



**SUMMATIVE (FORMAL) ASSESSMENT: MODULE 2A**

**THE UNCITRAL MODEL LAWS RELATING TO INSOLVENCY**

This is the **summative (formal) assessment** for **Module 2A** of this course and is compulsory for all candidates who **selected this module as one of their compulsory modules from Module 2**. Please read instruction 6.1 on the next page very carefully.

If you selected this module as **one of your elective modules**, please read instruction 6.2 on the next page very carefully.

**The mark awarded for this assessment will determine your final mark for Module 2A.** In order to pass this module, you need to obtain a mark of 50% or more for this assessment.

## **INSTRUCTIONS FOR COMPLETION AND SUBMISSION OF ASSESSMENT**

**Please read the following instructions very carefully before submitting / uploading your assessment on the Foundation Certificate web pages.**

1. You must use this document for the answering of the assessment for this module. The answers to each question must be completed using this document with the answers populated under each question.
2. All assessments must be submitted electronically in MS Word format, using a standard A4 size page and a 11-point Arial font. This document has been set up with these parameters – **please do not change the document settings in any way. DO NOT** submit your assessment in PDF format as it will be returned to you unmarked.
3. No limit has been set for the length of your answers to the questions. However, please be guided by the mark allocation for each question. More often than not, one fact / statement will earn one mark (unless it is obvious from the question that this is not the case).
4. You must save this document using the following format: **[student ID.assessment2A]**. An example would be something along the following lines: 202122-336.assessment2A. **Please also include the filename as a footer to each page of the assessment** (this has been pre-populated for you, merely replace the words “studentID” with the student number allocated to you). Do not include your name or any other identifying words in your file name. **Assessments that do not comply with this instruction will be returned to candidates unmarked.**
5. Before you will be allowed to upload / submit your assessment via the portal on the Foundation Certificate web pages, you will be required to confirm / certify that you are the person who completed the assessment and that the work submitted is your own, original work. Please see the part of the Course Handbook that deals with plagiarism and dishonesty in the submission of assessments. **Please note that copying and pasting from the Guidance Text into your answer is prohibited and constitutes plagiarism. You must write the answers to the questions in your own words.**
- 6.1 If you selected Module 2A as one of your **compulsory modules** (see the e-mail that was sent to you when your place on the course was confirmed), the final time and date for the submission of this assessment is **23:00 (11 pm) GMT on 1 March 2022**. The assessment submission portal will close at 23:00 (11 pm) GMT on 1 March 2022. No submissions can be made after the portal has closed and no further uploading of documents will be allowed, no matter the circumstances.
- 6.2 If you selected Module 2A as one of your **elective modules** (see the e-mail that was sent to you when your place on the course was confirmed), you have a **choice** as to when you may submit this assessment. You may either submit the assessment by **23:00 (11 pm) GMT on 1 March 2022** or by **23:00 (11 pm) BST (GMT +1) on 31 July 2022**. If you elect to submit by 1 March 2022, you **may not** submit the assessment again by 31 July 2022 (for example, in order to achieve a higher mark).
7. Prior to being populated with your answers, this assessment consists of **12 pages**.

## **ANSWER ALL THE QUESTIONS**

**Total marks 23,5 out of 25 (Course Leader: after reviewing this script, mark adjusted upwards to 50%)**

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

### **QUESTION 1 (multiple-choice questions) [10 marks in total] 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] 6 marks

### Question 2.1 [maximum 3 marks] 1 mark

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

The appropriate date for determining the COMI of a debtor, or where an establishment exists, is the date of commencement of the foreign proceedings. The COMI of a debtor can move, if such a move is in the proximity (timing wise) to the commencement of the foreign proceedings. However, the appropriate evidence for this will be harder to establish. The COMI must be readily ascertainable by third parties, such as creditors of the debtor.

There are two factors for determining COMI under to Model Law i.e. (a) location where the central administration of the debtor takes place and (b) which is readily ascertainable as such by creditors of the debtor. The court may also need to give greater or less weight to a given factors, but in most of the cases the determination of the COMI is a

holistic endeavour designed to determine that the location of the foreign proceedings in fact corresponds to the actual location of the debtors COMI. There are additional factors also to determine the debtors COMI, however these are not limited to only which are listed here. i) the location of the debtor's books and records, ii) the location where financing was organised or authorised, (iii) the location from where the cash management system was run, iv) the location in which the debtor's principal assets or operations are found, v) the location of the debtor's primary bank, vi) the location of employees, vii) the location in which commercial policy was determined, viii) the site of the controlling law or the law governing the main contracts of the debtor, ix) the location from which purchasing and sales policy, staff, accounts, payable and computer systems are managed, x) the location from which reorganisation of the debtor was being conducted, xi) the location from which contracts were organised, xii) the location in which debtor was subject to supervision or regulations, xiii) the jurisdiction whose law would apply to most disputes and xiv) the location whose law governed the preparation of accounts and in which they were prepared and audited.

For full marks on this question, it should be addressed, that the appropriate date is not mentioned explicitly in the MLCBI and that some jurisdictions take a slightly different approach.

### Question 2.2 [maximum 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."*

The Statement 1 is from the Article 30(c), wherein in the event of two concurrent foreign non-main proceedings, the court must grant, modify or terminate relief for the purpose of facilitating co-ordination of the proceedings. However, it also mentions that the Model law does not contain any rule of preference between concurrent foreign non-main proceedings. Article 30 talks about that any relief granted in favour of a foreign non-main proceedings must be consistent with the foreign non-main proceedings. However, if there are only non-main proceedings, any relief ordered should be coordinated. Relief granted under article 30 may be terminated or modified to ensure that consistency can be achieved.

The Statement 2 refers from the hotchpot rule i.e., Article 32, which talks about the intend to avoid situations in which a creditor might obtain more favourable treatment than the other creditors in the same class, by obtaining payment of the same claim in insolvency proceedings in different jurisdictions. The rule does not affect the ranking of claim as established under the law of the enacting State and solely intended to establish the equal treatment of creditors in the same class. To the extent that claims of secured creditors or creditors with right *in rem* are paid in full, those claims are not affected by the provision.

The Statement 3 refers to Article 31 of the Model Law. If the domestic proceeding is to be opened for the debtor in the enacting state, the Article 31 provides for the rebuttable presumption that the recognition of a foreign main proceedings is proof that debtor is insolvent. **The correct answer is 16(3)**

**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.**

As per the Court of Appeal, the real issue in this case was “whether as a matter of settled practice the court should not exercise its power to grant the indefinite Moratorium Continuation. The Court of Appeal said that an English court could only properly grant the indefinite Moratorium Continuation if it were satisfied of two things, firstly the stay would have to be necessary to protect the interest of IBA’s creditors and secondly, the stay would have to be an appropriate way of achieving such protection. The Court of Appeal held that neither of these conditions has been satisfied. On the facts which were submitted, it concluded that the IBA creditors needed no further protection on order for the foreign proceedings to achieve its purpose. The court further found it to be material that IBA could in principle have promoted a parallel scheme of arrangement in UK but chose not to do so.

The Court of Appeal also considered that the information obligation on the foreign representative contained in article 18 of the Model Law, regarding a substantial change in the status of the foreign proceeding and the status of the foreign representative’s own appointment require the foreign proceedings to still be in existence and foreign representative to still be in office. Thus, it should be noted that once foreign proceedings have come to an end and foreign representative no longer holds the office, there is no scope for further order to support the foreign proceedings and if any relief which was previously granted under the Model law should be terminated.

**Question 2.4 [2 marks] 1 mark**

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

Upon recognition of a foreign proceeding, Article 21 (1) of the Model Law provides the court in the enacting State with the discretionary powers. It basically states it is necessary to protect the assets of the debtor or the interest of creditors and at the request of the foreign representative to grant the appropriate relief which includes stay in the commencement or continuation of individual actions or individual proceedings concerning the debtor’s assets, rights, obligations or liabilities to the extent that have not automatically stayed under Article 20, Suspension of rights to transfer, encumber or otherwise dispose of any assets of debtor, stay on execution against the debtors assets, extending any interim relief granted and granting any additional relief that may be available to a domestic liquidator or office holder under the law.

**The correct answer should refer to art. 29 regarding concurrent proceedings.**

The foreign representative is required to promptly inform the court in the enacting State of the following things as per Article 18: a) any substantial change in the status of the recognised foreign proceeding or the status of the foreign representative’s appointment and b) any other foreign proceeding regarding the same debtor that becomes known to the foreign representative.



**QUESTION 3 (essay-type questions) [15 marks in total] 7,5 marks**

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

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

**Question 3.1 [maximum 4 marks] 3 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?

The Articles 9-14 of the Model Law provides for the standing before the courts in the enacting State for both the foreign representative & creditor and non-discrimination principles ensuring that foreign creditors have same rights as local creditors and benefits from the timely information of events taking place in the enacting state. The access rights and non-discrimination principles aim to save the time and expenses which also helps to avoid value destruction of the debtor's asset. The Article 9 mentions the principal of a direct access to foreign representative to courts of the enacting state. No recognition of the foreign proceeding opened in the foreign State is required in the enacting State to provide the foreign representative with standing in the courts of the enacting state, but such access does not automatically vest the foreign representative with any other rights or powers. Further, the Article 11, also focus on providing standing to the foreign representative in the courts of the enacting State, but here to request the commencement of a domestic insolvency proceedings in the enacting State is without modifying any of the conditions for opening of proceedings. Here also no prior recognition of the foreign proceeding is required.

Article 10 also responds to concerns of foreign representatives and creditors about exposure to an all-embracing jurisdiction triggered by an application under the model law. This law also ensures that the court in the enacting State does not assume jurisdiction over all the assets of the debtor on the sole ground of the fact that the foreign representative has made an application for the recognition of a foreign proceedings. Article 12 also focus on providing standing to the foreign representative in the courts of the enacting State but in this case recognition of the foreign proceeding is required for his standing to be available.

One should note that the Foreign creditors have the same rights as creditors domiciled in the enacting State regarding the commencement of and participation in the local proceedings regarding the debtor under the insolvency law of enacting state. This access of right of foreign creditor is expressed in Article 13. The ranking of the claims should not affect by the fact that they are foreign creditors and should be treated equally as other claims in the same ranking.

**For full marks, coordination rights in art. 25-27 should also be addressed**

**Question 3.2 [maximum 5 marks] 2 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 objective of the recognition principle is to avoid lengthy and time-consuming process by providing prompt resolution of applications for recognition. It also brings certainty to the process and enables the receiving court once recognition has been given to determine questions of relief in timely manner. The evidential requirements for recognition of a foreign proceeding are set forth in Article 15 of the Model Law. If those requirements are met then the recognition will be granted pursuant to Article 17 of the Model law. The Model Law also aims to expedite and simplify the process required to recognise foreign proceedings and it also aims to provide a clear framework for obtaining recognition. One of the important benefits of recognition in the enacting State of a foreign proceeding opened in another foreign State is that there is no need to open separate insolvency proceedings in the enacting state. Article 15 provides the recognition requirements such as a) foreign representative may apply to the court for recognition of the foreign proceeding to which the foreign representative has been appointed, b) the application of the recognition should be accompanied by any three of these (i) a certified copy of the decision commencing the foreign proceeding and appointing the foreign representative; or (ii) a certificate from the foreign court affirming the existence of the foreign proceedings and of the appointment of the foreign representative or (iii) in the absence of evidence referred in (i) and (ii), any other evidence acceptable to the court of the existence of the foreign proceeding and the appointment of the foreign representative, c) Any application for recognition is also expected to be accompanied by a statement identifying all foreign proceedings in respect of the debtor that are known to the foreign representative and lastly d) the court may require a translation of documents supplied in support of the application for recognition into an official language of the enacting State.

The recognition also allows the foreign representative to access certain tools and protections available to a local insolvency office-holder in the enacting State. Significant cost and time can be saved, and complications can be avoided by the foreign representative through the recognition process. One should also note that the foreign proceedings will not be denied recognition solely on the grounds that a court in the State in which the foreign proceeding was commenced would not provide equivalent relief to an insolvency representative from the enacting State. Article 17 further makes it clear that an application for recognition of a foreign proceeding must be decided upon at the earliest possible time and recognition can be modified or terminated if it is shown that the grounds for granting it were fully or partially lacking or have ceased to exist. Further one should note that in the absence of the public policy grounds in the enacting State for denying a request for recognition, such request should be made before the competent court of the enacting State, pursuant to article 4 of the Model law.

**For full marks on this question, it should also contain a reference to art. 1(2) on exclusions, art. 3 (restrictions) and a discussion on the judicial scrutiny in art. 16/17 regarding establishing where the debtor has its COMI.**

**Question 3.3 [maximum 5 marks] 2 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.

The court in the enacting State is entitled to grant urgently needed interim relief on the application for the recognition of a foreign proceedings, even prior to a decision on the recognition application based on the Article 19 of the Model Law. The article 19, states that, if the relief is urgently needed to protect the assets of the debtor or the interest of the creditor, the court in the enacting state may at the request of the foreign representative grant the relief of a provisional nature from the time of filing the recognition application until the application is decided upon. This interim relief applies to both foreign main and foreign non- main proceedings and can include i) a stay of execution against the debtors assets; ii) entrusting

the administration or realisation of all or part of the debtors assets located in the enacting State to the foreign representative or another person designated by the court, in order to preserve and protect the value of the asset that by the nature or because of other circumstances are perishable , susceptible to devaluation and iii) any of the following post-recognition relief provided for in article 21 of the Model Law i.e. a) suspension of the rights to transfer, encumbered or otherwise dispose of any assets of the debtor; b) providing for examination of witnesses or taking the evidences or deliver the information concerning the debtors assets or liabilities and c) granting any additional relief that may be available to a domestic liquidator under the law of enacting state. If the interim relief interferes with the administration of a foreign main proceeding, that the court may refuse to grant such interim relief.

Once the recognition of the foreign main or non-main proceeding is done, Article 21(1) of the Model Law provides the court of the enacting State with the discretionary powers, where it is necessary to protect the assets of the debtor or interest of the creditors. At the request of the foreign representative, the court can grant the appropriate relief such as i) stay on the commencement or continuation of individual actions or individual proceedings concerning the debtor's assets, rights, obligations or liabilities, to the extent they have not been (automatically) stayed under Article 20 (1)(a) of the model law; ii) stay on the execution against the debtor's assets to the extent it has not been stayed automatically stayed under Article 20 (1)(b); iii) suspending the rights to transfer, encumber or otherwise dispose of any assets of the debtor to the extent the right has not been automatically suspended under Article 20 (1)(c); iv) providing for the examination of witnesses, taking of evidence or delivery of information concerning the debtors assets, affairs, rights, obligations or liabilities; v) extending any interim relief granted pursuant to Article 19 (1). Though the Article 21 of the Model law is drafted broadly, the appropriate relief the court of the enacting state can grant is not unlimited.

**For full marks reference should be made to art. 22 on adequate protection, art. 3 (restrictions) and art. 6 on public policy.**

**Question 3.4 [maximum 1 mark] ½ 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?

The pre-recognition relief can be granted upon the application of recognition of foreign proceeding even before the decision on the recognition application while the Article 21 sets out the court's discretionary powers to provide the post recognition relief, in both the cases, the court in the enacting state must be satisfied that the interest of the all the parties involved are adequately protected. However, if the interim relief which is granted is interfering with the administration on the foreign main proceeding than court may refuse to grant such relief.

Article 22 mentions that court must strike an appropriate balance between the relief that may be granted to the foreign representative and the interest of the debtors, creditors and all other parties must be also be protected. Thus, these interests should guide the court in providing the discretionary powers to grant interim relief or post recognition relief.

**For full marks on this question, it should be clearly mentioned that art. 21 provide for another form for protection than a freezing order and the order therefore will not be warranted post recognition.**

**QUESTION 4 (fact-based application-type question) [15 marks in total] 5 marks**

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

**(1) Background**

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

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

Proceedings were issued in the High Court of England and Wales (Chancery Division) against various defendants on 11 February 2021 (the English Proceedings).

An affidavit (the Affidavit) sets out a detailed summary of the legislation of Country A's specific insolvency procedure for Banks. The procedure involves initial input from the National Bank (the NB) and at the time that the Bank entered liquidation, followed a number of stages:

#### ***Classification of the bank as troubled***

The NB may classify a bank as "troubled" if it meets at least one of the criteria set down by article 75 of the Law of Country A on Banks and Banking Activity (LBBA) or for any of the reasons specified in its regulations.

Once declared "troubled", the relevant bank has 180 days within which to bring its activities in line with the NB's requirements. At the end of that period, the NB must either recognise the Bank as compliant, or must classify it as insolvent.

#### ***Classification of the bank as insolvent***

The NB is obliged to classify a bank as insolvent if it meets the criteria set out in article 76 of the LBBA, which includes:

- (i) the bank's regulatory capital amount or standard capital ratios have reduced to one third of the minimum level specified by law;
- (ii) within five consecutive working days, the bank has failed to meet 2% or more of its obligations to depositors or creditors; and
- (iii) the bank, having been declared as troubled, then fails to comply with an order or decision of the NB and / or a request by the NB to remedy violations of the banking law.

The NB has the ability to classify a bank as insolvent without necessarily needing to first go through the troubled stage. Article 77 of the LBBA accordingly provides that a bank can be liquidated by the NB directly, revoking its licence.

#### ***Provisional administration***

The Deposit Guarantee Fund (DGF) is a governmental body of Country A tasked principally with providing deposit insurance to bank depositors in Country A. However, the Affidavit explained that the DGF is also responsible for the process of withdrawing insolvent banks from the market and winding down their operations via liquidation. Its powers include those related

to early detection and intervention, and the power to act in a bank's interim or provisional administration and its ultimate liquidation.

Pursuant to article 34 of the DGF Law, once a bank has been classified as insolvent, the DGF will begin the process of removing it from the market. This is often achieved with an initial period of provisional administration. During this period:

- (i) the DGF (acting via an authorised officer) begins the process of directly administering the bank's affairs. Articles 35(5) and 36(1) of the DGF Law provide that during provisional administration, the DGF shall have full and exclusive rights to manage the bank and all powers of the bank's management.
- (ii) Article 36(5) establishes a moratorium which prevents, *inter alia*: the claims of depositors or creditors being satisfied; execution or enforcement against the bank's assets; encumbrances and restrictions being created over the bank's property; and interest being charged.

### **Liquidation**

Liquidation follows provisional administration. The DGF is obliged to commence liquidation proceedings against a bank on or before the next working day after the NB's decision to revoke the bank's licence.

Article 77 of the LBBA provides that the DGF automatically becomes liquidator of a bank on the date it receives confirmation of the NB's decision to revoke the bank's licence. At that point, the DGF acquires the full powers of a liquidator under the law of Country A.

When the bank enters liquidation, all powers of the bank's management and control bodies are terminated (as are the provisional administrators' powers if the bank is first in provisional administration); all banking activities are terminated; all money liabilities due to the bank are deemed to become due; and, among other things, the DGF alienates the bank's property and funds. Public encumbrances and restrictions on disposal of bank property are terminated and offsetting of counter-claims is prohibited.

As liquidator, the DGF has extensive powers, including the power to investigate the bank's history and bring claims against parties believed to have caused its downfall. Those powers include:

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

The DGF also has powers of sale, distribution and the power to bring claims for compensation against persons for harm inflicted on the insolvent bank.

However, article 48(3) of the DGF Law empowers the DGF to delegate its powers to an “authorised officer” or “authorised person”. The “Fund’s authorised person” is defined by article 2(1)(17) of the DGF Law as: *“an employee of the Fund, who on behalf of the Fund and within the powers provided for by this Law and / or delegated by the Fund, performs actions to ensure the bank’s withdrawal from the market during provisional administration of the insolvent bank and/or bank liquidation”*.

Article 35(1) of the DGF Law specifies that an authorised person, must have: *“...high professional and moral qualities, impeccable business reputation, complete higher education in the field of economics, finance or law...and professional experience necessary.”* An authorised person may not be a creditor of the relevant bank, have a criminal record, have any obligations to the relevant bank, or have any conflict of interest with the bank. Once appointed, the authorised officer is accountable to the DGF for their actions and may exercise the powers delegated to them by the DGF in pursuance of the bank’s liquidation.

The DGF’s independence is addressed at articles 3(3) and 3(7) of the DGF Law which confirm that it is an economically independent institution with separate balance sheet and accounts from the NB and that neither public authorities nor the NB have any right to interfere in the exercise of its functions and powers.

Article 37 establishes that the DGF (or its authorised person, insofar as such powers are delegated) has extensive powers, including powers to exercise managerial and supervisory powers, to enter into contracts, to restrict or terminate the bank’s transactions, and to file property and non-property claims with a court.

## **(2) The Bank’s liquidation**

The Bank was formally classified by the NB as “troubled” on 19 January 2015. The translated NB resolution records:

“The statistical reports-based analysis of the Bank’s compliance with the banking law requirements has found that the Bank has been engaged in risky operations.”

Those operations included:

- (i) a breach, for eight consecutive reporting periods, of the NB’s minimum capital requirements;
- (ii) 10 months of loss-making activities;
- (iii) a reduction in its holding of highly liquid assets;
- (iv) a critically low balance of funds held with the NB; and
- (v) 48% of the Bank’s liabilities being dependent on individuals and a significant increase in “adversely classified assets” which are understood to be loans, whose full repayment has become questionable.

Despite initially appearing to improve, by September 2015 the Bank’s financial position had deteriorated further with increased losses, a further reduction in regulatory capital and numerous complaints to the NB. On 17 September 2015, the NB classified the Bank as insolvent pursuant to article 76 of the LBBA. On the same day, the DGF passed a resolution

commencing the process of withdrawing the Bank from the market and appointing Ms C as interim administrator.

Three months later, on 17 December 2015, the NB formally revoked the Bank's banking licence and resolved that it be liquidated. The following day, the DGF initiated the liquidation procedure and appointed Ms C as the first of the DGF's authorised persons to whom powers of the liquidator were delegated. Ms C was replaced as authorised officer with effect from 17 August 2020 by Ms G.

Ms G's appointment was pursuant to a Decision of the Executive Board of the Directors of the DGF, No 1513 (Resolution 1513). Resolution 1513 notes that Ms G is a "leading bank liquidation professional". It delegates to her all liquidation powers in respect of the Bank set out in the DGF Law and in particular articles 37, 38, 47-52, 521 and 53 of the DGF Law, including the authority to sign all agreements related to the sale of the bank's assets in the manner prescribed by the DGF Law. Resolution 1513 expressly excludes from Ms G's authority the power to claim damages from a related party of the Bank, the power to make a claim against a non-banking financial institution that raised money as loans or deposits from individuals, and the power to arrange for the sale of the Bank's assets. Each of the excluded powers remains vested in the DGF as the Bank's formally appointed liquidator.

On 14 December 2020, the Bank's liquidation was extended to an indefinite date, described as arising when circumstances rendered the sale of the Bank's assets and satisfaction of creditor's claims, no longer possible.

On 7 September 2020, the DGF resolved to approve an amended list of creditors' claims totalling approximately USD 1.113 billion. The Affidavit states that the Bank's current, estimated deficiency exceeds USD 823 million.

#### **QUESTION 4.1 [maximum 15 marks]**

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

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

- 4.1.1 whether the Bank's liquidation comprises a "foreign proceeding" within the meaning of article 2(a) of the MLCBI [**maximum 10 marks**]; **2 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**]. **3 marks**

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

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

4.1.1 Answer:

In this case, though the Commercial Bank for Business Corporation has a registered office in Country A, which has not adopted the MLCBI, the Bank's majority ultimate beneficial owner was Mr Z, who held around 95% of the Bank's shares through various corporate entities and some were also registered in England. Thus, this will qualify as a foreign proceeding. Ms. G together with the DGF application for recognition of the liquidation of the Bank before the English court based on the Cross-Border Insolvency Regulations 2006 (CBIR) will be accepted given Model law do not state that it is impossible to recognise a single group proceeding, however the English court will consider it to be collective proceedings. Further, they have applied for recognition of the liquidation.

Two of the elements of Model Law for proceedings to qualify as a foreign proceeding are met i.e., the proceedings may include an interim proceeding; however, it must be judicial or administrative and collective in nature; and the proceeding must be for the purpose of reorganisation or liquidation. Further, the Model law also states that for a proceeding to qualify as a foreign proceeding the proceedings must be in a foreign state authorised or conducted under a law related to insolvency, here the Bank's investments are in various countries and other proceedings were also issued in the High Court of England and Wales against various defendants on 11 February 2021, this element is also met. And lastly the assets & affairs of the debtor must be subject to control or supervision by a foreign court, this clause is also met.

For full marks on this question it should be markedly more elaborate and include a discussion on the requirements of art. 2 (a) – i.e. what does it mean when a proceeding needs to be “collective”, controlled by a foreign court etc and if the facts of the case fulfill these criteria. It is simply not adequate to just state that the proceeding is “collective in nature”.

The answer should be along the following:

### **“Collective proceeding”**

1. UNCITRAL's guide for judiciary, “The Model Law on Insolvency: The Judicial Perspective” (2013) explains the requirement for proceedings to be “collective”:

“The UNCITRAL Model Law was intended to apply only to particular types of insolvency proceedings. The Guide to Enactment and Interpretation indicates that the notion of a “collective” insolvency proceeding is based on the desirability of achieving a coordinated, global solution for all stakeholders of an insolvency proceeding. It is not intended that the Model Law be used merely as a collection device for a particular creditor or group of creditors who might have initiated a collection proceeding in another State, or as a tool for gathering up assets in a winding up or conservation proceeding that does not also include provision for addressing the claims of creditors. The Model Law may be an appropriate tool for certain kinds of actions that serve a regulatory purpose, such as receiverships for such publicly regulated entities as insurance companies or brokerage firms, provided the proceeding is collective as that term is used in the Model Law.”

2. The Guide to Enactment and Interpretation of the UNCITRAL Model Law (2014) explains that when:

“evaluating whether a given proceeding is *collective* for the purpose of the Model Law, a key consideration is whether substantially all of the assets and liabilities of the debtor are dealt with in the proceeding, subject to local priorities and statutory exceptions, and to local exclusions relating to the rights of secured creditors. A proceeding should not be considered to fail the test of collectivity purely because a class of creditors' rights is unaffected by it.”



3. Based on the facts provided the understanding is that *all* of the Bank's creditors are entitled to claim in the liquidation and that their claims are met from available assets, according to the statutory order of priorities. Consequently, the conclusion can be reached that the Bank's liquidation is a "*collective proceeding*".

***"Judicial or administrative" and "subject to the control or supervision by a foreign court"***

4. The collective proceeding, must be "*judicial or administrative*" where "*the assets and affairs or the debtor are subject to control or supervision by a foreign court*".
5. The term "*foreign court*" is defined at article 2(e) of the MLCBI and means: "*a judicial or other authority competent to control or supervise a foreign proceeding*".
6. The Guide to Enactment notes: "*87) A foreign proceeding that meets the requisites of article 2, subparagraph (a), should receive the same treatment irrespective of whether it has been commenced and supervised by a judicial body or an administrative body. Therefore, in order to obviate the need to refer to a foreign non-judicial authority whenever reference is made to a foreign court, the definition of "foreign court" in subparagraph (e) includes also non-judicial authorities.*"
7. In ***Re Sanko Steamship Co Ltd*** [2015] EWHC 1031 (Ch) Simon Barker QC, noted that a foreign proceeding may be recognised where the control or supervision of the proceeding is undertaken by a non-judicial administrative body.
8. The Guide to Enactment states: "*74) The Model Law specifies neither the level of control or supervision required to satisfy this aspect of the definition nor the time at which that control or supervision should arise. Although it is intended that the control or supervision required under subparagraph (a) should be formal in nature, it may be potential rather than actual. As noted in paragraph 71, a proceeding in which the debtor retains some measure of control over its assets, albeit under court supervision, such as a debtor-in-possession would satisfy this requirement. Control or supervision may be exercised not only directly by the court 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.*"
9. In this case the DGF has control of all of the Bank's assets and overall control of the liquidation.
10. 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.
11. 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.
12. Taking these factors into account, the Bank's liquidation is *administrative*. The assets and affairs of the Bank are subject to the control of the DGF, an official body which exercises its powers in the liquidation free from intervention by government or the NB and which should be considered, for the purposes of the definition set out in article 2(e) of the MLCBI, as a "*foreign court*".

***"Pursuant to a law relating to insolvency"***

13. The Guide to Enactment provides at paragraph 48:

"Acknowledging that different jurisdictions might have different notions of what falls within the term "insolvency proceedings", the Model Law does not define the term

“insolvency”. However, as used in the Model Law, the word “insolvency” refers to various types of collective proceedings commenced with respect to debtors that are in severe financial distress or insolvent.”

Further explanation is provided at paragraph 73:

“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 (e.g. company law), but which nevertheless deals with or addresses insolvency or severe financial distress. The purpose was to find a description that was sufficiently broad to encompass a range of insolvency rules irrespective of the type of statute or law in which they might be contained and irrespective of whether the law that contained the rules related exclusively to insolvency.”

14. Article 76 of the LBBA clearly set out Country A’s specific insolvency procedures for insolvent banks. The Bank’s liquidation was commenced pursuant to those provisions and in my judgment should be considered by this Court as being “*pursuant to a law relating to insolvency*”.

***“In which proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganisation or liquidation”***

15. Having determined that the DGF falls within the definition of “*foreign court*”, I am satisfied, that by virtue of the legislative provisions set out above, it has control of all of the Bank’s assets and affairs for the purposes of administering the Bank’s liquidation.

#### 4.1.2 Answer:

In this case, Ms G is appointed by DGF via a decision of the Executive Board of the Directors and is one of the leading bank liquidation professional and DGF has delegated her all-liquidation powers in respect of the Bank set out in 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. Thus, though Ms G is authorised to administer the reorganisation or liquidation of the debtor’s assets or affairs, however, she is not given the authority to claim damages from a related party of the Bank and the same remains vested in the DGF as the Bank’s formally appointed liquidator. Thus, here DGF or its authorised person, will qualify as a foreign representative. Further, as liquidator, the DGF has extensive powers, including the power to investigate the bank’s history and bring claims against parties that may have caused its downfall.

As to qualify for to be a Foreign representative within the meaning of the Model Law it needs to meet the following elements:

- a) An appointed person or body (including appointment on an interim basis) should be authorised in the foreign proceedings and
- b) Th person must be authorised to either administer the reorganisation or liquidation of the debtor’s assets or affairs or to act as representative of the foreign proceedings.

Again, the answer needs to be more elaborate on the interpretation of the criteria and the facts of the case.

**\* End of Assessment \***