



SUMMATIVE (FORMAL) ASSESSMENT: MODULE 2A
THE UNCITRAL MODEL LAWS RELATING TO INSOLVENCY

This is the **summative (formal) re-sit 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.**
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- 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 **12pages**.

ANSWER ALL THE QUESTIONS

Total: 38 out of 50

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] 6

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] 8

Question 2.1 [maximum 3 marks] 2

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

The UK enacted the MLCBI via the Cross Border Insolvency Regulations 2006¹. There have been some different approaches in determining the COMI of the debtor or whether an establishment exists. The starting point in the UK was the date of the commencement of the foreign proceedings². The COMI of a Debtor however can move and therefore determining

¹Cross Border Insolvency Regulations 2006, <https://www.legislation.gov.uk/ukxi/2006/1030/contents/made>

² Re Videology Ltd, [2018] EWHC 2186 (CH)

the timing can become crucial and have wider ramifications. Article 16 of the MLCBI³ details the presumption that the COMI is where the Debtor's registered office is, however, this presumption is rebuttable.

In the case of *Re Toisa Limited*⁴, which was analysed subsequently⁵, the UK Court shifted its approach to determining this question more in line with the US approach⁶. The Debtor in that case was the subject to Chapter 11 proceedings in the US and recognition was being sought of those proceedings in the UK. The UK Court determined that it was the date of the recognition proceedings and not the commencement date that needed to be used in order to determine the date for the purposes of COMI.

For full marks it should be noted, that the Guide to Enactment states that it is the time of commencement that is the appropriate date.

Question 2.2 [maximum 3 marks] 3

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

Statement 1 *"This Article provides guidance in case of concurrence of two foreign non-main proceedings."*

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."*

Statement 1: The statement appears to describe Chapter V, Article 30 of the Model Law *"Coordination of more than one foreign proceeding"*. Also Article 1 *"Scope of Application"* which clearly sets out when the Model Law applies.

Statement 2: The statement describes what is set out in Chapter V, Article 32 *"Rule of payment in concurrent proceedings"*, which essentially excludes secured creditors and rights in rem, regarding prohibiting part payments in foreign insolvency proceedings and part payments in relation to British insolvency proceedings concerning the same Debtor.

Statement 3: The statement relates to the rebuttable presumption regarding COMI (which is undefined in the Model Law), detailed in Chapter III, Article 16 *"Presumptions concerning recognition"* of the Model Law.

Question 2.3 [2 marks] 1 mark

³ Ibid, Schedule 1, Chapter III, Article 16, paragraph 3

⁴ Which considered COMI and ultimately resulted in an Order (dated 29 March 2019) that the Chapter 11 Proceedings be recognised as foreign main proceedings in accordance with the Model Law ; <https://www.thegazette.co.uk/notice/3252476>

⁵ *"Clarity on Cross-Border Conundrum"*: By Charlotte Moller, Helena Clarke and Harry Rudkin, 5 April 2019, <https://www.globalrestructuringwatch.com/>

⁶ <https://www.mondaq.com/insolvencybankruptcy/837102/timing-is-everything-different-approaches-to-the-relevant-date-for-determining-comi-in-cross-border-recognition-proceedings>

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 Court of Appeal in *Bakhshiyeva* (Foreign Representative of the Ojsc International Bank of Azerbaijan) v *Sberbank of Russia & Ors*⁷ (the “*IBA*” case appeal) in 2018, were called upon to consider the Gibbs Rule⁸. The Gibbs Rule essentially allows a Claimant, who has contracted with the Debtor and that contract is governed by English law and was performed in England - whose debts are discharged in foreign proceedings, to not affect the Claimant’s ability to bring an action in relation to that English contract to seek their relief in the English Courts. The Gibbs Rules does not apply when the Claimant (creditor) ‘submits’ to the foreign insolvency proceedings – it would be deemed to be an acceptance of the remit of that foreign court. In *IBA* there was no such submission and the application by the foreign representative to seek imposition of an indefinite moratorium continuation interfered substantially with the rights conferred under the Gibbs Rule under English law. The application sought to force the challenging creditors to conform to the foreign Court’s decision. Hildyard J. in the Court of first instance refused the application on that basis and the indefinite moratorium continuation under Article 21 of the CBIR was not granted.

The Court of Appeal specifically focused on the jurisdictional aspect⁹ and the principle of universalism¹⁰ when upholding Justice Hildyard’s decision to not grant the application for an indefinite moratorium continuation. Henderson LJ when addressing one or two questions in his judgment, stated:

“(a) Is it appropriate to grant an indefinite stay so as to defeat the rights of the English creditors?”

*An English court could only properly grant the stay sought by IBA, which is avowedly intended to prevent the English creditors from enforcing their English law rights indefinitely, if it were satisfied of two things. First, the stay would have to be necessary to protect the interests of IBA’s creditors. Secondly, the stay would have to be an appropriate way of achieving such protection. In my view, neither of those conditions is satisfied.”*¹¹

In considering the proposition put by the foreign representative to essentially bring the common law approach in line with modified universalism, the Court of Appeal confirmed, quoting case law¹², that Article 21 centres around procedural matters and essentially should not be applied to the recognition and enforcement of foreign judgments against third parties, similarly Article 21 should not be used to grant a stay in order to “*circumvent the Gibbs rule*”¹³.

Issue 2 of the following should also be mentioned to receive full marks:

- 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

⁷ [2018] EWCA Civ 2802

⁸ *Antony Gibbs & Sons v La Societe Industrielle et Commerciale des Metaux*, (1890) LR 25 QBD 399

⁹ *IBA case appeal*, [2018] EWCA Civ 2802, at paragraph 83 to 85.

¹⁰ *Ibid*, at paragraph 90

¹¹ *Ibid*, at paragraph 86

¹² *Rubin v Eurofinance SA* [2012] UKSC 46, [2013] 1 AC 236

¹³ *IBA case appeal*, at paragraph 91

Gibbs Rule (“Issue 1”) and / or (ii) prolong the stay after the Azeri reconstruction has come to an end (“Issue 2”).

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

Question 2.4 [2 marks] 2 marks

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

The Court in the enacting State, after their recognition of foreign main proceedings, should in terms of relief adhere to Article 29¹⁴. Article 29 in conjunction with Article 28 ensures that local proceedings are not prevented as a result of any recognition of foreign main proceedings being granted, so long as the Debtor has assets in the local State. Further, the opening part of Article 29 details that the Court in the enacting States shall “seek cooperation and coordination under articles 25, 26 and 27”. The enacting Court must also consider any relief to be granted pursuant to Article 19 (pre-recognition) and 21 (post-recognition) must be consistent with the laws of enacting State¹⁵ and following recognition being granted in relation to a foreign main proceeding, Article 20 does not apply, therefore the automatic relief does not apply upon recognition of foreign main proceeding¹⁶.

The Practice Guide¹⁷ on cross-border insolvency provides helpful insights and guidance in relation to relief once recognition has been granted in the enacting State. It is noted that Article 29 in particular provides guidance to a Court in an enacting State when there are concurrent proceedings, local and foreign, in relation to the same Debtor, specifically in relation to relief¹⁸. This Article seeks to provide guidance on coordination including in relation to relief to ensure there are no unnecessary stays, for example, to ensure investigations required to be carried out in multiple jurisdictions can proceed without a stay in one or more of them. Or perhaps proceedings have been commenced in one jurisdiction and a stay in another is desirable to ensure the protection for all creditors. The Courts can cooperate and coordinate to better understand the implications of various aspects including relief ensuring the “pre-eminence” of local proceedings¹⁹.

¹⁴ MLCBI, Chapter V, Article 29

¹⁵ Ibid, Article 29(a)(i)

¹⁶ Guide to Enactment and Interpretation, paragraphs 176 to 188

¹⁷ UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation

https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/practice_guide_ebook_eng.pdf

¹⁸ Practice Guide, Page 22, paragraph 12

¹⁹ UNCITRAL Model Law on Cross-Border Insolvency: The Judicial Perspective, page 73, paragraph 211

The foreign representatives in the foreign main proceedings have a duty towards the Court in the enacting State, pursuant to Article 18 of MLCBI. They are obligated to inform the court in the enacting State “promptly after the time of filing the application for recognition of the foreign proceeding, of “any substantial change in the status of the recognized foreign proceeding or the status of the foreign representative’s appointment”. The purpose of the obligation is to allow the court to modify or terminate the consequences of recognition”²⁰. This ensures that the Court is kept informed of any substantial changes that may affect decisions in relation to relief, including any changes to the status of the foreign representatives²¹.

QUESTION 3 (essay-type questions) [15 marks in total] 11

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

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

Question 3.1 [maximum 4 marks] 3 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?

Whilst the Model Law’s purpose is not to create substantive rights²² it does create a framework to harmonise but at the same time seeking to respect local laws of States who adopt it. The UNCTRAL Guide to Enactment lists²³ 7 ways which seek to achieve this approach.

Under the Model Law of State A (enacting State) a recognition of foreign proceedings application would be dealt with under Articles 15-18 of MLCBI²⁴. Access rights are detailed in Article 9 and give the right of direct access to a foreign representative and creditors in State A²⁵. This effectively provides freedoms to a foreign representative to appear before the enacting State’s court²⁶. The implementation of the MLCBI by State A should enable swifter access and cooperation which will benefit the foreign representative of State B. There is no need to open new insolvency proceedings in State A as they are essentially treated as if they are local. The core processes are detailed in Articles 15 and 16²⁷ of the MLCBI and provide “simplicity and speed”²⁸. The foreign representative has access to the Court in State A²⁹ and can make an application for recognition of the foreign proceedings. Further the

²⁰ Guide to Enactment and Interpretation, page 78, paragraph 168

²¹ The Judicial Perspective, page 13, paragraph 36

²² Guide to Enactment, page 32, paragraphs 46

²³ Ibid, page 19-20, paragraph 3

²⁴ Chapter III of MLCBI

²⁵ MLCBI, Article 9

²⁶ Digest of Case Law, MLCBI, page 29, paragraph 1 (no requirements required by the foreign representative such as a licence or consular action)

²⁷ Guide to Enactment, paragraphs 127-136

²⁸ Digest of Case Law on the UNCITRAL MLCBI, page 35, paragraph 1

²⁹ Pursuant to Article 15(1), MLCBI (there have been no reported cases in relation to this subparagraph 1)

document(s) required³⁰ for such an application are described but are flexible in approach, together with information regarding all other foreign proceedings³¹ to allow for consistency across proceedings where possible and possibly translations³² where appropriate.

Various presumptions are made based upon the information contained in the documents and so long as the proceedings in State B are considered a 'foreign proceeding'³³ and those representing in the foreign proceedings are considered to be 'foreign representatives'³⁴, then any documents used to support any application, such as them being considered authentic³⁵ and in relation to a body corporate, as in the instance case, the COMI is presumed³⁶ to be where the Debtor's registered office is. The benefit to the foreign representative of these presumptions are that the whole process becomes more streamline and efficient, given that the court in State A would not need to assess evidence, unless there was a challenge to the presumption³⁷.

Gaining access will allow the foreign representative to benefit from various tools and mechanisms in State A in relation to any relief for example. Certainly time and expense is also saved which is of great benefit. All of the above ensure that the foreign representative has no bar to access the Court in State A in order to make their application.

In relation to coordination, the foreign representative will benefit in State A in various ways, including providing a temporary pause and allowing the enacting State's court to decide what coordination³⁸ is required with the other jurisdiction. Coordination in terms of relief sought including in relation to coordinating relief.

Article 30 of the MLCBI which itself refers to Articles 25, 26 and 27 relates to how Courts will coordinate where there is more than one set of proceedings, so long as there is more than one³⁹. Agreements can be used in relation to coordination of proceedings⁴⁰ – also referred to as cross border insolvency agreements or protocols⁴¹. Article 29 deals with coordination of foreign and local proceedings and the court in State A (enacting State) will seek cooperation and coordination under Article 25, 26 and 27. Scope is provided for within Chapter IV of the MLCBI for coordination allowing judges and legal representative to decide when and how the coordination would work⁴², ranging from pre-recognition relief⁴³ to post-recognition relief, as well as between judges in different jurisdictions⁴⁴ and so on. The aforementioned will foster efficient working and assist in effecting better results out of the insolvency process.

It matters not that there is no reciprocity as the MLCBI does not require there needs to be and recognition will not be denied solely because the foreign State would not return the

³⁰ Ibid, Article 15(2)(a-c)

³¹ Ibid, Article 15(3)

³² Ibid, Article 15(4) (there have been no reported cases in relation to this subparagraph 4)

³³ MLCBI, Article 16(1)

³⁴ Ibid

³⁵ MLCBI, Article 16(2)

³⁶ Ibid, Article 16(3)

³⁷ Guide to Enactment, paragraphs 137 to 149

³⁸ Ibid, page 19-20, paragraph 3

³⁹ Digest of Case Law, page 87, paragraph 2

⁴⁰ MLCBI, Article 25 and 27(d)

⁴¹ MLCBI, Practice Guide

⁴² MLCBI, Guide to Enactment, paragraphs 209-223

⁴³ MLCBI, Article 19

⁴⁴ Ibid, specifically Article 27 (a),(d) and (e) (although the list in this article is non-exhaustive)

equivalent relief sought⁴⁵. As State A has not included reciprocity as a requirement for recognition to be granted there is no limitation in that regard in the instant case.

For full marks on this question, reference should also be made to art. 11 as an access right prior to recognition.

Question 3.2 [maximum 5 marks] 4 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.

Assuming the foreign proceedings in State B qualified to be a ‘foreign proceeding’ and the legal representative qualified to be ‘foreign representative’ in those foreign proceedings the following further considerations should be considered before there can be a successful recognition application. The burden of proof in a recognition application is on the applicant making such an application.

Evidence

Article 15 sets out the evidential criteria required for a recognition application. The foreign representative can make the application for recognition of the foreign proceedings so long as they have been appointed⁴⁶. The application would need to be supported by evidence (a certified document) of the decision commencing the foreign proceedings and appointing the foreign representative⁴⁷ or, evidence (a certificate) from the foreign court affirming the existence of the proceedings and appointment of the foreign representative⁴⁸, or, if neither of the aforementioned are used, other evidence from other documents which demonstrate the foreign proceedings exist and the appointment of the foreign representative⁴⁹. A statement must also be filed with the application detailing any other foreign proceedings regarding the particular debtor known to the legal representative⁵⁰. An official translation may also be required⁵¹. Further, Article 16, which details certain presumptions to be made in any application, together with Article 15 they form the core procedural requirements⁵².

Restrictions, Exclusions and Limitations

Article 28⁵³ concerns concurrent proceedings and provides that even though there are foreign proceedings it will not prevent the commencement of local proceedings, as long as the common Debtor has assets in the local State (a restriction). This Article caters for the local proceedings to potentially apply abroad where, for example, there are no foreign proceedings available – an extension. This extension is subject to two restrictions, firstly, the extension should be necessary to further coordination and cooperation under Article 25-27

⁴⁵ Judicial Perspective, page 18, paragraph 47

⁴⁶ MLCBI, Article 15(1)

⁴⁷ Ibid, Article 15(2)(a)

⁴⁸ Ibid, Article 15(2)(b)

⁴⁹ Ibid, Article 15(2)(c)

⁵⁰ Ibid, Article 15(3)

⁵¹ Ibid, Article 15(4)

⁵² MLCBI, Guide to Enactment and Interpretation, paragraphs 127 to 136

⁵³ MLCBI

and, secondly, the assets in the foreign State must be subject to administration in the acting State under their law⁵⁴.

Article 1(2) allows a State to exclude from their implemented Model Law certain proceedings. Article 2(a) provides for the Model Law to apply to all foreign proceedings but an exclusion can be added by a State, pursuant to Article 1(2). A State upon implementing often exclude certain categories or entities which are excluded from the Model Law perhaps because they are dealt with in a different way under that State's legislation⁵⁵.

Public Policy

Articles 15 and 17 are relevant Article 6 deals with possible public policy grounds that a foreign proceeding may be deemed to not be such and therefore excluded for the purposes of the Model Law, however, as per Snowden in *Nordic Trustee ASA v OGX Petroleo e Gas SA* stated:

*"I accept that, in the ordinary case, recognition of a foreign proceeding within the meaning of that expression in Article 2(i) of the Model Law is intended to follow if the applicant can satisfy the requirements of Articles 15 and 17 of the Model Law. Article 17 provides that if the requirements are satisfied, the foreign proceeding "shall" be recognised. Further, although Article 17 is subject to Article 6, which provides that the court can refuse to take any action which would be "manifestly contrary to the public policy of Great Britain or any part of it", it is clear that this public policy exception is intended to be restrictively interpreted"*⁵⁶.

This concept has been interpreted narrowly, the word 'manifestly' in Article 6 has meant that the application of public policy grounds for rejecting an application be applied in exceptional circumstances⁵⁷. However, it may be used to limit the relief sought.

Article 23(2) distinguishes between main and non-main proceedings with main being afforded automatic relief but non-main proceedings subject to some limitations in relation to relief, in that they are not automatic.

The court subject to the above considerations and a decision to be made in a timely manner, per Article 17, the court shall grant recognition pursuant to Article 4. Further, if the State where the foreign proceedings are is where the COMI of the debtor is then they would be considered main proceedings (Article 2(a)). Generally the granting of recognition is supposed to be straight forward and a 'tick box' exercise as detailed in an English case in 2019⁵⁸.

Art. 3 on international obligations should be mentioned for full marks on this question.

Question 3.3 [maximum 5 marks] 3 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.

⁵⁴ MLCBI, Digest of Case Law, page83, paragraph 1

⁵⁵ The UK's CBIR 2006 is an example where various entities and companies are excluded and do not fall within the remit of the MLCBI, as implemented

⁵⁶ [2016] EWHC 25 (Ch), Snowden J, at paragraphs 44 and 45

⁵⁷ MLCBI, Digest of Case Law, page20, paragraph 1

⁵⁸ *Rozhkov v Markus* [2019] EWHC 1519 (Ch)

If there are no concurrent proceedings, Articles 19-24 of MLCBI are relevant as these relate to relief.

Pre-recognition

Article 19 of MLCBI details the relief that may be granted upon application for recognition of foreign proceedings, therefore pre-recognition. Where relief is urgently needed to protect the assets of the debtor or interested creditors, the court can:

- stay execution against debtor's assets⁵⁹, in order to protect and preserve assets in the enacting State
- entrust the administration/realization of assets in that State that are perishable, susceptible to devaluation or in jeopardy⁶⁰,
- grant any relief listed in certain parts of Article 21, such as, suspending rights to transfer, encumber or dispose of debtor assets⁶¹,
- examine witnesses/taking evidence regarding assets/affairs/rights/obligations and liabilities of the debtor⁶²,
- grant any additional relief available under that State's laws regarding reorganisations or liquidations⁶³.

Post-recognition

Article 21 of MLCBI details the discretionary relief that may be granted upon recognition of foreign proceedings (main or non-main), therefore post-recognition. These include⁶⁴:

- staying the commencement or continuation of actions regarding the debtor's assets, rights, obligations/liabilities if not already occurred under Article 20(1)(a)⁶⁵,
- staying execution against the debtor's assets to the extent not already occurred under Article 20(1)(b)⁶⁶
- suspending the right to transfer/encumber or dispose of assets to the extent not already occurred under Article 20(1)(c)⁶⁷,
- examine witnesses, taking evidence regarding debtor's assets/affairs/right/liabilities/obligations⁶⁸,
- entrusting the administration or realization of all/part of debtor's assets in the State to the foreign representative⁶⁹,
- extend relief granted under Article 19(1), that of pre-recognition relief⁷⁰
- grant any additional relief available under that State's laws regarding reorganisations or liquidations⁷¹

Article 20 of MLCBI details the mandatory relief that is available where the foreign proceedings are 'main' proceedings only. Those include:

- stay regarding any existing actions concerning the debtor's assets⁷²,
- stay on execution against debtor's assets⁷³,

⁵⁹ MLCBI, Article 19(1)(a)

⁶⁰ MLCBI, Article 19(1)(b)

⁶¹ MLCBI, Article 21(1)(c)

⁶² MLCBI, Article 21(1)(d)

⁶³ MLCBI, Article 21(1)(g)

⁶⁴ Not an exhaustive list as detailed in UNCITRAL, Guide to Enactment page87-88, paragraphs 189-195

⁶⁵ MLCBI, Article 21(1)(a)

⁶⁶ MLCBI, Article 21(1)(b)

⁶⁷ MLCBI, Article 21(1)(c)

⁶⁸ MLCBI, Article 21(1)(d)

⁶⁹ MLCBI, Article 21(1)(e)

⁷⁰ MLCBI, Article 21(1)(f)

⁷¹ MLCBI, Article 21(1)(g)

⁷² MLCBI, Article 20(1)(a)

- suspension of rights to transfer/encumber or dispose of any assets⁷⁴.

Restrictions, Limitations or Conditions

The restriction under Article 21(3) regarding when the court should consider granting relief in foreign non-main proceedings, the court must be satisfied that the relief relates to assets, under the enacting State, that should be administered in the foreign non-main proceedings or information needed in that proceedings. It only applies to non-main proceedings⁷⁵

Article 20(2) permits a State to incorporate exceptions, limitations, modifications or termination regarding a stay and suspension in paragraph 1. Therefore, one would also look to the State's law implementing the MLCBI to check whether any such limitations etc...apply.

Article 21(1) although drafted broadly does not provide unlimited relief - States can set their own limits. In the UK courts certain limits have been set, for example, one case saw the Supreme Court decide that enforcement of insolvency-related in personam default judgments are not covered by the MLCBI⁷⁶. Further, a UK Court at first instance deciding that applying foreign insolvency law to English law governed contract fell outside the scope of the MLCBI⁷⁷.

Article 22(1) details limitations which the court has at its disposal when consider granting relief, both in relation to Article 19 (pre-recognition) and under Article 21 (post-recognition). The court will have to consider whether the creditors and other interested parties are protected⁷⁸. The Court has the ability to impose conditions on any pre or post recognition relief sought, pursuant to Article 22(2). The Court can also be called upon, pursuant to Article 22(3) to modify or terminate relief.

Again, reference here should also be made to art. 3 and art. 6 on public policy.

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?

Article 21 relief is discretionary and only available upon recognition. Article 19 relief is discretionary and deals with urgent relief that may be required upon an application being made for recognition. The provisional nature of Article 19 provides for the expiry of any provisional relief initially granted when the recognition application is decided/dealt with⁷⁹, so long as there has been no extension of that relief pursuant to Article 21⁸⁰. It is unlikely that the English Court would permit the continuation because Article 20(1)(c) sets out that once the recognition order has been made the Debtor effectively no longer has control of their assets, this ability effectively being suspended. The suspension is given the same scope as if "*adjudged bankrupt under the Insolvency Act 1986*"⁸¹, therefore there is no need for a continuation of the provisional freezing injunction. A recent case in the High Court confirmed this approach⁸².

⁷³ MLCBI, Article 21(1)(b)

⁷⁴ MLCBI, Article 21(1)(c)

⁷⁵ *Swissair Schweizerische Luftverkehrsengesellschaft* [2009] EWHC 2099 (Ch), paragraph 14

⁷⁶ *Rubin v Eurofinance SA* [2010], UKSC, at 46

⁷⁷ *Fibria Celulose S/A v Pan Ocean Ltd* [2014] EWHC 2124 (Ch)

⁷⁸ UNCITRAL, *Digest of Case Law*, page 73

⁷⁹ Cross Border Insolvency Regulations 2006, Schedule 1, Model Law, Article 19, paragraph 2

⁸⁰ Cross Border Insolvency Regulations 2006, Schedule 1, Model Law, Article 21, paragraph 1(f)

⁸¹ Cross Border Insolvency Regulations 2006, Schedule 1, Model Law, Article 20, paragraph (2)(a)

⁸² *Protasov v Derev*, [2021] EWHC 392 (CH), paragraphs 56, 58-63 for Johnson J. decision

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

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

(1) Background

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

The Bank entered provisional administration on 17 September 2015 and liquidation on 17 December 2015. Investigations into the Bank have revealed that it appears to have been potentially involved in a multi-million dollar fraud resulting in monies being sent to many overseas companies, including entities incorporated and registered in England.

Proceedings were 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 marks** and

4.1.2 whether the Applicants fall within the description of "foreign representatives" as defined by article 2(d) of the MLCBI[**maximum 5 marks**]. **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.

4.1.1

It is noted that the Bank is not excluded from the scope of the MLCBI by Article 1(2). The bank falls within the MLCBI for the purposes of this question. It is further noted that notwithstanding that Country A has not adopted the MLCBI this does not prevent the English Courts from applying the MLCBI in an application for recognition⁸³ of the liquidation in England.

For the purposes of the MLCBI a "foreign proceeding" is defined in Article 2 of the MLCBI:

"(a) "foreign proceeding" means 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 reorganisation or liquidation;"⁸⁴

In order to consider the definition further and its application in the instance case, one needs to look to the Guide to Enactment and Interpretation, Digest of Case Law⁸⁵ and the Judicial Perspective for more detail as well as possible case law to support.

Given the context of the scenario is before an English Court for recognition, the English law (CBIR) adopting the Model Law will be referenced below.

Foreign Proceeding

Every element in Article 2(i) has to be satisfied in order to fall within the definition and be classed as foreign proceedings⁸⁶ and should be considered as a whole⁸⁷. A foreign proceeding can be either a collective judicial or administrative proceedings and only one of those two elements need be present as long as there is a liquidation element⁸⁸ and should be interpreted in light of the "international origin and the need to promote uniformity"⁸⁹. Further, a 'proceeding' has been interpreted to mean "a statutory framework that constrains a company's actions and that regulates the final distribution of the company's assets"⁹⁰. In this scenario there is no mention of judicial intervention in the traditional sense. However, it

⁸³ Guide to Enactment and Interpretation of the Model Law, page 24, paragraph 19

⁸⁴ Model Law on CBI Guide to Enactment and Interpretation; identical wording adopted in the UK under Cross Border Insolvency Regulations 2006 (CBIR), Schedule 1, Model Law, Article 2(i) (*Definitions*)

⁸⁵ MLCBI, Digest of Case Law, pages 6-16

⁸⁶ Guide to Enactment and Interpretation, paragraphs 62 to 80

⁸⁷ *Stanford International Bank Limited* [2010] EWCA Civ 137 at para 23, CLOUT 1003 (Clout being the reporting system for UNCITRAL case law)

⁸⁸ *New Paragon Investments Limited* [2012] BCC 371, at para 7, CLOUT 1272

⁸⁹ MLCBI Article 8

⁹⁰ Digest of Case Law, page 6, para 4

is likely to be interpreted as a proceeding as the proceeding appears to be administrative insolvency based law⁹¹ and it is recognised that foreign proceedings may differ even in relation to creditor priorities but that is unlikely to be sufficient to refuse⁹². The law of Country A on Banks and Bank Activity ('LBBA') and other regulations deal with insolvency and set out the criteria for insolvency regarding Banks (Article 76 of LBBA), this is likely to mean that this aspect of Article 2(i) would be satisfied.

Collective

In relation to the involvement of creditors collectively, this aspect needs to be satisfied and is designed to ensure an inclusive approach regarding the involvement of all creditors in the insolvency proceeding⁹³. Certain characteristics have been used in order to identify what are considered to be collective proceedings, including an "orderly regime"⁹⁴ affecting the rights and obligations of all creditors, which we appear to have in this case given the framework contained within LBBA and the Deposit Guarantee Fund ('DGF'). Also regarding the provisional administration where the DGF are given full and exclusive rights to manage the bank (Article 35(5) and 36(1) of the DGF Law) and the moratorium period preventing claims by depositors or creditors and so on (Article 36(5) of the DGF Law) are indications that Country A's framework is designed to encompass creditor claims. There does not necessarily need to be distribution for the proceedings to be considered collective⁹⁵, in the current case there does not appear to have been any distribution, and certain parties should and in the current case do not appear to have been given a preference⁹⁶. Creditor participation must be a reality even if it is limited⁹⁷, there is mention of a Mr Z owning 95% of the Bank's shares via various corporate entities – this is identifying a creditor. Under Article 36(5) of LBBA, when the Bank is in provisional liquidation, which provides for a moratorium period preventing certain actions, including claims of creditors, appears to comply with the criteria regarding collectivity, if a list of creditors is being drawn up. The DGF Law also provides powers to compile a register of creditor claims and to seek to satisfy them. These indicate there is likely to be deemed to be creditor participation. However, it is unclear whether there is a process which provides for a Creditor to appeal or have proceedings reviewed. The DGF, as liquidator does have extensive powers including to file claims with the Court (involving a Court (under Article 37 of DGF Law) and therefore some ability to challenge any claim. Whilst the DGF have the power to compile a register of creditor claims and seek to satisfy them it is unclear, one would assume that notification would be given to all creditors under the Laws and Regulations Country A has in place. Subject to the last point being satisfied then this aspect of Article 2(i) would be satisfied.

The foreign proceeding must be pursuant to the law relating to insolvency.

It is clear that the statutory framework in Country A is designed to deal with law and insolvency as envisaged in the MLCBI⁹⁸. The English Court noted that the law did not have to be statutory or exclusively relate to insolvency⁹⁹. In the instant case there is clearly a law which would satisfy this aspect of Article 2(i) and the Debtor was classified under the framework on 17 September 2015 as insolvent pursuant to Article 76 of the LBBA.

⁹¹ Nordic Trustee ASA v OGX Petroleo e Gas SA, per Snowden J. at para 45 (where he quoted the Guide to Enactment of the Model Law, paragraphs 29 to 30)

⁹² Bud-Bank Leasing SP [2010] BCC 255 (reference was made to McGrath v Riddell [2008] UKHL 21)

⁹³ Guide to Enactment and Interpretation, paragraphs 69-72

⁹⁴ Larsen v Navios International Inc. [2011] EWHC 878 (Ch) at para 23

⁹⁵ Digest of Case Law, Page 6 paragraph 7(b)

⁹⁶ Ibid, page 6, paragraphs 7(c)

⁹⁷ Stanford International Bank Limited [2010] EWCA Civ 137 at para 23, CLOUT 1003

⁹⁸ Guide to Enactment and Interpretation, paragraph 73

⁹⁹ Stanford International Bank Limited [2010] EWCA Civ 137 at para 24, CLOUT 1003

Control and supervision of the assets and affairs of the debtor by court or official body

The Guide to Enactment does not specify a level of supervision or a time from which there should be supervision¹⁰⁰ it does state:

"The Model Law specifies neither the level of control or supervision required to satisfy this aspect of the definition nor the time at which that control or supervision should arise. Although it is intended that the control or supervision required under subparagraph (a) should be formal in nature, it may be potential rather than actual. As noted in paragraph 71, a proceeding in which the debtor retains some measure of control over its assets, albeit under court supervision, such as a debtor in possession would satisfy this requirement. Control or supervision may be exercised not only directly by the court and also by an insolvency representative where, for example, the insolvency representative is subject to control or supervision by the court. Mere supervision of an insolvency representative by a licensing authority would not be sufficient."¹⁰¹

Foreign Court is defined in the MLCBI¹⁰² and the CBIR¹⁰³ as "...a judicial or other authority competent to control or supervise a foreign proceedings". The DGF are a governmental body in Country A whom, amongst other things, are responsible for the process of withdrawing insolvent banks from the market and winding down their operation using liquidation. In accordance with Article 77 of the LBBA the DGF automatically become the liquidator of a bank when the National Bank ('NB') revoke a bank's licence. DGF could be classed as 'other authority competent...' in the instant case.

English Courts have looked at other jurisdictions' interpretation¹⁰⁴ and it was noted that it is a low legal standard and that any control by the Court does not need to be day-to-day supervision and liquidators can proceed without much involvement of the Courts. This is analogous to the instant case where Article 37 of the DGF Law involves the Court should claims to be made, which could give rise to the contentious proceedings which a court would need to adjudicate on. However, although it is possible to present arguments to the contrary, for example, using Articles 3(3) and (7) of the DGF Law to suggest that no public authority, possibly even the court, have the right to interfere with the DGF's functions and powers. Given the remit permitted under the DGF Law for the court to play a role in the insolvency proceedings could be sufficient to meet the low standard required in this aspect of Article 2(i), of Schedule 1 of the CBIR.

Reorganisation or liquidation of the debtor as the purpose of the proceedings

It appears apparent on the facts of the instant case that this aspect of Article 2(i), of Schedule 1 of the CBIR is met. The clear purpose of Country A's Law is to liquidate where appropriate¹⁰⁵ and the fact that the Debtor is in liquidation would denote that this aspect has been met.

In conclusion it is apparent it would appear that most aspects of Article 2(i) of Schedule 1 of the CBIR would be satisfied and that the application would likely succeed on this aspect.

4.1.2

¹⁰⁰ Guide to Enactment and Interpretation, paragraph 74

¹⁰¹ Ibid

¹⁰² MLCBI, Article 2(e) and Guide to Enactment and Interpretation, page 46, paragraph 86

¹⁰³ CBIR, Schedule 1, Model Law, Article 2(f)

¹⁰⁴ Agrokor DD, Re (Cross-Border Insolvency Regulations 2006) [2017] EWHC 2791 (Ch) (09 November 2017)

¹⁰⁵ In accordance with Guide on Enactment and Interpretation, paragraph 77

For the purposes of the MLCBI a “foreign representative” is defined in Article 2 of the MLCBI and CBIR as,

“(j)“foreign representative” means a person or body, including one appointed on an interim basis, authorised in a foreign proceeding to administer the reorganisation or the liquidation of the debtor’s assets or affairs or to act as a representative of the foreign proceeding;”¹⁰⁶

The aforementioned definition needs to be considered further in order to establish whether both DGF and the authorised officer/person, Mrs G, are capable of both applying for recognition, of the liquidation, as the foreign representative in the Bank’s liquidation.

Generally, the Model Law does not detail that the foreign representative has to be authorised by the foreign court¹⁰⁷. In this case the court in Country A has not made any such appointment as the statutory framework provides the mechanism but this would appear to have no impact on the requirements outlined in Article 2(j)¹⁰⁸ of the CBIR.

From the definition above the elements that need to be satisfied are as follows:

1. An appointed person or body, including on appointed on an interim basis.

Although the MLCBI does not define ‘person’ or body’, Mrs G would be classed as a person and DGF, although a governmental body of Country A is an economically independent institution and could be classed as a body as a person (if a corporate entity) or as a body (defined as an artificial person created by a legal entity¹⁰⁹). The latter having been given the power to act on an interim basis initially, as well as later in the liquidation, as the formally appointed liquidator. It would appear that the definition of what an appointed liquidator can be is broad and has been interpreted to include appoints made by a specific agency, it does not just have to be a Court and falling under either one of these definitions would be sufficient to satisfy this aspect under the MLCBI¹¹⁰.

Article 16(1) and Article 15(1) of the MLCBI enables the Court to presume the facts indicated in any documents presented, including regarding the appointment of a foreign representative. Therefore, the Affidavit or other documents if they contain this information may be used to assist the Court.

2. Authorised in a foreign proceeding to administer the reorganisation or liquidation of the debtor’s assets or affairs or to act as representative of the foreign proceeding.

DGF have been authorised under the laws of Country A as provided for in Article 34 of the DGF Law they are the ‘authorised officer’ during any provisional administration and under Article 77 of LBBA DGF are the independent liquidator automatically appointed on the date they are notified by NB that the Bank’s licence would be revoked. DGF at this point acquires the full powers of a liquidator under their law and has the ability to deal with the Debtor’s assets and affairs and full and exclusive rights to manage the Bank and all the powers of the Bank’s management, pursuant to Articles 35(5) and 36(1) of

¹⁰⁶ Cross Border Insolvency Regulations 2006, Schedule 1, Model Law, Article 2(j) (*Definitions*); also found in Model Law Guide to Enactment and Interpretation

¹⁰⁷ Digest of Case Law on the UNCITRAL Model Law, Page 10, paragraph 37

¹⁰⁸ Schedule 1, CBIR

¹⁰⁹ Petition of Ernst& Young, Inc. 383 B.R. 773, 777 (Bankr. D.Colo. 2008), CLOUT 790 - USA Courts found a ‘person’ to include an individual, partnership or corporation

¹¹⁰ Guide to the Enactment and Interpretation of the Model Law, paragraph 86

the DGF Law. The Bank went into liquidation on 17 December 2015 and the following day the aforementioned powers were acquired by DGF as the liquidator. DGF therefore would qualify as being the Debtor's foreign representative and satisfy this aspect of the definition.

Mrs G, had some limits to the powers vested in her by DGF. Mrs G has been designated as the 'authorised officer' by DGF under Article 48(3) of the DGF Law and Article 2(1)(17) of the DGF Law essentially gives the Fund's authorised person, who is classed as an employee of the Fund, who under the powers of this Law and any powers delegated by the Fund, proceeds with actions to withdraw the Bank from the market during the provisional administration or liquidation. Further, Article 37 of the DGF Law provides for extensive powers to DGF or its 'authorised person' but only insofar as those powers are delegated. However, she also has some considerable restrictions on her powers– as detailed in Resolution 1513 passed by the DGF Board. The Guide to Enactment does indicate that a foreign representative can be someone authorised in the foreign proceedings¹¹¹ to administer, including in a recognition application and representing in those proceedings. The definition appears to be broad¹¹². If this is the starting point in relation Mrs G, the next question should be, if Mrs G's powers have been restricted considerably, does this impact on whether she is still considered to be a foreign representative or not? It appears so, as under Resolution 1513 Mrs G she is delegated all liquidation powers, as set out in the DGF Law (which itself refers more to the Bank's withdrawal from the market under Article 2(1)(17) – but also other Articles which effectively are restricted if the DGF so decide to limit powers – which they have), but at the time of the recognition application in England, Mrs G had no authority or powers to:

- Claim damages from a related party of the Bank
- Claim against a non-banking financial institution (who raised money as loans or deposits from individuals)
- Power to arrange for the sale of the Bank's assets (although she has the power to sign all agreements related to the sale of the Bank's assets)

The above remained vested in DGF. Mrs G must satisfy the criteria that she is empowered to administer the liquidation of the Debtors assets or affairs at the time of the recognition application. She appears to fall foul of having the power to administer the liquidation regarding assets. This power could be given later in which case Article 18 of the MLCBI may assist. The second half of Article 2(j) allows for an 'or' – assets or affairs or to act as a representative of the foreign proceeding. Therefore, if she has the power to deal with affairs or to act as the representative of the foreign proceedings then she will satisfy this aspect would the English Court could proceed to treat her as a foreign representative.

Very good answer!

End of Assessment

¹¹¹ Guide to the Enactment and Interpretation of the Model Law, paragraph 86

¹¹² Ibid, paragraph 86