



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: 43 out of 50 marks

Please note that all references to the “MLCBI” or “Model Law” in this assessment are references to the Model Law on Cross-Border Insolvency.

QUESTION 1 (multiple-choice questions) [10 marks in total] 9 marks

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

Question 1.1

Which of the following statements **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] 10 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.

Under the MLCBI, the appropriate date for determining COMI of a debtor, or whether an establishment exists, is the date of commencement of the foreign proceeding. The determination of COMI or existence of an establishment is important in that it determines whether the foreign proceeding is a “foreign main proceeding” or “foreign non-main proceeding,” respectively, in the enacting State.

Historically, the English courts have referred to the date of commencement of the foreign proceeding when conducting the COMI analysis (“**the Historic Approach**”). However, in *Morning Mist Holdings Ltd v Krys (Re Fairfield Sentry Ltd)* 714 F3d137 (2d Cir. 2013), the US Bankruptcy Court took the view that the COMI analysis should instead be conducted as at the

time of the Chapter 15 (being the enactment of the MLCBI into US law) recognition petition (“the Chapter 15 Approach”).¹

In *Re Toisa Limited*, it was submitted to the English courts that in respect of the date of determination of COMI, the Chapter 15 Approach should be used rather than the Historic Approach. According to the Chapter 15 Approach, Toisa’s COMI was in the US but according to the Historic Approach, the location of Toisa’s COMI was not as easily determined. After hearing the arguments and counterarguments, the English courts decided that it was appropriate to go with the Chapter 15 Approach.²

The Chapter 15 Approach, having been successfully argued for in *Re Fairfield Sentry Ltd* and now in *Re Toisa Limited*, now gives courts scope to refer to the date of the recognition petition, rather than the date of initiation of the foreign proceeding, when conducting the COMI analysis.

Question 2.2 [maximum 3 marks] 3 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.*”

Statement 1 is in respect of Article 30(c) of the Model Law which says in case of concurrence of two foreign non-main proceedings, no foreign proceeding is *a priori* treated preferentially.

Statement 2 is in respect of Article 32 of the Model Law, and specifically, the hotchpot rule, which intends to ensure equality across creditors (without prejudice to secured creditors or rights *in rem*) by taking into consideration distributions made to creditors when determining the proportion of any remaining assets held on behalf of a debtor that are due to such creditors.

Statement 3 is in respect of Article 16 of the Model Law which contains a rebuttable presumption that a debtor’s COMI (an undefined key concept in the Model Law) is the location of that debtor’s registered office.

Question 2.3 [2 marks] 2 marks

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.**

Article 20 of the Model Law provides for an automatic moratorium upon the granting of a recognition order of a foreign main proceeding. In the *IBA* case, the foreign representative requested relief from the English Court pursuant to Article 21 of the Model Law in the form of an indefinite continuation of the automatic moratorium (“the **Moratorium Continuation Application**”) following the completion of an Azeri restructuring of the OJSC International

¹ Global Restructuring Watch, “Clarity on Cross-Border Conundrum”, at <https://www.globalrestructuringwatch.com/2019/04/clarity-on-cross-border-conundrum/>, accessed 20 February 2022.

² *Ibid.*

Bank of Azerbaijan (“**IBA**”). The decision on this request largely revolved around the Gibbs Rule which states that generally, a debt instrument governed by English law cannot be discharged or compromised by a foreign insolvency proceeding. The granting of the Moratorium Continuation Application would have resulted in the prevention of the English creditors (“**the Challenging Creditors**”) from enforcing their English law claims, despite having not submitted to the foreign (Azeri) proceeding (the exception to the Gibbs Rule).

In the court of the first instance, the Moratorium Continuation Application was rejected on the basis that an indefinite continuation of the automatic moratorium could not be a mechanism used to circumvent the Gibbs Rule. The foreign representative appealed the decision to the English Court of Appeal which upheld the decision of the court of the first instance based on the following:³

- a) The indefinite continuation of the automatic moratorium was not necessary to protect the interests of IBA’s creditors as IBA was trading again following the completion of the Azeri restructuring.
- b) The Model Law did not provide for the court’s ability to remove the rights guaranteed by the Gibbs Rule.
- c) The Model Law did not provide for an indefinite continuation of the automatic moratorium upon completion of the foreign proceeding (i.e. the Azeri restructuring).

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**.

Article 29(a) of the MLCBI addresses the situation where a domestic proceeding exists at the time of the application for recognition of a foreign main proceeding. In terms of relief, in these situations the court in an enacting State (“**the Court**”) will refer to Article 19 of the MLCBI in respect of interim relief and Article 21 of the MLCBI in respect of post-recognition relief. The automatic relief available in Article 20 of the MLCBI is not available in these situations. When considering interim relief and/or post-recognition relief, the Court must ensure that any such relief granted is consistent with that of the domestic proceeding.

Article 18 of the MLCBI mandates that the foreign representative, from the date of filing of the recognition application of the foreign main proceeding, to keep the Court updated as it relates to:

- a) The status of the foreign proceeding;
- b) The status of the appointment of the foreign representative; and,
- c) Any other foreign proceeding of the debtor that the foreign representative becomes aware of.

³ Jones Day, “English Court of Appeal Upholds “The Gibbs Rule””, at <https://www.jonesday.com/en/insights/2019/02/english-court-of-appeal-upholds-the-gibbs-rule>, accessed 21 February 2022.

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] 4 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?

Article 9 of the Model Law provides the foreign representative with direct access to the domestic court. As re-iterated below in respect of Article 25 of the Model Law, this access is not dependent on the recognition of the foreign proceeding. Therefore, the foreign representative can be confident that they should have standing in the domestic court although such standing does not equate to automatic rights or powers on the part of the foreign representative.

Article 11 of the Model Law provides the foreign representative with access to the domestic court for the purposes of requesting the commencement of a domestic proceeding. However, assuming that the foreign proceeding is successfully recognized in State A, the expectation is that such recognition will provide the foreign representative with the rights and powers equivalent to that of a domestic proceeding.

In addition, it should be noted that the Model Law does not require reciprocity and that State A does not contain any reciprocity provision. The foreign representative can therefore be confident that the recognition application will not be denied based on whether State B would provide equivalent relief to an insolvency representative of State A.

Article 25 of the Model Law provides for the mandatory co-operation and direct communication with the foreign representative from the domestic court. Such co-operation and direct communication are not dependent on the recognition of the foreign proceeding and can therefore be facilitated at the outset. This co-operation and direct communication allow for the efficient co-ordination between the foreign representative / courts and the domestic courts as it relates to the recognition hearing(s) and information requests in support of such hearings.

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.

Article 15 of the MLCBI requires evidence of the commencement of the foreign proceeding and appointment of the foreign representative in State B. Such evidence will most commonly be in the form of a set of resolutions passed by the shareholders or creditors of the Debtor or by an order of the court in State B. The court in State A has the flexibility to consider any other

evidence of the foreign proceeding and foreign representative if no resolutions or court order are available. The foreign representative has a duty to notify the court in State A of any other foreign proceedings in respect of the Debtor that they are aware of. In some cases, the court in State A may require translations of the supporting documents should those documents not be in State A's official language. In any event, pursuant to Article 16 of the MLCBI, the court in State A is to presume that the supporting documents are authentic.

In addition, subsequent to the submission of the recognition application, Article 18 of the MLCBI requires the foreign representative to keep the court in State A updated on any significant changes to the status of the foreign proceeding or the appointment of the foreign representative as well as any other foreign proceedings that the foreign representative may become aware of.

As mentioned in the facts of the questions, the Model Law of State A does not contain any reciprocity provision. Therefore, the foreign representative can be confident that the recognition application will not be denied on the grounds that State B would not reciprocate any relief granted to the foreign representative to an insolvency practitioner from State A.

While the MLCBI does not contain provisions relating to abuse of process, it does not prohibit the court in State A from taking into consideration any actual or perceived abuse of process. The foreign representative has a duty to provide full and frank disclosure to the court in State A and if this duty is found to have been breached, the recognition application may be refused. For completeness, in refusing a recognition application, the public policy exception provided for in Article 6 of the MLCBI is rarely used although it could be used to limit the relief granted.

Article 17 of the MLCBI places an obligation on the court in State A to promptly decide upon the recognition application. Assuming the public policy exception does not apply and noting that the foreign proceeding and foreign representative qualify as such within the meaning of the MLCBI, the recognition application shall be granted.

Pursuant to Article 17 of the MLCBI, the court in State A will have to decide on whether the foreign proceeding is to be recognized as a foreign main proceeding or a foreign non-main proceeding. To be considered a foreign main proceeding, State B must be the location of the Debtor's centre of main interest ("**COMI**"). To be considered a foreign non-main proceeding, the Debtor must have only an establishment in State B.

- a) In respect of COMI, this is an undefined term in the MLCBI although the UNCITRAL Guide to Enactment provides guidance. State B would generally be considered the location of the Debtor's COMI if it is the location of the headquarters where the main administration takes place and is readily ascertainable by third parties. Article 16 of the MLCBI provides a rebuttable presumption that the location of the registered office of the Debtor is its COMI. Therefore, the foreign representative may have to provide additional evidence to satisfy the court that State B is in fact the location of the Debtor's COMI.
- b) In respect of establishment, Article 2 of the MLCBI defines this as any place of operations where the debtor carries out a non-transitory economic activity with human means and goods or services.⁴

Whether the foreign proceeding is considered a foreign main proceeding or a foreign non-main proceeding will determine the nature of relief granted by the court of State A, the co-

⁴ Xian, Irvin Ho Jia, "*The Concept of 'Establishment' in the Model Law on Cross-Border Insolvency*", at [https://ccla.smu.edu.sg/sagri/blog/2021/01/18/concept-establishment-model-law-on-cross-border-insolvency#:~:text=Under%20Article%20\(f\)%20of,means%20and%20goods%20or%20services.](https://ccla.smu.edu.sg/sagri/blog/2021/01/18/concept-establishment-model-law-on-cross-border-insolvency#:~:text=Under%20Article%20(f)%20of,means%20and%20goods%20or%20services.), accessed 23 February 2022.

ordination of the foreign proceeding with concurrent proceedings in State A, and the coordination of the foreign proceeding with proceedings subsequently commenced in State A.

It should be noted that pursuant to the MLCBI, the date of determination of COMI or whether an establishment exists is the date of commencement of the foreign proceeding. However, in *Re Fairfield Sentry Ltd* and *Re Toisa Limited*, the US Bankruptcy Court and English Court, respectively, took the view that the COMI analysis should instead be conducted as at the time of the recognition applications.⁵ Therefore, the court of State A may have some flexibility to deviate from the historical approach provided for in the MLCBI (as it relates to the date of determination) when determining the location of the Debtor's COMI.

For full marks on this question, it should also be mentioned that restrictions can be found in art. 3 and exclusions in art. 1(2)

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.

Article 19 of the MLCBI enables the court of State A to grant interim relief after the recognition application has been filed but before a decision is made on the application. The court of State A will have to be satisfied that the interim relief is required to protect and preserve the assets of the Debtor and/or the interests of its economic stakeholders. It should be noted that interim relief can be granted for foreign main and foreign non-main proceedings. Such relief can include a stay on the execution against assets of the Debtor and a suspension of the right to cause any form of dissipation of the assets of the Debtor ("**the Interim Relief**").

In respect of foreign main proceedings, Article 20 of the MLCBI provides for automatic mandatory relief. This includes the Interim Relief as well as a stay on the commencement or continuation of proceedings against the Debtor (collectively, "**the Automatic Relief**").

Article 21 of the MLCBI provides the post-recognition relief available at the discretion of the court of State A. This relief and discretion are irrespective of whether the foreign proceeding is considered main or non-main and is again based on the need to protect and preserve the assets of the Debtor and/or the interests of its economic stakeholders. Examples of relief available include the extension of any interim relief granted, the Automatic Relief and the power to request information and documents from relevant parties including by interview.

When granting relief pursuant to Articles 19 and 21 of the MLCBI, Article 22 of the MLCBI states that the court must be comfortable that the interests of the Debtor's economic stakeholders are protected. This provides further discretion on the part of the court as it relates to the relief granted and any modifications made to such relief.

In general, the relief available to the court of State A is not unlimited and must be determined on a case-by-case basis. The complexity of foreign judgments and/or foreign insolvency law as it relates to the law of State A can make the decision of whether to grant or deny a specific relief a challenging one.

Again, a reference to art. 3 and art. 6 should be mentioned here also.

⁵ Global Restructuring Watch, "Clarity on Cross-Border Conundrum", at <https://www.globalrestructuringwatch.com/2019/04/clarity-on-cross-border-conundrum/>, accessed 23 February 2022.

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?

Any relief granted as pre-recognition interim relief pursuant to Article 19 of the MLCBI (“**Article 19**”) is granted on the basis that such relief is urgently needed to protect the interests of the debtor or of the creditors. It should be noted that any relief granted under Article 19 terminates upon the granting of the recognition application although the relief may be extended under Article 21 of the MLCBI.

One of the main purposes of the MLCBI is to give access to foreign representatives of foreign proceedings to courts of the enacting State (rather than extending to all jurisdictions worldwide) to deal with, amongst other things, assets located within the enacting State. In the case of a foreign proceeding with assets located in multiple jurisdictions, the foreign representative would generally have to apply in each of those jurisdictions for recognition of the foreign proceeding.

The court presiding over the current recognition application (where the pre-recognition worldwide freezing order has been granted) is likely to view the extension of the worldwide freezing order as excessive and not in line with the purpose of the MLCBI. The interim relief provides provisional relief to give the foreign representative some breathing space to prevent the dissipation of assets during the preliminary investigations. This breathing space should be sufficient to identify the other jurisdictions in which foreign recognition applications also need to be made.

QUESTION 4 (fact-based application-type question) [15 marks in total] 13 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] 13 marks

Prior to any determination made in the English Proceedings, Ms G, in her capacity as authorised officer of the Deposit Guarantee Fund (or DGF) of Country A in respect of the liquidation of the Commercial Bank for Business Corporation (the Bank), together with the DGF (the Applicants), applied for recognition of the liquidation of the Bank before the English court based on the Cross-Border Insolvency Regulations 2006 (CBIR), the English adopted version of the MLCBI.

Assuming you are the judge in the English court considering this recognition application, you are required to discuss:

- 4.1.1 whether the Bank's liquidation comprises a "foreign proceeding" within the meaning of article 2(a) of the MLCBI [maximum 10 marks]; and 8 marks
- 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.

Foreign Proceeding

The definition of "foreign proceeding" as defined in article 2(a) of the MLCBI can be split into the following elements⁶:

1. A proceeding (including an interim proceeding);
2. That is either judicial or administrative;
3. That is collective in nature;
4. That is in a foreign State;
5. That is authorised or conducted under a law relating to insolvency;
6. In which the assets and affairs of the debtor are subject to control or supervision by a foreign court; and,
7. Which proceeding is for the purpose of reorganisation or liquidation.

I will address each of these seven points in turn below to show whether the Bank's liquidation is considered a foreign proceeding pursuant to the MLCBI.

In respect of point 1, as further detailed below in respect of point 3, the Law of Country A on Banks and Banking Activity ("LBBA") places the control of the Bank in the hands of the liquidator up to the final distribution and completion of the liquidation. As such, the liquidation of the Bank would be considered a proceeding.

⁶ Declercq, Peter J M, *Module 2A Guidance Text: UNCITRAL Model Laws Relating to Insolvency 2021 / 2022*, INSOL International (2021), pp. 13-14.

In respect of point 2, the proceeding is administrative in nature as evidenced in the various powers (and duties) of the liquidator provided for in the LBBA (detailed below in respect of point 3) including compiling a register of creditor claims, dismissing employees, and withdrawing from/terminating contracts.

In respect of point 3, to be considered collective, the proceeding would have to deal with substantially all of the assets and liabilities of the Bank. Based on the facts of the case, the LBBA provides the following powers to a liquidator:

- a) the power to exercise management powers and take over management of the property (including the money) of the bank;
- b) the power to compile a register of creditor claims and to seek to satisfy those claims;
- c) the power to take steps to find, identify and recover property belonging to the bank;
- d) the power to dismiss employees and withdraw from/terminate contracts;
- e) the power to dispose of the bank's assets; and,
- f) the power to exercise "such other powers as are necessary to complete the liquidation of a bank".

Under the LBBA, the liquidator also has powers of sale, distribution and the power to bring claims for compensation against persons for harm inflicted on the Bank.

Based on these powers, it would appear that the collective requirement has been met.

In respect of point 4, Country A would be considered a foreign State from the perspective of the UK.

In respect of point 5, in the *Agrokor* case, the court found that to be a law relating to insolvency, it was sufficient if insolvency was one of the grounds on which the proceeding could be commenced (i.e. not the sole ground).⁷ According to the facts of the case, the Bank was classified as insolvent pursuant to Article 76 of the LBBA when it was initially placed into provisional administration which immediately preceded liquidation. Therefore, the LBBA satisfies the requirement of point 5.

In respect of point 6, it should be noted that the MLCBI does not specify the level of control or supervision necessary to satisfy this requirement and such control or supervision can be potential, rather than actual, in nature.⁸ Pursuant the LBBA, the liquidator has powers to, amongst other things, file property and non-property claims with a court. As such, the potential to satisfy this element is satisfied.

In respect of point 7, the purpose of the proceeding pursuant to LBBA is to liquidate the Bank. This is illustrated in the facts of the case where on 17 December 2015, the National Bank ("**the NB**") formally revoked the Bank's banking licence and resolved that it be liquidated.

⁷ Hogan Lovells, *English recognition for Agrokor insolvency: not a tick-box exercise*, at <https://www.jdsupra.com/legalnews/english-recognition-for-agrokor-29922/>, accessed 1 March 2022.

⁸ Declercq, Peter J M, *Module 2A Guidance Text: UNCITRAL Model Laws Relating to Insolvency 2021 / 2022*, INSOL International (2021), p. 14.

Based on the above discussions on each of points 1 to 7, it is my view that the liquidation of the Bank in Country A qualifies as a foreign proceeding within the meaning of article 2(a) of the MLCBI.

Great answer, for full marks there should be a more elaborate discussion what is meant by “foreign court” and if the DGF qualifies as such and a bit more on the meaning. Also more reference to i.e. the guide to enactment would be good.

Foreign Representatives

The definition of “foreign representative” as defined in article 2(d) of the MLCBI can be split into the following elements^{6.4.1:}⁹

1. a person or body, including one appointed on an interim basis;
2. authorised in a foreign proceeding; and,
3. to administer the reorganisation or liquidation of the debtor’s assets or affairs or to act as representative of the foreign proceeding.

I will address each of the three points in turn below to show whether the Applicants are considered foreign representatives pursuant to the MLCBI.

In respect of point 1, Ms. G and the Deposit Guarantee Fund (“**the DGF**”) would be considered a person and body, respectively. This would satisfy this element.

In respect of point 2:

- **Ms. G:** Article 77 of the LBBA provides that the DGF automatically became liquidator of the Bank on 17 December 2015, when the NB formally revoked the Bank’s banking licence. Article 48(3) of the DGF Law empowers the DGF to delegate its powers to an “authorised officer” or “authorised person” who performs actions to ensure the Bank’s withdrawal from the market during the liquidation. On 17 August 2020, Ms. G received such delegated powers as authorised officer.
- **DGF:** The facts of the case confirm that 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 however, expressly excluded 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. Such excluded powers remained vested in the DGF.

I would therefore consider that both of the Applicants (i.e. Ms. G and the DGF) are considered to satisfy this element.

In respect of point 3, based on the facts of the case, the LBBA provides the following powers to the Applicants:

- a) the power to exercise management powers and take over management of the property (including the money) of the bank;
- b) the power to compile a register of creditor claims and to seek to satisfy those claims;

⁹ Declercq, Peter J M, *Module 2A Guidance Text: UNCITRAL Model Laws Relating to Insolvency 2021 / 2022*, INSOL International (2021), p. 16.

- c) the power to take steps to find, identify and recover property belonging to the bank;
- d) the power to dismiss employees and withdraw from/terminate contracts;
- e) the power to dispose of the bank's assets; and,
- f) the power to exercise "such other powers as are necessary to complete the liquidation of a bank".

Under the LBBA, the Applicants also have powers of sale, distribution and the power to bring claims for compensation against persons for harm inflicted on the Bank.

As such, I would consider that the Applicants satisfy this element.

Based on the above, I would consider that the Applicants both satisfy all three elements of a foreign representative and would be considered as such in the recognition application.

*** End of Assessment ***