



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 marks: 38,5 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] 7 marks

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

Question 1.1

Which of the following statements **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.

The correct answer is D

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.

The correct answer is A

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).

The correct answer is C

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] 8,5 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.

ANS: The appropriate date for determining the COMI of a debtor, or whether an establishment exists is the date of commencement of foreign proceedings. It may be possible in certain cases that the COMI of the debtor might shift to a new place during the impending/imminent perils of insolvency commencement but then the particular requirement of ascertainment by creditors (as mentioned in UNCITRAL Guide to Enactment) as on the date of commencement of foreign insolvency proceedings would be difficult to meet and therefore such COMIs which have been suspected to have shifted with mala fide intentions and a close proximity to commencement of foreign proceedings is established then such situations might require some tweaks in the above approach.

The international judicial precedents however seem to inculcate different situational standards. The second circuit of appeals in US held in the matter of Morning Mist Holdings Ltd. Vs Kryz that the relevant date for determining the COMI would be around the time when

chapter 15 petition in US is filed under the Model Law but however, the EIR and other instruments are majorly inclined on consideration of period of COMI from commencement of foreign insolvency proceedings to filing of chapter 15 petition so that bona fide intention of debtor may be ascertained.

Therefore, to conclude, Considering the debtor's COMI, the various reference that the courts have made till date includes the date of commencement of COMI, date of application for recognition, date the court is called upon to decide the application or a date determined by reference to the operational history of the debtor.

Question 2.2 [maximum 3 marks] 2 marks

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

Statement 1 *"This Article 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."*

ANS: Statement 1: Article 30 (c) mentions that in the event of recognition of more than one foreign non-main proceedings regarding the same debtor, then the court in the enacting state where relief/recognition is sought, then such court shall ensure maximum cooperation and coordination by granting, modifying or terminating the relief to achieve consistency. It is also mandated that this consistency must be achieved or maintained thereafter with the foreign main proceedings. This provision applies irrespective of whether there is any pending proceeding in the recognising state or not.

Statement 2: Article 32 is intended to ensure equality of treatment to the same class of creditors by stating that a creditor who has received part payment in foreign insolvency jurisdictions is not entitled to gain his share in another jurisdiction unless the proportionate claims of other creditors of same class are met. This rule creates an exception to the creditors who have secured claims which are either guaranteed by assets or the creditors who enjoy *rights in rem* which are enforceable against third party as the rights of such creditors depend upon the law of the state where proceeding is conducted and therefore, the secured claims have been kept out of the HOTCHPOT RULE.

Statement 3: The word "Insolvency" is not defined in the MLCBI and Article 31 here brings the rebuttable presumption for insolvency of debtor in the enacting state on the recognition of the foreign main proceedings. This provision ensures the immediate protection to local creditors by not indulging into time consuming process of proving of insolvency as the commencement of insolvency proceedings in the area where COMI of the debtor lies is assumed as the proof of distress in the financial position of the debtor. Therefore, the onus of proving the insolvent position of the debtor no more would lie of creditor as recognition of foreign main proceedings are presumed to have fulfilled this ground. **The correct answer is 16 (3)**

Question 2.3 [2 marks] 1,5 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.**

ANS: In the IBA case, Justice Hildyard denied the relief of the Moratorium continuation application as the grant of permanent stay would be against the *Gibbs rule* as the rule requires the strict definition and distinction of legal rights and their enforcement. Since the grant of indefinite moratorium would forever prevent the exercise of challenging creditors of English Contact law right and recognise the discharge of challenging creditors' claims under the Azeri insolvency law which is contrary to Gibbs law.

Also, the court of appeal rejected the notion that enforcement of claims by English creditors might jeopardize the ability of IBA to repay the new corporate bonds that were issued as part of Azeri restructuring plan as such consequence would be too far indirect and imponderable a consideration to satisfy the test of necessity under article 21(1) of MLCBI. The court in fact went to suggest that the parallel scheme of arrangement in UK might have solved the issue. The Court of Appeal finally held that such indefinite moratorium could be granted only on two conditions: *firstly, such stay is necessary to protect the interests of IBA creditors and secondly, the stay is an only appropriate way of providing such protection. Since both the conditions were not fulfilled, the court of appeal denied to grant the stay.*

For full marks on this question reference should be made to the court's argumentation on the fact that granting recognition would prolong the stay after the Azeri reconstruction had come to an end.

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**.

ANS: The rules for coordination of concurrent proceedings require consistency and coordination of all proceedings at international level and Article 29 of MLCBI highlights such contrasting situations and In cases where domestic proceedings are already opened at the time when recognition of foreign proceedings is sought then Article 29(a) becomes relevant herein for the relief that may be sought in such situations. The already commenced domestic proceedings therefore demand the consistency and thus any relief that such proceeding seeks under Article 19 or 21 must be consistent with such local proceeding. It is imperative to mention here that if the domestic proceedings are recognised as the foreign main proceeding, then the automatic reliefs as enshrined under Article 20 won't be available to later foreign proceeding. The foreign representative is having the continuous duty under Article 18 of MLCBI to inform the court of any substantial changes including the status of the proceedings, change/appointment of foreign representative, any other additional proceedings concerning the debtor that would have affected the relief/recognition decision of the enacting state had those facts been known at the time of application/recognition. Also, It is the duty embarked upon the foreign representative to advise the enacting state of any other foreign proceedings regarding the debtor so that consistency and coordination could be achieved. The recognising court may also ask for status report to bring clarity on the effect of technical modifications on recognition/relief of proceedings.

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

A foreign representative of a foreign proceeding opened in State B in respect of a corporate debtor (the Debtor) is considering whether or not to make a recognition application under the implemented Model Law of State A (which does not contain any reciprocity provision). In

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

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

Question 3.1 [maximum 4 marks] 3,5 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?

ANS: Model Law provisions does not specifically mandate the formal order of recognition for seeking cooperation by foreign representative. There are few cases that held that even in cases where foreign proceeding is not entitled to recognition then articles 25 - 27 do not limit any jurisdiction of courts to provide assistance to foreign representative. Therefore, the foreign representative enjoys access and coordination rights that provide them standing before the courts in the enacting state *without the need of opening up separate proceedings to achieve such standings in the enacting state*. Any kind of communication could be made with such standing and thereby MLCBI fills in the gap to enable courts and foreign representatives to be efficient and achieve optimal results.

Another benefit that such access and coordination offer to foreign representatives is that it avoids the traditional *time consuming and cost-inefficient* procedures of letters rogatory and requests for consular assistance. Also, the anti-discrimination principle as provided in MLCBI also helps to achieve consistency of treatment of stakeholders across different jurisdictions and thereby facilitates in transparency and consistency of insolvency proceedings.

Since cooperation is not dependant on recognition, the procedural framework as prescribed in MLCBI would assist the foreign representative in exploring the appropriate means of cooperation. These access rights when used in conjunction with recognition help to achieve optimal results. Moreover, along with the safe conduct rule, such access rights ensure that foreign representative is adequately represented and equipped with local rights without the need of going through complex procedure of opening up separate proceedings. This would ensure maximum recoveries to foreign representative without being burdened with domestic insolvency proceedings. *The access rights, the safe conduct rule and the anti-discrimination rule along with other articles* in the MLCBI ensure that foreign representative gets the maximum benefit of cooperation even prior to the stage of recognition.

For full marks reference should be made to the articles on access rights – art. 11 and 9.

Question 3.2 [maximum 5 marks] 3 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.

ANS: Article 17 of MLCBI states that recognition may be granted only if such proceedings fall within the ambit of the terms “foreign proceedings” and “foreign representative” as set forth in article 2 of MLCBI apart from other formal essential elements as prescribed in MLCBI. There are certain evidences that need to be produced before recognising court as mentioned in article 15 in relation to certified copy, certificate of proceedings, statement of identification by the foreign representative or the translation documents for obtaining a valid recognition. Also, additionally the requirements as per 17(1)(c) and 17(1)(d) need to be fulfilled before the court.

There are certain presumptions as mentioned in article 16 for assuming the authenticity of documents, status of proceedings and representative, place of centre of debtor's main interest. But such *presumptions may be rebutted* with surfacing of few exceptional situations like belated discovery of Ponzi Scheme. The timing with respect to the consideration of COMI need to be considered for recognition of foreign main proceedings and accordingly the date of commencement of foreign proceeding for which recognition is sought need to be considered generally by the courts. There have been few exclusions to this also as if the COMI has been manipulated *in bad faith* and debtor's vehicle was used as a *fraud* then court can stretch its limits and refuse the recognition expressly.

There are certain exceptions or limitations applicable to the concept as the *concept of bad faith or abuse of process* would disentitle the recognition to foreign proceedings. The concept of abuse of process is not mentioned and therefore the enacting state may carve out anything that might bring injustice to the proceedings under the ambit of this definition and limit the application of MLCBI. There have been certain cases which include the *mala fide intentions for commencement of foreign proceedings or ill- motivation behind the application for recognition or fraudulent determination of the location of debtor's COMI etc.* Such foreign decisions culminating out of bad intentions or corruption ought not be dealt with recognition under the MLCBI. If the court could make out that the intention of the recognition application is to defraud the creditors or the improper forum shopping or frustration of an existing judgment, then such grounds can definitely limit the successful contention of the recognition application.

The recognition application could be successful only when it is proved to the satisfaction of the court that such is *not contrary to public policy* of the enacting state under article 6. This public policy ground has been specifically The judicial scrutiny now therefore need to made in respect of the status of proceedings as mentioned in 17(2) and when the debtor has its centre of main interest/ establishment, accordingly the proceedings shall be recognised as Foreign Main Proceedings/ Foreign Non- Main Proceedings. The judiciary is not entitled to embark upon the idea whether the foreign proceedings were appropriately commenced under the applicable law but nature of foreign proceedings or the reasonings of the judgment need be properly considered as the recognition cannot be held to be a mere rubber stamp exercise. The relevant facts in relation to recognition are a must for consideration and a mere no objection to the application would not entitle the judiciary to grant the same with affirmations. Also, nothing in the MLCBI states that for granting recognition, foreign proceeding need to have mandatorily obtained the finality or have become non-appealable, this strengthens the power of enacting court to grant recognition within time. Even the countries that have adopted the MLCBI with the condition of reciprocity, then such condition could limit the recognition applications and therefore impede the optimum operational quotient of the MLCBI

For full marks reference should be made to art. 1(2) exclusions and art 3 on international obligation (restrictions)

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.

ANS: PRE RECOGNITION: To avail pre recognition relief as per article 19 of MLCBI, it is mandated that recognition application must have been pending at the time of when relief under this article is sought. The reliefs that foreign representative can seek in State A includes the urgently needed ones to protect the assets or the interests of creditors when the concern exists that the assets may perish or are susceptible to devaluation etc. The relief may also be sought if the foreign representative has a reasonable belief supported by evidence that creditors are unduly trying to take control of assets or the unfavourable contracts need urgent

termination or refund of security deposits is mandated or tightening of credit terms is required or any other detrimental business action need to be avoided. It is specifically required to be considered by the foreign representative that such should not in any way interfere with the administration of a foreign main proceeding.

The duration of the automatic relief granted upon recognition of foreign main proceeding under Article 20 has been held to be coterminous with the stay applicable in the corresponding foreign proceeding. So, the foreign representative need be wary of the fact that he will not have any standing to apply for relief post the termination of proceeding under State B.

POST RECOGNITION: The discretionary reliefs that are available to the foreign representative are mentioned in Article 21 and applies to both recognised main and non-main foreign proceedings for protection of assets of debtor, or interests of creditors. The consideration of public policy exception under article 6 entitle the court to refuse the reliefs sought an the tailor made or customized relief may be sought herein by the foreign representative provided the court needs to consider that the undue favor to one group of creditors is not extended. The foreign representative must be aware of the fact the court may in such situations require the posting of a security or a bond and thus provide conditional/provisional relief and therefore may be entrusted with the administration or realization of debtor's assets. There have been few instances in which the foreign representative has been able secure a broader relief than what would have been possible /permitted under the laws of the recognising state, solely on the basis of the giving effect to the position in the foreign main proceedings.

The general relief of stay sought under article 21 must be procedural in nature as the court might refuse such substantive reliefs or reliefs that might disturb the balancing principle under article 22. Staying execution or suspending the rights to transfer, encumber or otherwise dispose of any assets of debtor, providing for examination of witness, taking of evidence or the delivery of information concerning debtor's assets, affairs, obligations or liabilities etc are few other broad appropriate reliefs that may be sought. The foreign representative can seek information only concerning the debtor's estate, affairs and related, but cannot enter the ambit of seeking personal information unrelated to affairs or third-party non-debtor information. The entrustment of administration or realization of assets located in the recognizing state with the foreign representative might be issued with conditions.

For full marks, again reference should be made to art. 3 also. Other than that, good answer.

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?

ANS: After the recognition of proceedings, automatic stay happens under Article 20 and the foreign representative therefore becomes entitled for recognition and relief in relevant foreign proceedings. Now the relevant foreign proceedings can get the automatic stay and appropriate reliefs from the relevant jurisdictions. The freezing order of main foreign proceedings was just meant to preserve the assets of debtor and since this purpose will thereby be served and decided

QUESTION 4 (fact-based application-type question) [15 marks in total] 12 marks

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

(1) Background

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

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

Proceedings were 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]; 8 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]. 4 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 for 4.1.1

To qualify a particular proceeding as “Foreign proceeding”, the following elements of the definition of MLCBI as mentioned in article 2(a) must be fulfilled:

1. Judicial or administrative proceeding with its basis in insolvency-related law of the enacting state
2. Involvement of creditors collectively
3. Control or supervision of the assets and affairs of the debtor by a court or another official body
4. Reorganization or liquidation of the debtor as the purpose of the proceeding.

To answer the question, let's analyse each and every element in the context of the facts of the case mentioned:

1. Judicial or administrative proceeding with its basis in insolvency-related law of the enacting state

The proceedings ought to fall either under the domain of “judicial” or “administrative” and here once the Bank was declared as “troubled” and thereafter classified as insolvent, DGF i.e., Deposit Guarantee Fund passed a resolution to commence the process of withdrawing the Bank from the market and appointed Mr. C as the administrative. So, the proceedings fall within the ambit of administrative ones and qualify the first element.

As far as the proceedings for the purpose of MLCBI is concerned, then since such are guided by the statutory framework that constrains the actions of the debtor bank and regulates the final distribution of the assets. Therefore, the proceedings are well within the defined words.

2. Involvement of creditors collectively

This is meant to fructify the need for a coordinated global solution for all stakeholders of an insolvency proceeding. It has been held that MLCBI may be an appropriate tool for certain kinds of actions that serve the regulatory purpose and actions against regulated public entities might be covered under the collective proceedings' definition, along with all the other basic elements.

The key consideration for determination of the question under this section would pertain to the idea if all the assets and liabilities of the Bank are dealt with the proceeding and here all the asset are definitely dealt with the proceeding but certainly few powers have been excluded from the authority of Ms. G which includes the power to claim damages from the related party of the Bank, the power to make a claim against the 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 since the formally appointed liquidator is vested with these excluded powers reassures the idea that proceedings are collective as the DGF is ultimately entitled to deal with all the excluded matters.

Here, the other characteristics of collective proceedings like imposition of an orderly regime that affects the rights and obligations of all creditors, distribution of assets as per the statutory provisions, inability of the interested parties to take advantage of individual gains, making the creditor participation a reality, power to creditors to seek appellate review and the adequate notice of all proceedings to the creditors etc. need to be tested to answer the question with certainty. Hence, lack of this information might render the analysis ineffective but the limited set of facts entails the positive feedback.

3. Control or supervision of the assets and affairs of the debtor by a court or another official body

Control or supervision may be potential, rather than actual but must be formal in nature. This might not be exercised directly by court but an insolvency representative who is further supervised by a regulatory regime/ regulatory authority or the court. Here Ms. G is regulated by DGF and authorised with the power to act vide Board Resolution no. 1513. There have been precedents suggesting that in some jurisdictions, the required control and supervision of the proceedings has been entrusted with regulatory or administrative body under the local laws of the country and in such cases, the hard-core requirement of the conduct of proceedings under the supervision of the court might be dispensed with. Here since DGF is entitled to directly administer the bank's affairs to the exclusion of bank's management and is entrusted with the powers of management and includes the extensive powers of powers even during liquidation. The effective powers of sale, distribution and the power to bring claims for compensation against persons in effect, makes DGF the real supervisor under the regulatory regime of the Country. Even It has been held that the insolvency of an insurance company when supervised by the regulatory body which oversights the entire insurance body would be a "body" under this section. Therefore, it can be deduced from the set of facts that if such regulatory bodies have the domain of expertise and if the statute confers them with necessary powers for regulation and management then there is no issue in considering such bodies as relevant bodies for the purpose of this section. It is concluded that DGF is a body which controls the supervision of the assets and affairs of the debtor bank.

4. Reorganization of liquidation of the debtor as the purpose of the proceeding.

The purpose must be clear for the fulfilment of this essential element. It has been held that the proceedings in which power conferred and duties imposed on the foreign representative are limited in nature and the powers and duties are typically associated with liquidation or reorganization or are just limited to doing no more than preserving assets, then such proceedings might not get the direct recognition and therefore need to adduce supplemental evidences to assure the recognising court that the real purpose is reorganization or liquidation.

This case entails the provisional administration of an insolvency Bank with DGF and on appointment of authorised representative, the entire conduct of affairs and management is vested with the DGF. Ultimately, on the day when NB classifies the Bank as Insolvent then DGF is entitled to exercise management, compile creditors, dispose off the assets of bank, terminate contracts, and distribute/sell all the assets belonging to Bank. Such procedures seem to be eligible under this definitional part. The authorised representative Ms. G seem to have the relevant authority to liquidate and distribute the assets of creditors and proceedings have been designed to allow parties to collect their debts and therefore fulfils the requirement of this part.

Hence, to conclude, these proceedings can be held to be foreign proceedings for the purpose of the MLCBI and since it requires the authorised representative to consider the rights and obligations of all the creditors and even the amended list of creditors was also filed on 7 September 2020. Since the proceeding has been designed to take care of stakeholders and follow the all-encompassing approach, such may be classified as inclusive in the said definition. It is to be mentioned here that since the proceedings have been triggered by the regulatory body to prevent the massive ongoing fraud and to prevent detriment to investors but because of the authority to liquidate and distribute the assets of the bank debtor has been vested with the representative then such would bring these proceedings to the domain of this definition.

Good answer. For full marks on this question it needs to be a little more elaborate on the interpretation of the requirements, i.e. how to interpret "law of insolvency" and "administrative proceeding." Also, it should be addressed that DGF works independently.

Answer for 4.1.2

To fall within the definition of “Foreign Representative”, the following elements need to be fulfilled:

- Person or body, including the one appointed on an interim basis
- Authorised in a foreign proceeding to administer reorganization or liquidation
- Of the debtor’s assets or affairs
- Or to act as the representative of the foreign proceedings

Here the Applicant i.e. Ms. G has applied for the recognition of foreign proceedings to England court which has adopted the Model Law. Since MLCBI does not specify that the appointment of the person must be made by the court, it has been declared safe to assume that the definition is broad enough to include appointments made by special agencies other than courts. Here Ms. G is appointed by the DGF, the regulatory body under the local Laws of the State and hence her appointment may be considered to be valid for the purpose of this section. Also DGF being a regulatory body is independent as per articles 3(3) and 3(7) of DGF Law as it having sperate balance sheet and accounts from NB and NB does not have any right to interfere with the functions of DGF.

It has been held that the focus is upon the fact that authorisations must be provided “in the context of “ or “in the course of” the proceeding, rather than upon the body providing the authorization. The body i.e. DGF has provided the authorisation to Ms. G vide board resolution no 1513 and since the focus of the English Court here ought to be upon the kind of authorisations i.e. “in the context of “ or “in the course of” proceedings, therefore, it may be held that this authorisation is valid in nature.

Since the Foreign Representative here is authorised to administer or represent the reorganisation/ liquidation proceedings, no further tests need to be given to ensure the transparency and accountability of the person as the statute in the local country has itself set high standards vide article 35(1) of the DGF Law which mentions that he must have high professional and moral qualities, impeccable business reputation, complete higher education....” He ought not be a creditor to the relevant bank, have cri9minal record, have any obligations to the relevant bank, have any conflict of interest with the bank. Since Ms. G has been appointed by DGF after ensuring all the essential credentials then she may held to be authorised for this section.

It is pertinent to mention here that 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. Since Ms G was authorised w.e.f. 17 August 2020 and if such recognition application is made to English post her formal appointment, then she fulfils the requires eligibility criteria. If she has made the application prior to her formal appointment then Article 18 would become relevant herein wherein she is entrusted with the obligation to inform recognising court of any substantial change in the status of Foreign Representative and Foreign proceeding. Hence, considering the set of information available, it can be assumed that Ms. G would be entitled to the status of Foreign Representative in the English Court.

The answer should also deal with the question on whether DGF *along* with Ms G can be considered a foreign representative.

*** End of Assessment ***