sup> Supra.

<sup>99</sup> See, n 5, p 16.

<sup>100</sup> Legislative Guide on Insolvency Law, p 5, para. 12.

<sup>101</sup> See, n 2, p 39, para. 68.

## ANSWER TO QUESTION 4.1.2

In considering whether the Applicants fall within the description of “foreign representatives” as defined by Article 2 (d) of the MLCBI, we shall consider the definition of a foreign representative under Article 2 (d) of the MLCBI and the pre-conditions to qualify therein as a foreign representative.

Foreign Representative as defined under Article 2 (d) of the MLCBI means, “a person or body, including one appointed on an interim basis, authorized in a foreign proceeding to administer the reorganization or the liquidation of the debtor’s assets or affairs or to act as a representative of the foreign proceeding”. The definition of a foreign proceeding above has the following elements:

- (1) A person or body, including one appointed on an interim basis;
- (2) Authorised in a foreign proceeding;
- (3) To administer the reorganization or liquidation of the debtor’s assets or affairs to act as representative of the foreign proceeding.<sup>102</sup>

In relation, to element (1). It is to be noted that the MLCBI did not define the words “person” or “body”. However, the courts have found that a foreign representative might be a firm of accountants, if otherwise qualified, on the basis that a firm can constitute a “person” as required by sub-paragraph (d) of Article 2 of the MLCBI. A “body” also has been interpreted as meaning; “an artificial person created by a legal authority”.<sup>103</sup> In *Petition of Ernst & Young Inc.*,<sup>104</sup> the US Court, defined a “person” to include an “individual, partnership or corporation”. The fact of appointment of the foreign representative in the foreign proceeding to act in either or both of those capacities is sufficient for the purpose of the MLCBI; article 15 requires either a certified copy of the decision appointing the representative, a certificate affirming the appointment or other evidence of that appointment that is acceptable to the receiving Court.<sup>105</sup>

The facts of the Bank’s liquidation reveal that Ms. G was appointed pursuant to a decision of the Executive Board of the Directors of the DGF, NO. 1513 (Resolution 1513). The Resolution 1513 notes that Ms. G is a “leading Bank liquidation professional”. The Resolution delegated to MG all liquidation powers in respect of the Bank liquidation 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. Ms. G was properly delegated the powers of the DGF as an authorised person to perform actions to ensure the bank’s liquidation with the necessary certification under Article 35(1) of the DGF law. Ms. G based on the relevant facts fulfilled the element of a “person” under Article 2(d) of the MLCBI, and the evidence of same can be annexed pursuant to Article 15(2) of the MLCBI to the application for recognition and the court can presume same pursuant to Article 16 of the MLCBI.<sup>106</sup>

However, with regard to the DGF in relation to element 1, the DGF can be said not to qualify as a foreign representative under Article 2(d) of the MLCBI having delegated its powers as an official liquidator to Ms. G the authorised liquidator under the DGF law. Also, at the point of the application for recognition, the DGF has ceased to be the bank’s appointed liquidator as a

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<sup>102</sup> See, n 99.

<sup>103</sup> See, n 95.

<sup>104</sup> 383 B.R. 773, 777 (Bankr. S.D.N.Y 2015), CLOUT 1629.

<sup>105</sup> See, n 2, p 46, para 86.

<sup>106</sup> The UNCITRAL Guide to Enactment and Interpretation has noted that the definition in Article 2 (d) is sufficiently broad to include appointments that might be made by a special agency other than the Court as in this case of Ms. G appointment by the DGF under the DGF law.

result of Resolution 1513 appointing Ms. G. The only powers vested on the DGF after the Ms. G appointment as the Liquidator of the bank is 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, but not the power to administer reorganization or liquidate the bank's assets or affairs or act as a foreign representative.

In relation to element 2, it has been noted that Article 2(d) of the MLCBI, recognises that the foreign representative may be a person authorised in the foreign proceedings either to administer those proceedings which would include seeking recognition, relief and cooperation in another jurisdiction, or for the purposes of representing those proceedings.<sup>107</sup>

The MLCBI did not specify that the foreign representative must be authorised by the foreign court. As the definition in Article 2 (d) sufficiently broad to include appointment that might be made by a special agency other than the Court<sup>108</sup>, as in the facts of the Bank's liquidation where the DGF is the special agency that made Ms. G's appointment as the authorised liquidator in the Bank's liquidation. In this regard, the Courts have indicated that the focus is upon the authorization being provided "in the context of" or "in the course of" the proceeding, rather than upon the body providing the authorization, which might include the court, the law or even appointment by the debtor itself, such as an appointment made by the Board of Directors of the debtor.<sup>109</sup> In the Bank's liquidation Ms. G, by the available facts, was authorised by Resolution 1513 to perform actions including to ensure the bank's liquidation under Article 48(3) of the DGF law through DGF's Resolution 1513 a special governmental body of Country A. Only Ms. G in this regard, can be said to meet the requirement of this element under Article 2 (d) of the MLCBI. The DGF under the LBBA can be said to be the administrative body which also can be referred to as the foreign court under the Bank's liquidation in Country A. And as the administrative body, it is not qualify as having the element of authority in the Bank's liquidation to act as a foreign representative under Article 2 (d) of the MLCBI.

In relation to element 3, where the first arm of the definition is relied upon, the foreign representative must have the power to administer the reorganization or liquidation of the debtor's assets or affairs at the time of the application for recognition.<sup>110</sup> In *Stanford International Bank Limited*,<sup>111</sup> the Court said, without that vesting of power, it was unclear whether the foreign representative would have been a foreign representative for the purposes of making an application for recognition. While on the facts of the Bank's liquidation, Ms. G has the vested powers under Resolution 1513 pursuant to the DGF law under Article 48(3) to perform actions to ensure the Bank's liquidation at the time of the application for recognition; the DGF has ceased at the said time to exercise the powers to ensure the bank's liquidation. The powers of the DGF at the relevant time, were the powers expressly excluded from Ms. G's authority by Resolution 1513 which do not include the powers to administer reorganization or liquidation under Article 2 (d) of the MLCBI. Only Ms. G can be said to have met the requirement of element 3 under Article 2(d) of the MLCBI.

It is worthy to note that the above elements can be said to be cumulative under Article 2 (d) of the MLCBI and ought also to be considered as a whole. On the whole however, only Ms. G can as applicant fall within the description of "foreign representative" as defined by Article 2(d)

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<sup>107</sup> See, n 103, p 10.

<sup>108</sup> *Idem*

<sup>109</sup> *Idem*.

<sup>110</sup> *Idem*.

<sup>111</sup> [2010] EWCA Civ. 1441 [para. 29], CLOUT 1003: See, n 107, p 15, n 95.

of the MLCBI. DGF as applicant failed to fulfil the requirements of the elements to fall within the description of “foreign representative” as defined by Article 2(d) of the MLCBI.]

**\* End of Assessment \***