



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.**
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- 6.1 If you selected Module 2A as one of your **compulsory modules** (see the e-mail that was sent to you when your place on the course was confirmed), the final time and date for the submission of this assessment is **23:00 (11 pm) GMT on 1 March 2022**. The assessment submission portal will close at 23:00 (11 pm) GMT on 1 March 2022. No submissions can be made after the portal has closed and no further uploading of documents will be allowed, no matter the circumstances.
- 6.2 If you selected Module 2A as one of your **elective modules** (see the e-mail that was sent to you when your place on the course was confirmed), you have a **choice** as to when you may submit this assessment. You may either submit the assessment by **23:00 (11 pm) GMT on 1 March 2022** or by **23:00 (11 pm) BST (GMT +1) on 31 July 2022**. If you elect to submit by 1 March 2022, you **may not** submit the assessment again by 31 July 2022 (for example, in order to achieve a higher mark).
7. Prior to being populated with your answers, this assessment consists of **12 pages**.

ANSWER ALL THE QUESTIONS

Total: 37 out of 50 marks

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

QUESTION 1 (multiple-choice questions) [10 marks in total] 5 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] 9 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 Model Law, a court in the enacting state must recognize proceedings as a “foreign main proceeding” if the conditions prescribed under Article 2(b) are satisfied. In this context, a foreign proceeding will be recognized as a “foreign main proceeding” if such proceedings are commenced where the debtor has its ‘centre of main interest’ (COMI). Suppose the proceedings are commenced where the debtor has an establishment within the meaning of Article 2(f) of the Model Law. In that case, the court must recognize these proceedings as “foreign non-main” proceedings in the enacting state. Therefore, the relevant date for determining the COMI or establishment of the debtor is significant, as this determination will dictate the nature of the relief available to the foreign representative.

As the Model Law does not provide further guidance on the standard for determining the COMI or establishment of the debtor, various approaches have been adopted by jurisdictions concerning this determination. The UK approach is that the COMI or establishment is

determined on the date of commencement of the foreign originating proceedings¹. However, it should be noted that in the recent case of *Re Tosia Limited*, the UK Court followed the US approach. In *Re Tosia*, the UK Court held that the appropriate date for determining a debtor's COMI or establishment for the purpose of recognition was the date of the recognition application².

As indicated above, the US has adopted a different approach from the suggested approach set out in the Guide to Enactment and Interpretation towards the date for determination of a debtor's COMI or establishment. In *Morning Mist Holdings Ltd v Kryz (Matter of Fairfield Sentry Ltd)* (2nd Cir Appeals Apr.16 2013), the Second Circuit of Appeals found that the appropriate date for the purpose of recognition is the date of the recognition application³.

The Australian position for the purpose of recognition is the date of the hearing of the recognition application⁴.

The Singapore position has been clarified in *Re Zetta Jet Pte Ltd & Ors (Asia Aviation Holdings Pte Ltd, intervener)* [2019] SGHC 53. In this case, the High Court of Singapore followed the US approach for recognition, being the date of filing the recognition application. The rationale underpinning this decision was that the postponement of the date for determination might lead to the manipulation of the debtor's COMI.

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 “*This Article provides guidance in case of concurrence of two foreign non-main proceedings*”

Chapter V of the Model Law provides guidance on the primacy of proceedings where more than one insolvency proceeding is opened against a single debtor⁵.

Article 30 of the Model Law deals with cases where there is a foreign main, and foreign non-main proceeding opened against a debtor (Article 30(a) and (b)) and where more than one non-main foreign proceeding is opened against a debtor (Article 30(c)). In particular,

Art. 30 – Coordination of more than one foreign proceeding

¹ Model Law Module pg 27.

² <https://www.globalrestructuringwatch.com/2019/04/clarity-on-cross-border-conundrum>

³ Model Law Module p 27

⁴ Australian Equity Investors [2012] FCA 1002

⁵ Model Law Module p 43

In matters referred to in Article 1, in respect of more than one foreign proceeding regarding the same debtor, the court shall seek cooperation and coordination under articles 25, 26, and 27, and the following shall apply:

(c) If after recognition of a foreign non-main proceeding, another foreign non-main proceeding is recognized, the court shall grant, modify, or terminate relief to facilitate coordination of the proceedings.”

Article 30(c) aims to ensure the fair administration of cross-border insolvencies by facilitating the coordination and relief available under those proceedings.

Statement 2: “The rule in this article does not affect secured creditors”

Article 32 – Rule of Payment in Concurrent Proceedings

“Without prejudice to secured claims or rights in rem, a creditor who has received part payment in respect of its claim in a proceeding pursuant to a law relating to insolvency in a foreign state may not receive a payment for the same claim in a proceeding [domestic law] regarding the same debtor, so long as the payment to the other creditors of the same class is proportionately less than the payment the creditor has already received.”

Article 32 (known as the Hotch Potch Rule) ensures the equal treatment of creditors in circumstances where it would be possible for a creditor of the same class to receive more favourable treatment for its claim in a different jurisdiction⁶. As expressly stated above, this rule does not affect secured creditors to the extent that their claims are paid in full.

Statement 3: This Article contains a rebuttable presumption regarding an undefined key concept in the MLCBI.

Article 16 – Presumptions concerning recognition

“3 In the absence of proof to the contrary, the debtor’s registered office or habitual residence in the case of an individual is presumed to be the centre of the debtor’s main interest.”

The presumption aims to save both time and costs by dispensing with evidentiary requirements required to establish a debtor’s COMI. However, this is a rebuttable presumption and a court in the enacting state, if established on evidence the contrary is the case⁷. Under the case law that has developed on this issue, courts have identified the following factors as the most relevant⁸:

- The location of the debtor’s primary assets
- The jurisdiction whose law would apply to most disputes
- The location of the majority of the debtor’s creditors or of a majority of the creditors who would be affected by the case
- The location of those who actually manage the debtor
- The location of the debtor’s ‘nerve centre.’

⁶ Guide to Enactment and Interpretation §239

⁷ Guide to Enactment and Interpretation §137

⁸ Model Law Module pg 26

In undertaking this exercise, it is intended to assist the court to ensure that the location of foreign proceedings corresponds to the actual location of the debtor's COMI as ascertained by creditors⁹.

Question 2.3 [2 marks] 2 mark

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

The purpose of the Model Law is to provide a procedural framework for dealing with issues arising out of cross-border insolvencies. The Model Law is/was not intended to provide universal substantive insolvency law. Against this backdrop, the English Court of Appeal in *Re OJSC International Bank [2019] 2 All ER* had to consider whether it was appropriate to grant an indefinite stay which in effect would defeat the English creditors substantive rights under domestic law or whether the Court could prolong the stay after the foreign proceedings had come to an end.

In considering the first question, the Court confirmed that the scope of the Model law was limited to procedural aspects, and it does not intend the substantive unification of insolvency law. The Court explained that if the available relief under Article 21 (post recognition relief) had been intended to override the substantive rights of creditors, the Court would have expected that this would have been made explicit in the Model Law. On this basis, the Court found that the provisions of the Model Law do not empower the English Court to vary or discharge the substantive rights conferred to the creditors under English law.

As to whether the stay could be granted beyond the end of the foreign proceedings, the Court of Appeal found that once the foreign proceedings had come to an end and the foreign representative is no longer in office, there is no scope for further orders to be made and any relief granted under the Model Law should also come to an end. In this case, the purpose of the reconstruction had been achieved, and the company had resumed trading. The Court recognized that the reconstruction had been extended beyond its original termination date by a change in Azeri law but nevertheless found that the reconstruction as an insolvency proceeding had ended.

Question 2.4 [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**.

In circumstances where proceedings have been opened against a debtor under domestic law, upon recognition of foreign proceedings Article 20 of the Model Law provides:

- "1. Upon recognition of a foreign proceeding that is a foreign main proceeding*
- (a) Commencement or continuation of individual actions or individual proceedings concerning the debtor's assets, rights, obligations or liabilities is stayed;*
 - (b) Execution against the debtor's assets is stayed; and*

⁹ Model Law Module pg 27

(c) *The right to transfer, encumber or otherwise dispose of any assets of the debtor is suspended.*

Article 20 (2) expressly limits the scope of the stay as the effect of the stay depends on any limitations that exist under the domestic law of the enacting state¹⁰. Additionally, Article 20(3) does not affect the right of a creditor to commence individual actions against the debtor for the purpose of preserving a claim against the debtor or the right to request the commencement of a proceeding under the domestic law of the enacting state or the right to file a claim in such proceedings (Article 20(4)).

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

Article 18 of the Model Law expressly mandates from the time of filing a recognition application a positive obligation on the foreign representative to “promptly inform” the court in the enacting state of:

“Any substantial change in the status of the recognized foreign proceedings or the status of the foreign representative’s appointment; and

Any other foreign proceeding regarding the same debtor becomes known to the foreign representative.”

This provision accepts that upon the filing of a recognition application, the circumstances of the case may change, which may affect the relief available to the foreign representative. In this regard, the purpose of this obligation is to allow the court in the enacting state to modify or terminate any relief granted upon recognition of the foreign proceeding¹¹.

QUESTION 3 (essay-type questions) [15 marks in total] 10 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?

As indicated above, the Model Law provides a procedural framework for states to advance a uniform approach to deal with issues arising under cross-border insolvencies. The Model Law achieves this by granting access to a foreign representative or creditors to the courts in the enacting state, and by the coordination of relief in the enacting state to assist parallel insolvency proceedings in different states against the same debtor.

As to access, Article 9 of the Model Law confers standing for foreign representatives or creditors to appear before the courts in the enacting state without the need to meet the formal requirements for standing prescribed under domestic law. Under Article 9, there is no prior

¹⁰ Guide to Enactment and Interpretation §183

¹¹ Guide to Enactment and Interpretation §165

requirement for recognition for the foreign representative or creditor to be conferred standing. Article 11 provides standing to a foreign representative or creditor to commence domestic insolvency proceedings in the enacting state provided that the foreign representative or creditor satisfies the other requirements to commence proceedings under the law of the enacting state. Similar to Article 9, Article 11 of the Model Law also does not require prior recognition of the foreign proceeding to confer standing.

The access rights under the Model Law seek to maintain the status quo to allow courts in the enacting state to coordinate relief in concurrent proceedings. The Model Law grants a foreign representative immediate access to the Court in the enacting state to apply for relief or assistance swiftly and seek interim relief should the circumstances of the case require. By conferring standing to a foreign representative and/or creditor this saves both time and expense and obviates the need to commence separate proceedings which are costly. The purpose of these provisions (Articles 9 & 11) is two-fold. First, to minimize the diminution of value of the debtor's estate, which in some circumstances may create value for the benefit of all creditors, and second, to allow for the orderly administration of the debtor's insolvency estate.

Similar to access, coordination of cross-border insolvencies assists in the orderly administration of the debtor's insolvency estate. Communication between courts or insolvency practitioners may occur prior to recognition of the proceedings. The purpose of the Model Law is to protect the assets of the debtor by preventing the dissipation of assets and maximizing the value of the debtor's estate. Coordination and/or communication allows the insolvency practitioner to tailor relief to the particular circumstances of each case. This is especially so where a business seeks to implement a scheme of arrangement to restructure its debts and continue as a going concern. Another advantage of communication/cooperation is to remove the need for the court/insolvency practitioner to make formal applications through diplomatic or judicial channels. This method is both time-consuming and increases the costs of administration, which has the effect of reducing the estate of a debtor. The Model Law achieves this by providing a framework for courts and practitioners.

Article 25 of the Model Law provides that a court in the enacting state shall cooperate with foreign courts or foreign representatives¹² to the maximum extent possible. The Court in the enacting state may do this by communicating directly with or request assistance directly from a foreign court or representative¹³.

Article 26 of the Model Law deals with communication and cooperation between insolvency practitioners. This Article provides that the insolvency practitioner under the supervision of the Court shall carry out its functions and cooperate to the maximum extent possible with foreign courts and foreign representatives¹⁴. The insolvency practitioner may do this under the supervision of the Court by communicating directly with the foreign Court or foreign representative¹⁵.

Article 27 of the Model Law provides a non-exhaustive list of methods to implement cooperation and includes:

- Appointment of a person or body to act at the direction of the Court¹⁶;
- Communication of information by any means considered appropriate by the Court¹⁷;

¹² Article 25(a)

¹³ Article 25(b)

¹⁴ Article 26(a)

¹⁵ Article 26(b)

¹⁶ Article 27(a)

¹⁷ Article 27(b)

- Coordination of the administration and supervision of the debtor’s assets and affairs¹⁸;
- Approval or implementation by courts and agreements concerning the coordination of proceedings¹⁹;
- Coordination of concurrent proceedings regarding the same debtor²⁰.

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.

The Model law provides for the recognition of two distinct types of insolvency proceedings “foreign main” and “foreign non-main” proceedings. Article 15 of the Model law imports into the domestic law of the enacting state the procedural requirements for recognition. The purpose of this provision, together with Article 16 is to facilitate a swift and simple framework for foreign insolvency proceedings to be recognised²¹. The Model law achieves this by containing certain evidential presumptions to expediate the process²². However, it must be kept in mind that the court in the enacting state retains a discretion if it is satisfied on the evidence the contrary position exists²³.

Article 15 provides an express requirement for the following documentation to be filed in support of a recognition application:

- A certified copy of the decision commencing the foreign proceeding and appointing the foreign representative²⁴; or
- A certificate from the foreign Court affirming the existence of a foreign proceeding and appointment of a foreign representative²⁵.

Article 15(3) obliges the foreign representative to provide a statement identifying all foreign proceedings in respect of a debtor known to the foreign representative at the time of filing the recognition application. This obligation is an ongoing duty as from the time of filing the application for recognition; the foreign representative must promptly inform the Court of:

- Any substantial change in the status of the recognized foreign proceeding or status of the foreign representative’s appointment²⁶; or
- Any other foreign proceeding regarding the same debtor that becomes known to the foreign representative²⁷.

¹⁸ Article 27(c)

¹⁹ Article 27(d)

²⁰ Article 27(e)

²¹ Guide to Enactment and Interpretation §127

²² Guide to Enactment and Interpretation §128

²³ Guide to Enactment and Interpretation §129

²⁴ Article 15(2)(a)

²⁵ Article 15(2)(b)

²⁶ Article 18(a)

²⁷ Article 18(b)

This evidence assists the Court to ensure the fair and orderly administration of the debtor's insolvency and ensure any relief granted in the enacting state is consistent with any other insolvency proceeding²⁸.

As indicated above, the Court in the enacting state is entitled to presume that the documents submitted in support of a recognition application are authentic²⁹. Further, in the absence of proof to the contrary, a debtor's registered office is presumed to be the COMI of a debtor³⁰.

Article 17 of the Model law expressly mandates that foreign proceedings shall be recognized as a matter of course if the requirements therein are satisfied³¹. It should be noted that Article 17 is subject to the public policy exception³², but this should rarely be a basis for the refusal of a recognition application³³.

In particular, a foreign proceeding shall be recognized if:

- It is a foreign proceeding within the meaning of Article 2(a)³⁴;
- The foreign representative applying for recognition is a person or body within the meaning of Article 2(d)³⁵;
- The application meets the requirements of Article 15(2)³⁶;
- The application has been submitted to the Court referred to in Article 4³⁷.

Article 17 then goes on to provide a foreign proceeding shall be recognized:

- As a foreign main proceeding if it takes place in the state where a debtor has its COMI³⁸; or
- As a foreign non-main proceeding if the debtor has an establishment within the meaning of Article 2(f) in the foreign state³⁹.

In making this determination, the key consideration for the Court is to ensure that the location of foreign proceedings correspond to the actual location of the debtor's COMI as ascertained by creditors⁴⁰. Additionally, as set out above, the Court is entitled to presume that the registered office of a debtor is its COMI⁴¹. This is significant for two reasons. Firstly, if a proceeding is recognized as a foreign main proceeding, upon recognition, automatic relief follows from that determination. Secondly, if the current proceedings are not current, then such proceeding is not eligible for recognition under the Model Law⁴². As set out above at 2.2, the factors that Court's have identified most relevant for determining a debtor's COMI⁴³ are:

- The location of the debtor's primary assets;

²⁸ Guide to Enactment and Interpretation §132

²⁹ Article 16(2)

³⁰ Article 16(3)

³¹ Guide to Enactment and Interpretation §150

³² Article 6

³³ Article 17(1); Guide to Enactment and Interpretation §161

³⁴ Article 17(1)(a)

³⁵ Article 17(1)(b)

³⁶ Article 17(1)(c)

³⁷ Article 17(1)(d)

³⁸ Article 17(2)(a)

³⁹ Article 17(2)(b)

⁴⁰ Model Law Module pg 27

⁴¹ Article 16(3)

⁴² Guide to Enactment and Interpretation §158

⁴³ Module pg 26

- The jurisdiction whose law would apply to most disputes;
- The location of the majority of a debtor's creditors or of a majority of the creditors who would be affected by the case;
- The location of those who actually manage the debtor; and
- The location of the debtor's 'nerve centre.'

Moreover, Article 17(4) provides that the provisions of Articles 15, 16, 17, and 18 of the Model Law do not prevent the modification or termination of recognition if it is shown that the grounds for granting it were fully or in part lacking or cease to exist. Accordingly, a court in the enacting state may modify or terminate the recognition decision if there has been a change in circumstances⁴⁴. In this regard, Article 18 imposes a positive obligation to assist the Court by requiring a foreign representative to notify the court 'promptly' of:

- Any change in status of the foreignized foreign proceeding or the status of the foreign representative⁴⁵; and
- Any other foreign proceeding concerning the same debtor that becomes known to the foreign representative⁴⁶.

Against this procedural framework for recognition, the Model law does not contain a reciprocity requirement nor an abuse of process provision. Some states that have enacted the Model law have included a reciprocity requirement for recognition⁴⁷. The effect of this may render the implementation, and, therefore recognition toothless. As to abuse of process, the courts deal with this in the enacting state under domestic law. Consequently, courts in the enacting state on a recognition application may take into account any abuse of process in considering whether to grant or decline recognition⁴⁸. Further, foreign representatives have a duty of full and frank disclosure. Thus, if a foreign representative fails to comply with its disclosure requirements, this may constitute an abuse of process under the domestic laws of the enacting state with the recognition application being refused⁴⁹.

For full marks on this question, you should also mention the following:

1. Exclusions: If the debtor is an entity that is subject to a special insolvency regime in State B, the foreign representative should first of all check if the foreign proceedings regarding that type of a debtor are excluded in State A based on Article 1(2) of the implemented Model Law in State A.
2. Restrictions;- Existing international obligations of State A: Based on Article 3 of the Model Law, the court in State A should also check if there are no existing international obligations of State A (under a treaty or otherwise) that may conflict with granting the recognition application under the implemented Model Law in State A.

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.

A fundamental principle under the Model law is that relief is necessary for the fair and orderly conduct of the administration of a debtor's estate. This is so whether the relief is on an interim

⁴⁴ Guide to Enactment and Interpretation §165

⁴⁵ Article 18(a)

⁴⁶ Article 18(b)

⁴⁷ Module 8.2.6

⁴⁸ Guide to Enactment and Interpretation §161

⁴⁹ Module §8.2.8

basis (Article 19) or discretionary post-recognition relief (Article 21). In addition, Article 20 of the Model law provides automatic relief upon foreign proceedings' recognition.

Automatic Relief

As to automatic relief, the effect of a recognition order will differ depending on whether the foreign proceedings are recognised as “foreign main proceedings” or “foreign non-main proceedings.”⁵⁰

If the proceedings are recognised as “foreign main proceedings,” pursuant to Article 20 of the Model law, an automatic stay will prevent:

- The commencement of or continuation of actions or proceedings concerning a debtor’s rights, obligations or liabilities (Article 20(1)(a));
- Execution against a debtor’s assets (Article 20(1)(b)); and
- The transfer, encumbrance, or other disposal of a debtor’s assets (Article 20(1)(c)).

As indicated above, the effect of a recognition order in “foreign main proceedings” is automatic, and no further application to the court in the enacting state is required⁵¹. However, Article 20(2) confers, if provided for under the domestic law of the enacting state, a power to modify or terminate the automatic relief which follows upon recognition of a “foreign main proceeding”⁵².

Moreover, the automatic relief does not effect any right to commence individual actions or proceedings to the extent necessary to preserve a claim against a debtor⁵³. Further, Article 20(4) does not effect any right to commence a proceeding under the domestic law of the enacting state or rights to file claims in such proceedings.

The stay of actions against a debtor or a debtor’s assets is envisaged to provide a foreign representative with “breathing space” until the foreign representative is in a position to restructure or liquidate the debtor⁵⁴.

Interim Relief

In circumstances where urgent relief is required to protect the assets of a debtor or interests of creditors, pursuant to Article 19 of the Model law, upon an application of a foreign representative, the court in the enacting state may grant the following provisional relief:

- A stay of execution against a debtor’s assets (Article 19(1)(a));
- Entrusting the administration or realization of all or part of a debtor’s assets located in the enacting state to the foreign representative or other person determined by the court to preserve or protect the value of assets that, by their nature or because of other circumstances, are perishable or susceptible to devaluation (Article 19(1)(b));
- Suspending the right to transfer, encumber or otherwise dispose of any assets of a debtor (Article 19(1)(c) as read with Article 21(1)(c));
- Providing for the examination of witnesses, the taking of evidence, or delivery of information concerning a debtor’s assets, affairs, rights, obligations, or liabilities (Article 19(1)(c) as read with Article 21(1)(d)); and

⁵⁰ Bailey & Grooves §35.6

⁵¹ Bailey & Grooves §35.6

⁵² Module §8.3.2

⁵³ Article 20(3); Bailey & grooves §35.7

⁵⁴ Guide to Enactment & Interpretation §37

- Granting any relief that may be available under domestic law to a liquidator pursuant to the laws of the enacting state (Article 19(1)(c) as read with Article 21(1)(g))⁵⁵.

This relief is available from the time of filing a recognition application until its disposal⁵⁶. In granting or denying or modifying, or terminating provisional relief under Article 19, the court in the enacting state must be satisfied that the rights of creditors and/or interested parties are 'adequately protected'⁵⁷. The court also retains a discretionary power to grant such relief on such terms and conditions as it sees fit⁵⁸.

In addition to the above, Article 6 of the Model law contains a general public policy exception, whereby a court in the enacting state may refuse to take any steps under the Model law if the same would be 'manifestly contrary' to the public policy of the enacting state. However, the Model law expressly provides that the public policy exception should be interpreted narrowly and only engaged in exceptional circumstances⁵⁹.

Post-Recognition Relief

Upon foreign proceedings being recognized, Article 24 of the Model law provides that a foreign representative may intervene in any proceedings to which a debtor is a party provided the requirements under the domestic law of the enacting state are met. Further, Article 23 of the Model law confers standing to the foreign representative to commence proceedings to avoid certain transactions (under the enacting state's domestic laws) that are detrimental to creditors⁶⁰. By way of example, a foreign representative may commence an action to set aside a transaction at an undervalue. In the case of a foreign non-main proceeding, in order to grant such relief, the court must be satisfied that it relates to assets under the domestic law of the enacting state that should be administered in the foreign non-main proceeding⁶¹.

The Court in the enacting state whether 'non-main' or 'main' foreign proceedings may grant provisional relief where it is necessary to protect the assets of a debtor or interests of a creditor including:

- Staying the commencement of or continuation of individual actions or individual proceedings concerning a debtor's assets, rights, obligations, or liabilities to the extent that they have not been automatically stayed under Article 20 of the Model law⁶²;
- Staying execution against a debtor's assets to the extent, they have not been automatically stayed under Article 20 of the Model law⁶³;
- Suspending the right to transfer encumber or otherwise dispose of assets to the extent that they have not been suspended under Article 20 of the Model law⁶⁴;
- Providing for the examination of witnesses, the taking of evidence, or the delivery of information concerning a debtor's rights, assets, affairs, obligations, or liabilities⁶⁵;

⁵⁵ Module §8.3.2

⁵⁶ Article 19(2)

⁵⁷ Article 22

⁵⁸ Article 22(2)

⁵⁹ Module §6.8

⁶⁰ Article 23(1)

⁶¹ Article 23(2)

⁶² Article 21(1)(a)

⁶³ Article 21(1)(b)

⁶⁴ Article 21(1)(c)

⁶⁵ Article 21(1)(d)

- Entrusting the administration or realization of all or part of the debtor's assets located in the enacting state to the foreign representative or other person designated by the court⁶⁶;
- Extending provisional relief granted under Article 19 of the Model law⁶⁷; or
- Granting any additional relief that may be available to a liquidator under the domestic laws of the enacting state⁶⁸.

If provisional relief is granted to a foreign representative of foreign non-main proceedings, the court must be satisfied that the provisional relief relates to assets under the law of the enacting state should be administrated in the foreign non-main proceedings⁶⁹. The purpose of Article 21(3) of the Model law is to ensure that the provisional relief granted by the court does not interfere with the administration of another insolvency proceeding⁷⁰.

While courts are given broad discretion to grant relief under Article 21 of the Model law, there are limits to the court's discretion. In the case of *Pan Ocean Co Ltd*⁷¹, the court found that this broad discretion does not allow the court to give relief that is not available to the court in the enacting state under the enacting state's domestic insolvency law. Further, the Supreme Court in *Rubin v Euro Finance SA*⁷² held that the discretionary relief available under the Cross-Border Insolvency Regulations (which implements the Model Law in England) is limited to procedural, not substantive, relief. This is because the purpose of the Model Law is to provide a procedural framework and does not seek to create a uniform substantive insolvency law⁷³.

For full marks on this question, you should also mention:

1. Adequate protection: Pursuant to Article 22 of the Model Law any interim relief under Article 19 of the Model Law or any post-recognition relief under Article 21 of the Model Law require the court in State A to be satisfied that the interests of the creditors and the other interested persons, including the debtor, are adequately protected and any relief may be subject to conditions as the court considers appropriate.
2. Existing international obligations of State A: Based on Article 3 of the Model Law, the court in State A should again verify that there are no existing international obligations of State A (under a treaty or otherwise) that may conflict with granting the requested relief under the implemented Model Law in State A.

Question 3.4 [maximum 1 mark] 1 mark

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

A worldwide freezing order (**freezer**) is an injunction to restrain an individual from disposing of or dissipating its assets until the court determines the underlying claims between the parties. The purpose of a freezer is to maintain the status quo, so if the applicant is successful at trial, the applicant is able to enforce a judgment against a respondent's assets.

Upon recognition of foreign proceedings, the court in the enacting state has the discretion to grant post-recognition relief under Article 21 of the Model Law. This relief may be granted

⁶⁶ Article 21(1)(e)

⁶⁷ Article 21(1)(f)

⁶⁸ Article 21(1)(g)

⁶⁹ Article 21(3)

⁷⁰ Module §8.3.1

⁷¹ *Pan Ocean Co Ltd* [2014] EWHC 2124 (Ch)

⁷² *Rubin v Euro Finance SA* [2013] B.C.C. 1

⁷³ *Bakhshiyeva v Sherbank of Russia; Re OJSV International Bank of Azerbaijan* [2019] 2 All ER 713

where the court is satisfied that it is necessary to protect a debtor's assets or the interests of creditors⁷⁴. Pursuant to Article 21, this relief includes:

"(a) Staying the commencement or continuation of individual actions or individual proceedings concerning the debtor's assets, rights, obligations, or liabilities, to the extent they have not been stayed under paragraph 1(a) of Article 20.

(b) Staying execution against the debtor's assets to the extent it has not been stayed under paragraph 1(b) of Article 20.

(c) Suspending the right to transfer, encumber or otherwise dispose of any assets of the debtor to the extent that this right has not been suspended under paragraph 1(c) of Article 20."

If a court in the enacting state were to grant post-recognition relief to the foreign representative under Article 21(b), the effect of the 'moratorium' against the debtor's assets freezes those assets to protect those assets. As the discretionary relief available under Article 21 stays any actions against the debtor's assets, it is therefore unlikely that the freezing order would continue post-recognition. This is because there is no longer a risk that actions would be commenced against or that the debtor may transfer or otherwise dispose of its assets⁷⁵.

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.

⁷⁴ Article 21(1) of the Model Law

⁷⁵ Article 21 1(c).

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]; 9 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.

Before considering whether the Bank's liquidation constitutes a 'foreign proceeding' within the meaning of Article 2(a) of the UNCITRAL Model Law on Cross-Border Insolvency (**Model Law**), it is important to first set out the relevant legal principles.

Legal Principles – UNCITRAL Model Law on Cross Border Insolvency

Article 15 of the Model Law provides:

- (1) A foreign representative may apply to the Court for recognition of the foreign proceeding in which the foreign representative has been appointed.
- (2) An application for recognition shall be accompanied by:
 - a. A certified copy of the decision commencing the foreign proceeding and appointing the foreign representative.
 - b. A certificate from the foreign Court affirming the existence of the foreign proceeding and the appointment of the foreign representative
 - c. In the absence of evidence referred to in subparagraphs (a) and (b), any other evidence acceptable to the Court of the existence of the foreign proceeding and of the appointment of the foreign representative.

- (3) An application for recognition shall also be accompanied by a statement identifying all foreign proceedings in respect of the debtor that are known to the foreign representative.
- (4) The Court may require a translation of documents supplied in support of the application for recognition into the official language of the State.

Article 17 provides:

1. Subject to Article 6, a foreign proceeding shall be recognized if:
 - a. Foreign proceeding is a proceeding within the meaning of subparagraph (a) of Article 2;
 - b. The foreign representative applying for recognition is a person or body within the meaning of subparagraph (d) of Article 2;
 - c. The application meets the requirements of paragraph 2 of Article 15; and
 - d. The application has been submitted to the Court referred to in Article 4.
2. The foreign proceeding shall be recognized
 - a. As a foreign main proceeding if it is taking place in the State where the debtor has the centre of its main interests; or
 - b. As a foreign non-main proceeding if the debtor has an establishment within the meaning of subparagraph (f) of Article 2 in the foreign State.
3. An application for recognition of a foreign proceeding shall be decided upon at the earliest possible time.
4. The provisions of articles 15, 16, 17, and 18 do not prevent modification or termination of recognition if it is shown that the grounds for granting it were fully or partially lacking or have ceased to exist.

As can be seen from Article 17(1) of the Model Law, recognition is subject to Article 6, which provides that *“nothing in this law prevents the Court from refusing to take an action governed by this law if the action would be manifestly contrary to the law of this State.”*

Article 2(a) of the Model Law then goes on to broadly define a ‘foreign proceeding’ to mean:

“a collective judicial or administrative proceeding in a foreign state, including an interim proceeding, pursuant to a law relating to insolvency in which proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganization or liquidation.”

A ‘foreign representative’ by virtue of Article 2(d) of the Model Law means:

“A person or body, including one appointed on an interim basis, authorized in a foreign proceeding to administer the reorganization or the liquidation of the debtor’s assets or affairs to act as a representative in a foreign proceeding.”

Within this framework, I will go on to consider whether (i) the Bank's liquidation constitutes a foreign proceeding; and (ii) whether Ms. G is a foreign representative. These questions will be discussed below in turn.

As to whether the Bank's liquidation in Country A constitutes a foreign proceeding, it must be established on the facts that it is a (i) collective judicial or administrative proceeding (ii) pursuant to the law relating to insolvency; and (iii) the assets and affairs of the debtor are subject to control or supervision by a foreign court.

Collective judicial or administrative proceeding

The Model Law Guide to Enactment and Interpretation (**Enactment Guide**) helpfully provides guidance in relation to whether a proceeding qualifies as a collective proceeding under the Model Law. In particular, paragraph 70 of the Enactment Guide provides:

"...a key consideration is whether substantially all of the assets and liabilities of the debtor are dealt with in the proceeding, subject to local priorities and statutory exception, and to local exclusions relating to the rights of secured creditors. A proceeding should not be considered to fail the test of collectively purely because a class of creditors' rights is unaffected by it."

In this case, under Article 34 of DGF law, once the Bank has been classified as insolvent, the Bank is put into statutory administration. During this period, the Deposit Guarantee Fund (**DGF**) becomes responsible for removing the Bank from the market by winding down its affairs. Upon the DGF's decision to revoke the Bank's licence, it is placed into liquidation. Under Article 77 of DGF law, the DGF automatically becomes the liquidator of the bank and acquires the full powers of a liquidator under the laws of Country A. During this time, all the powers of the bank's management and control bodies are terminated, all banking activities are terminated, all money liabilities due and owing to the Bank are deemed to become due. In addition, and importantly for the purposes of determining whether this is a "collective proceeding" upon being put into liquidation, the DGF has extensive powers to:

- Compile a register of creditor claims and to seek to satisfy those claims;
- The power to dispose of the bank's assets;
- The power to exercise such other powers as are necessary to complete the liquidation of a bank;
- The power to take steps, find, identify and recover property to the bank; and
- The power to dismiss employees and withdraw from/terminate contracts.

It is clear from the above that the DGF has the express power under the law of Country A to compile a register of creditor claims and seek to satisfy those claims. In this case, the DGF resolved to approve an amended list of creditor claims totalling approximately USD 1.13 billion. The Bank's current estimated deficiency exceeds US 823 million. The purpose of the DGF's powers is to assess the bank's assets to take steps to determine the value of the assets and to take all steps necessary to realize their value for the benefit of creditors. There was no affidavit evidence to suggest that all the creditors of the Bank are prevented from filing a claim in the liquidation.

It should also be considered administrative. During the provisional administration, the DGF assumes responsibility for administering the affairs of the Bank. Upon being put into liquidation, Article 37 confers very broad powers, which include managerial and supervisory powers to enter into contracts, restrict or terminate the bank's transactions, and to file property and non-property claims with the Court. The DGF also has the power to take steps to find, identify and recover property belonging to the Bank.

Law relating to insolvency

Paragraph 73 of the Enactment Guide provides:

“This formulation is used in the Model Law to acknowledge the fact that liquidation and reorganization might be conducted under law that is not labelled as insolvency law, but which nevertheless deals with or addresses insolvency or severe financial distress.”

The provision of DGF Law provides for both statutory administrations as well as liquidation of financially distressed or troubled banks. The liquidation of the Bank was commenced under these provisions, thus constitutes *“pursuant to the law of insolvency.”*

Subject to the control of a foreign court

Pursuant to Article 2(e) of the Model Law, a foreign court means *“a judicial body or other authority competent to control or supervise a foreign proceeding.”* The Enactment Guide at paragraph 74 provides:

“Control or supervision may be exercised not only directly by the Court but also by an insolvency representative, where for example the insolvency representative is subject to control or supervision by the Court. Mere supervision of an insolvency representative by a licensing authority would not be sufficient.”

The Enactment Guide then goes on to state at paragraph 87 that:

“A foreign proceeding that meets the requisite of article 2, subparagraph (a) should receive the same treatment irrespective of whether it has been commenced or supervised by a judicial body or an administrative body..... the definition of foreign court in subparagraph (e) includes non-judicial authorities.”

Pursuant to Article 3, the DGF is a separate legal entity from the National Bank. It is also economically independent and maintains a separate balance sheet. Neither the National Bank nor any other public authority has the right to interfere with the exercise of the DGF statutory function. The DGF is an independent body which is responsible for the liquidation of banks, thus should be treated as a foreign court within the meaning of Article 2(e) of the Model Law.

Great answer. However, it should also be discussed whether the proceedings are in the purposes of liquidation or reorganisation.

Having considered that the proceedings are foreign proceedings within the meaning of Article 2(a), the Court must then go on to consider whether Ms. G has standing as a “foreign representative” within the meaning of Article 2(d).

A ‘foreign representative’ by virtue of Article 2(d) of the Model Law means:

“A person or body, including one appointed on an interim basis, authorized in a foreign proceeding to administer the reorganization or the liquidation of the debtor’s assets or affairs to act as a representative in a foreign proceeding.”

Article 77 of the LBBA provides that DGF automatically becomes liquidator of a bank on the date it receives confirmation of the NB’s decision to revoke the bank’s licence. Article 48(3) of the DGF Law provides that the DGF may delegate its powers to an *“authorised officer or authorised person.* An authorised person is defined by Article 2(1)(17) 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.

An authorized person must not be a creditor of the bank nor have any conflict of interest with the bank. Article 35(1) then goes on to provide 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.*”

Ms. G was appointed pursuant to a Decision of the Executive Board of Directors of DGF. Ms. G is a leading liquidation professional. The DGF had delegated all liquidation powers in respect of the Bank as set out under Articles 37,38, 47-52, 521, and 53 of the DGF. As a liquidator appointed pursuant to the laws of Country A, Ms. G has the requisite standing to apply for recognition as a foreign representative pursuant to Article 2(a) of the Model Law.

It should be noted that the Resolution appointing Ms. G expressly excludes from Ms. G's authority certain powers, and such powers remain vested in DGF. Specifically, DGF retains the power to claim damages from a related party to the Bank, make a claim against a non-banking financial institution that raised money as loans or deposits from individuals, and arrange for the sale of the Bank's assets.

Taking the above factors into account, subject to satisfying the Court that no public policy considerations exist and meeting the evidentiary requirements of Article 15, the Court should recognize the Bank's liquidation as a “foreign proceeding” and Ms G and/or DGF as “foreign representatives.”

A bit more attention should be given to the character of DGF and if this *body* also is considered a foreign representative. Also, it should be discussed what effects ths split in power has.

*** End of Assessment ***