



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**.

Commented [DB1]: Please do me the courtesy of reading and complying with the instructions. If you don't someone else has to do this and that someone else is me.

ANSWER ALL THE QUESTIONS

Total: 40 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] 7

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.

Generally the appropriate date to determine the COMI of a debtor is at the date of commencement of the foreign proceeding. However, the COMI of the debt must be readily ascertainable to the creditors and the debtors, and should the COMI of a debtor move in close proximity to the date of the commencement of the foreign proceedings, it may be difficult to establish the COMI at this point in time. Across different jurisdictions, the appropriate date to determine the COMI may vary, for example in the US judgement of *Morning Mist Ltd v Kryss*¹ the court provided that although the debtor's COMI should be determined with reference to its activities at the time the petition for recognition for a foreign proceeding is made, a court

¹ *Morning Mist Holdings Ltd. v. Kryss (In re Fairfield Sentry Ltd.)*, 714 F.3d 127 (2d Cir. 2013).

may consider the period between commencement of the foreign insolvency proceedings and the filing of the aforementioned petition. The court concluded "that a debtor's COMI is determined as of the time of the filing of the Chapter 15 petition. To offset a debtor's ability to manipulate its COMI, a court may also look at the time period between the initiation of the foreign liquidation proceeding and the filing of the Chapter 15 petition."² This is based on the focus on the regularity and ascertainability of the debtors COMI, and covers off any issues which may arise as should the debtor act in bad faith and try and manipulate its COMI prior to the commencement of the proceedings. Australia's approach is similar to the US position, however from an Australian law perspective, the appropriate date for determining the debtor's COMI is at the time of the court's decision on the recognition application.³

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."*

In respect of Statement 1, the applicable Article is 30(c) – concurrent foreign non-main proceedings - which provides that if after recognition of a foreign non-main proceeding, another foreign non-main proceeding is recognised, the court shall grant, modify or terminate relief for the purpose of facilitating coordination of the proceedings. This Article is aimed to aid cooperation through coordination and consistency of relief.

In respect of Statement 2, the applicable Article is 32 which refers to the "hotchpot" rule. This rule provides that where a creditor has received payment of its claim (in part or otherwise) in relation to a specified debtor pursuant to the laws of insolvency in one foreign state, such creditor may not make the same claim in relation to the same debtor pursuant to the laws of insolvency of the domestic proceeding in the enacting State.

In respect of Statement 3, the applicable Article is 16(3) of the Model Law – the presumption concerning COMI - which provides that there is a rebuttable presumption that the place of the registered office of the debtor is the place of its COMI.

Question 2.3 [2 marks] 1 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.**

² Supra note 1 above at paragraph 133.

³ <https://www.mondaq.com/insolvencybankruptcy/837102/timing-is-everything-different-approaches-to-the-relevant-date-for-determining-comi-in-cross-border-recognition-proceedings> "Timing Is Everything: Different Approaches To The Relevant Date For Determining COMI In Cross-Border Recognition Proceedings" by Herman Jeremiah and Kia Jeng Koh, Dentons Singapore dated 15 August 2019, accessed 26 February 2022.

The Court confirmed the applicability of the English common law rule, the "Gibbs rule", which provides that a debt governed by English law cannot be discharged or compromised by foreign insolvency proceedings without consent. The Court's reasoning was that the formal recognition of a foreign insolvency proceeding by the English courts does not in itself create the opportunity to also apply foreign insolvency laws over that of the applicable English law principles (*in casu* English contract law). The Court found that the applicant could not circumvent the Gibb's rule by seeking permanent stay of the relevant creditors' rights under English law on the basis of the principles of "modified universalism" as set out in the Model Law (which has been implemented by the Cross-Border Insolvency Regulations 2006) with the court finding that the principle of universalism could not be used to justify the disregard of English law to assist a foreign insolvency process.

It should also be mentioned that Based on Article 18 of the MLCBI, the English Court of Appeal in the IBA case appeal held that had the MLCBI ever contemplated the continuance of relief after the end of the relevant foreign proceeding, it would have addressed the question explicitly and provided appropriate machinery for that purpose.

Question 2.4 [2 marks] 2

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**.

Following the recognition of a foreign proceeding, Article 18 provides that from the time of filing an application for recognition of the foreign proceeding, the foreign representative shall inform the court of (a) any substantial change in 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 the foreign representative becomes aware of. The basis for this ongoing duty is that following the application for recognition, there is a chance that circumstances may change, and that these changes, had they been known at the time of the application for recognition or at the time of the decision for recognition, could affect that decision or the kind of relief to be attained.

Pursuant to Article 30, following the recognition of a foreign proceeding and upon relief being granted pursuant to either Article 19 or 21, the court shall review such relief granted and if inconsistent with the domestic insolvency proceeding, modify or terminated that relief.

The correct answer is art 29(a) on concurrent proceeding – however I think you have a typo here and have given you a mark for this.

QUESTION 3 (essay-type questions) [15 marks in total] 9 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] 2 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?

One of the key provisions of the Model Law is that it focuses on access of a foreign representative to a court in another State to as to ensure that the fairest outcome is achieved in insolvency proceedings with cross-border elements, for both the debtor and all its creditors. Essentially, "access" entails providing a representative of foreign insolvency proceedings and creditors a right of access to the courts of an enacting State to pursue assistance as may be necessary given a variety of factors (for example, the situs of the debtors assets etc) as well as to allow representatives of domestic proceedings to be conducted in the enacting State to see assistance elsewhere.

It includes access to certain tools and protections available to foreign representatives in the enacting State and vice versa.

Access "opens borders", so to speak, between nations to facilitate collaboration between different States courts and to assist with the provision of the most appropriate relief in insolvency proceedings which may not have been achievable if the proceedings were limited to a particular State. Although there is interplay between "access" and "co-ordination", co-ordination and cooperation are key provisions of the Model law in their own right and should be upheld alongside "access". These provisions entail cooperation and co-ordination between the courts as well as the representatives of different States where the debtor's assets are located (which could be scattered over many States) and the coordination of concurrent proceedings in respect of that debtor.

The Model Law expressly empowers courts to cooperate in the areas governed by the Model Law and to communicate directly with their foreign counterparts. This includes cooperation between courts and foreign representatives, or between the foreign and local representatives themselves. Provisions dealing with coordination of concurrent proceedings are important as they aim to nurture decisions that would best achieve the objectives of both proceedings, whether local and foreign proceedings or multiple foreign proceedings and this is why they are considered key provisions of the Model Law. Without the "access" and "co-ordination" rights which are provided by the Model Law, cross-border insolvency proceedings concerning debtors experiencing severe financial distress or insolvency, may not be dealt with effectively as one particular State may not be equipped to deal with the cross border aspects which will certainly differ across States and thus, the creditors of such a debtor as well as the debtor itself will suffer prejudice. The Model Law by authorising access between States and encouraging cooperation and coordination between jurisdictions is essential in respecting the differences among national procedural laws and avoiding the unification of substantive insolvency law. Allowing representatives to communicate and thus coordinate solutions, will best serve both the creditors of the debtor and the debtor themselves and this is the main benefit of the provisions of "access" and "cooperation".

Cooperation is specifically dealt with in Articles 25-27 of the Model Law and is not dependent upon recognition of the proceedings. This means that cooperation may be available to proceedings which are neither classified as foreign main proceedings or non-main proceedings on the basis of the presence of assets in the various States. Article 26 takes cooperation a step further and makes it mandatory for a domestic insolvency office-holder to cooperate to the maximum extent possible with foreign courts or foreign representatives and is entitled to communicate directly with foreign courts and representatives.

For full marks, reference to the specific articles should be made also, etc art. 9 and 11.

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.

Once the two main questions of whether the proceeding qualifies as a foreign proceeding and the representative is classified as a "foreign representative", the next steps are to determine whether there are any further hindrances to proceeding with a recognition application. [Standing is not an issue, as Article 9 of the Model Law provides that a foreign representative is entitled to apply directly to a court in the enacting State. There are no additional requirements to be met to establish *locus standi*.]

What may however become important is the need to distinguish the foreign proceedings as either main or non-main proceedings as this may affect the nature of the relief accorded to the foreign representative under articles 20 and articles 21 of the Model Law, the coordination of the foreign proceeding under articles 25-27 and in relation to concurrent proceedings provisions set out at articles 28-32. In order to determine whether proceedings can be regarded as main or non-main foreign proceedings, article 17(2) provides that a foreign proceeding shall be recognised as (a) a foreign main proceeding if it is taking place in the State where the debtor has its centre of main interest ("**COMI**"); and (b) a foreign non-main proceeding if the debtor has an "establishment" within the meaning of article 2(f) in the foreign State. There is a presumption in the Model Law at article 16(3) that the debtor's registered office is presumed to be the COMI. A debtor is said to have an "establishment" in a particular State where there is a place of operations where the debtor carries out a non-transitory economic activity with human means and goods or services. Therefore, if a recognition application is made where the debtor has neither a COMI nor an establishment in the State where the foreign proceedings were opened, then such foreign proceeding will be unable to be recognised as a foreign proceeding under the Model Law and the court in the enacting State will have to deny the application for recognition. Further, it is important to make the distinction between main and non-main foreign proceedings as Article 20 provides for automatic mandatory relief where the foreign proceeding qualifies as the main foreign proceeding.

Before bringing a recognition application, it would be prudent to ascertain whether there is no conflicting treaty or other form of transnational agreement in the State where the recognition application is to be brought, which would take preference over provisions of the Model Law thus hindering a recognition application. Article 3 of the Model Law provides for the principle of supremacy of international obligations of the enacting State over internal law and accordingly, if the locally enacted Model Law provisions conflict with treaty or transnational agreement of the enacting State, then that treaty or agreement would prevail.

Articles 4, 5 and 6 of the Model Law may also affect whether an application for recognition can be made and should be considered prior to making the application. Article 4 enables the enacting State to provide for an authority other than the court to be specified as being competent to perform any functions relating to recognition and cooperation. It is a requirement under article 17(1)(d) that an application for recognition must have been submitted to the court referred to in Article 4. Article 5 provides for the authorisation of a particular person or entity

to act in a foreign State. Article 6 allows a court to refuse to take an action under the Model if the action would be manifestly contrary to the public policy of the state. All three of these articles should be considered by the foreign representative before bringing a recognition application so as to: 1) ascertain the competent court or authority to approach; 2) determine whether they are entitled to act abroad as foreign representative in those proceedings; and 3) determine whether there is any cause that the court may refuse the application based on public policy considerations of the enacting State. Although Articles 6 and 7 are not in a strict sense requirements to the recognition process, they are provisions which may affect the recognition proceedings and may in a sense be limitations should they conflict with anything in the recognition proceedings.

For full marks, the following should also be included

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. **Sufficient evidence:** Article 15 of the Model Law sets forth in paragraph 2 what evidence in respect of the commencement of the foreign proceedings and the appointment of the foreign representative must accompany the recognition application. A statement identifying all foreign proceedings in respect of the debtor that are known to the foreign representative must also accompany the recognition application (Article 15(3) of the Model Law).

Question 3.3 [maximum 5 marks] 3 marks

As far as relief is concerned, briefly explain (with reference to the relevant MLCBI articles) what pre- and post-recognition relief can be considered in the context of the MLCBI, as well as any restrictions, limitations or conditions that should be considered in this context. For purposes of this question, it can be assumed that there is no concurrence of proceedings.

Article 19 of the Model Law provides for pre-recognition urgent interim relief at the request of the foreign representative in order to protect the assets of the debtor or the interests of the creditor. Such pre-recognition relief can include: (a) staying execution against the debtor's assets; and (b) entrusting the administration or realisation of all or part of the debtor's assets located in the enacting State to the foreign representative (or person designated by the court) in order to protect and preserve the value of the assets which due to their nature (or due to other circumstances) are perishable, are susceptible to devaluation or otherwise in jeopardy. The following relief measures, as set out at Article 21(c)(d) and (g) (in respect of post recognition relief) may also be granted as pre-recognition relief under Article 19:

- suspension of the right to transfer, encumber or otherwise dispose of any assets of the debtor (to the extent that this right has not already been suspended by Article 20(1)(c);
- provision for the examination of witnesses, taking of evidence or the delivery of information concerning the debtor's assets affairs, rights, obligations or liabilities; or
- the granting of any additional relief that may be available to the person or body administering a reorganisation or liquidation under the laws of the enacting State.

Article 21 provides for post-recognition relief in that upon recognition of a foreign proceeding, where it's necessary to protect the assets of the debtor or the interests of the creditors, the court may, at the request of foreign representative, grant any appropriate relief including the following:

- a) staying the commencement or continuation of individual actions or individual proceedings concerning the debtor's assets, rights, obligations or liabilities (to the extent not already done so under Article 20);

- b) staying the execution against the debtor's assets (to the extent not already done so under Article 20);
- c) suspension of the right to transfer, encumber or otherwise dispose of any assets of the debtor (to the extent that this right has not already been suspended by Article 20(1)(c));
- d) providing for the examination of witnesses, taking of evidence or delivery of information concerning the debtor's assets, rights, affairs, obligations or liabilities;
- e) entrusting the administration or realisation of all or part of the debtor's assets located in the enacting State to the foreign representative (or person designated by the court);
- f) extending the relief granted under paragraph 1 of article 19; and
- g) granting of any additional relief that may be available to the person or body administering a reorganisation or liquidation under the laws of the enacting State

Paragraph 2 of Article 21 provides the court in the enacting State with the discretion, at the request of the foreign representative, to hand over all or part of the debtor's assets located in the enacting State to the foreign representative (or another person designated by the court), provided the court is satisfied that the interests of the local creditors in the enacting State are adequately protected.

Paragraph 3 of Article 21 provides that where the foreign proceeding is considered the non-main foreign proceeding, the court when granting relief under Article 21, must be satisfied that the relief relates to the assets that under the law of the enacting State should be administered in the foreign non-main proceeding or concerns information required in that proceeding. What's important in relation to this paragraph is that the court must be satisfied that the relief relates to the assets that under the law of the enacting State should be administered in the foreign non-main proceeding. The reference to law of the enacting State indicates that the intention of the Model Law is not to extend the effects of the foreign proceeding at the expense of the States existing laws but instead looks to work together with the existing principles of the law of the enacting State to avoid blurring the lines of sovereignty of state.

The relief to be granted under both Articles 19 and 21 must be seen to adequately protect the interests of the debtor's creditors and other interested parties. This means that the court in granting relief under Articles 19 and 21 may subject the relief granted to certain conditions it deems appropriate to achieve that adequate protection. The court is also allowed to modify and terminate the relief granted at the request of the foreign representative. The relief under Articles 19 and 21 are discretionary, giving the court the power to decide what relief is best in the given matter and to decide to what extent that relief is to be applied. The position is different when it comes to Articles 20, which provides for mandatory relief which cannot be modified or terminated at the court's discretion even upon request from a foreign representative. For Article 20 to apply, the foreign proceeding must be recognised as the main foreign proceeding (i.e. the State where the COMI of the debtor's assets are). The automatic relief contemplated by this article is:

- a stay of the commencement or continuation of individual actions or individual proceedings concerning the debtor's assets, rights, obligations or liabilities;
- a stay of execution against the debtor's assets; and
- a suspension of the right to transfer, encumber or otherwise dispose of any assets of the debtor.

Article 22 is also important in the context of relief as it prescribes the requirements for granting or denying relief under Articles 19 and 21. This requirement is that the court must consider the relief able to provide adequate protection to the interests of the creditors or other interested parties including the debtor.

For full marks, please include:

1. 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.
2. Public policy exception: The court in State A should, based on Article 6 of the Model Law, also again verify that the relief application is not manifestly contrary to public policy of 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?

The court may find in accordance with article 22 that continuing with an indefinite freezing order, after a foreign proceeding received the necessary recognition to appropriately deal with the matter from a cross-border perspective, would be contrary to adequately protecting the interest of the debtor's creditors or other interested parties. For the freezing order to carry on after the urgency has diminished, into the recognition application, could not be said to be adequately protecting the interest of the debtor's creditors. The relief granted pre and post recognition needs to be balanced against the rights of the other interested parties and creditors.

In granting or denying relief pursuant to Article 19, in relation to interim pre-recognition relief or under Article 21 in relation to discretionary post-recognition relief, the court in the enacting State must be satisfied that the interests of the creditors are adequately protected. Accordingly the court is entitled to grant relief subject to certain conditions or at the request of the foreign representative modify or terminate the relief. Relief granted Article 19 of the MLCBI is only intended to be interim relief of a provisional nature and is only meant to be applicable in urgent circumstances from the time of filing the recognition application until the application is decided upon. Article 21 envisages the longer term relief to be provided post-recognition and should be applied accordingly. [Although article 21 does allow any interim relief provided under article 19 to be extended if needed, it provides that as far as granting relief to a foreign representative of a foreign non-main proceeding is concerned the court must be satisfied that the relief relates to assets that, under the law of the enacting State should be administered in the foreign non-main proceeding.

Essentially, different factors may be taken into account at the different points in time. Following recognition, you will be assessing the relief in terms of a recognised foreign proceeding however when dealing with pre recognition, you aren't yet dealing with what qualifies as a foreign proceeding and separate factors will be considered at the appropriate time.

QUESTION 4 (fact-based application-type question) [15 marks in total] 15 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]; 10 marks** and
- 4.1.2 whether the Applicants fall within the description of "foreign representatives" as defined by article 2(d) of the MLCBI **[maximum 5 marks]. 5 marks**

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

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

4.1.1 In order for a proceeding to qualify as a foreign proceeding the characteristics set out in the definition of foreign proceeding at article 2(a) of the MLCBI will need to be met. These requirements are:

1. Collective in nature – the proceedings must be judicial or administrative and collective in nature, which includes interim proceedings, taking place in a foreign State ("**Characteristic 1**").
2. Pursuant to a law relating to insolvency – the proceedings must be brought under the law of a foreign State relating to insolvency ("**Characteristic 2**").
3. Assets and affairs of the debtor should be subject to the control or supervision by a foreign court ("**Characteristic 3**").
4. Purpose of the proceedings should be for reorganisation or liquidation ("**Characteristic 4**").

Although the above characteristics are requirements in their own right, in order to qualify as a "foreign proceeding" they need to be read together and met as a whole.⁴ One characteristic is not exclusive of the other.

In respect of the first point above, the proceedings may be either judicial in nature or administrative, only of these characteristics is sufficient and it is not an issue if the proceedings have both judicial and administrative elements.⁵ Accordingly, In relation to the facts of Bank's case, the fact that the nature of proceedings changed from being administrative to judicial (in that the proceedings begun as provisional administration by the Deposit Guarantee Fund (DGF), a governmental body of Country A, and subsequently changed into Liquidation proceedings before the courts of Country A), is not an issue for purposes of meeting Characteristic 1 above. In respect of the "collective" aspect of the proceedings, the Guide to Enactment has provided that main consideration when determining whether the proceeding is collective in nature is to ask the question whether substantially all of the assets and the liabilities of the debtor are dealt with in the proceeding (subject to statutory exclusions and priorities). The concept that the insolvency proceedings are to be collective in nature stems from the purpose of the MLCBI in achieving a coordinated, global solution for all stakeholders involved. In this regard, the Courts have identified certain further characteristics of collective proceedings as follows:⁶

- An orderly regime is used to consider and sort the rights and obligations of all creditors. This means that the rights and obligations of all creditors must be taken into account.
- Not all creditors need to receive a share of the distribution, but the foreign representative could acknowledge their overall duty to the creditors in general. Assets should be distributed in accordance with any statutory priorities.
- There should be creditor participation, in that it is reflected that unsecured creditors were able to voice concerns or object where necessary.
- An interested party should not be able to exploit certain circumstances in their favour over and above the creditors.
- Creditors should be able to appeal decisions of the proceedings.
- Adequate notice should be provided to creditors under that foreign law.

⁴ https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/20-06293_uncitral_mlcibi_digest_e.pdf "The Digest of Case Law on the UNCITRAL Model Law on Cross-Border Insolvency" dated February 2021 (hereinafter "**Digest of Case Law**"), accessed on 25 February 2022 at p5 with reference to Stanford International Bank Limited [2010] EWCA Civ 137 [para. 23], CLOUT 1003 (hereinafter the "**Stanford case**").

⁵ Supra note 4 Digest of Case Law at p6.

⁶ Ibid with reference to the following cases in order of applicability: Katayama v Japan Airlines Corporation [2010] FCA 794 [para. 24]; Betcorp Limited 400 B.R. 266, 281 (Bankr. D. Nev. 2009), CLOUT 927; Gold & Honey, Ltd. 410 B.R. 357, 370 (Bankr. E.D.N.Y. 2009), CLOUT 1008 and 1338; British-American Insurance Co., Ltd. 425 B.R. 884, 903 (Bankr. S.D.Fla. 2010), CLOUT 1005; Gold & Honey, Ltd., 410 B.R. 357, 372 (Bankr. E.D.N.Y. 2009), CLOUT 1008; Gold & Honey, Ltd., 410 B.R. 357, 372 (Bankr. E.D.N.Y. 2009), CLOUT 1008; Gold & Honey, Ltd., 410 B.R. 357, 372 (Bankr. E.D.N.Y. 2009), CLOUT 1008; and the Stanford case.

In the above set of facts, insolvency proceedings under the law of Country A have begun and appear to be collective in nature as it appears that substantially all of the assets and liabilities of the Bank are subject to the proceedings. The Bank has been classified as insolvent being unable to pay its debts and by virtue of the fact that it is a bank, and the nature of its business, it involves providing financing (in a variety of ways) to various creditors, its liquidation will involve a distribution of all its assets to its creditors with a claim. The insolvency proceedings should necessarily involve all assets and liabilities of the Bank and the distribution of same will take into account the rights of the creditors as whole. This is appears to be what is happening in the above set of facts as it is not one creditor who is petitioning the court to institute proceedings but rather a governmental body (acting through its appointed advisor) which has been tasked with principally withdrawing insolvent banks from the market and winding down their operations via liquidation. Should one creditor or one group of creditors not receive anything from the liquidation in settlement of any claims they may have against the Bank, this would be insufficient to say that the proceedings were not collective in nature. The idea is that so long as the rights of the body of creditors as a whole were considered, then the "collective" characteristic should be seen to be met. Thus, the first characteristic of a foreign proceeding appears to be met and the proceedings are judicial and collective in nature.

The way in which Characteristic 2 is set out in the definition of foreign proceedings, is wide enough to encompass laws which are not explicitly set out as such for example under the State's company law. This means that laws of a State which are perhaps set out in other statutes or pieces of law may be considered for purposes of Characteristic 2 to be "law of a foreign State relating to insolvency" irrespective of whether that piece of law does not exclusively relate to insolvency. What appears to be the main identifier for purposes of this Characteristic is that it be sufficiently identifiable that the law relates to insolvency in some way for example the law relates to the financial affairs of the entity and the potential financial distress of same, or the need to restructure these affairs, or the liquidation of the entity. Based on the specific facts of the Bank's matter, there is no doubt that the proceedings were brought pursuant to a law of Country A relating to insolvency. The Bank in the above set of facts is being liquidated in terms of Country A's law, the LBBA. This directly ties into Characteristic 4, where the proceedings should be for the purpose of reorganisation or liquidation. As already stated there can be no doubt that the proceedings brought against the Bank in the above set of facts is for the purpose of the Bank's liquidation. Generally however, Characteristic 4 can prove to be quite strict in its application. For example, the Guide of Enactment has found that proceedings that are designed to prevent squander and waste or to prevent detriment to investors rather than to liquidate or reorganise an insolvent estate, would not meet the required threshold for purposes of Characteristic 4. Another important example put forward by the Guide of Enactment is that where in proceedings the powers or duties conferred upon the foreign representative are more limited than the powers or duties typically associated with liquidation or reorganisation. These powers may only be for the preservation of assets rather than the distribution of assets to satisfy creditor claims. If this is the case Characteristic 4 will not be met as the purpose of the proceedings will then not be for purposes of reorganisation or liquidation but rather to assist an entity to prevent further loss. This is clearly not the intention in the

In respect of Characteristic 3, the MLCBI is silent on what the level of control or supervision out to be in order for this Characteristic to be met. There is also no particular time as to when this control or supervision is to be determined. From the various decisions of the courts as referred to in the Guide to Enactment, it appears that this Characteristic of control and supervision may be met in a variety of ways and that there is not one standard way to do so. Control or supervision is not necessarily required to only be exercised directly by the court but may also be done so indirectly by the insolvency representative, where that representative is

subject to the control or supervision of the court (or other regulatory body).⁷ Courts have further indicated that it is not necessary that for the courts to direct day-day operations of the debtor.⁸ Further, the Courts have confirmed that the control or supervision must be in respect of both the assets and affairs of the debtor.⁹ In the Ashapura case, control over the debtor's assets and affairs was proven by the fact that India's Board for Industrial and Financial Reconstruction (the relevant authority in that case) could suspend operation of contracts, settlements and awards.¹⁰

Lastly, it is not relevant that Country A has not adopted the MLCBI, what is relevant in order to be able to apply the above provisions and definition of foreign proceedings pursuant to the MLCBI is that the request for recognition is being made in England, where the MLCBI has been adopted via the CBIR.

4.1.2 On the assumption that the matter *in casu*, meets to the requirements of a "foreign proceeding", the next step would be to determine whether Applicants would be considered foreign representatives who are entitled to bring the proceedings before the UK court in this instance. Article 2(d) of the MLCBI defines a "foreign representative" as a person or body, including one appointed on an interim basis, authorised in a foreign proceeding to administer the reorganisation or liquidation of the debtor's assets or affairs or to act as representative of the foreign proceeding. This may include a representative seeking recognition, relief and cooperation in another jurisdiction.¹¹ In respect of the above set of facts there is no contention that Ms G is a person, who in her capacity as authorised officer of the DFG (a body) has approached the English courts together with the DFG for recognition of the foreign proceedings in respect of the liquidation of the Bank, within the meaning of the definition. Whether or not Ms G's appointment is on interim basis or not is not relevant as the definition specifically provides that even an appointment on an interim basis is sufficient to classify as a foreign representative.

What is required to be determined on the set of facts is the next part of the definition and what is meant by the word "authorised" in order to determine whether the Applicants would fall within the definition of "foreign representative". The definition does not specify that such a person/ body need to be authorised by a foreign court, and thus it has been noted in the Guide to Enactment¹² that this article has been drafted broadly enough to include appointments made by a special agency other than the court. However this does not take away from the fact that the person or body must be "authorised". As to when this authority needs to be exits, it has been found that the person or body must have the power to administer the reorganisation or liquidation of the debtor's assets or affairs at the time of the application or recognition.¹³ Article 15(2)(c) may also be understood to support this need for authorisation (and ultimately the decision as to whether the person or body qualifies as a foreign representative), by stating that with an application for recognition of a foreign proceeding made a foreign representative

⁷ Supra note 4 Digest of Case Law at p7 with reference to *Betcorp Limited* 400 B.R. 266, 283–284 (Bankr. D.Nev. 2009), CLOUT 927.

⁸ Supra note 4 Digest of Case Law at p7 with reference to *Oversight & Control Commission of Avanzit, S.A.* 385 B.R. 525, 531 (Bankr. S.D.N.Y. 2008), CLOUT 925 and *Ashapura Minechem Ltd.* 480 B.R. 129, 143 (S.D.N.Y. 2012), CLOUT 1313 (hereinafter the "**Ashapura case**").

⁹ Supra note 8 *Ashapura case*, 480 B.R.139.

¹⁰ Supra note 8 *Ashapura case*, 480 B.R.144.

¹¹ Guide to Enactment and Interpretation of the UNCITRAL MLCBI, as revised and adopted by the Commission on 18 July 2013 at paragraphs 71, 74 and 86 (hereinafter referred to as the "**Guide to Enactment**")

¹² Supra note 8, Guide to Enactment at paragraph 86.

¹³ Supra note 4 at Digest of Case Law at p10 with reference to *In re Oversight Control Com. of Avanzit*, 385 B.R. 525 (Bankr. S.D.N.Y. 2008).

that in the absence of the evidence referred in article 15(2)(a) and (b), "any other evidence acceptable to the court of the...appointment of the foreign representative" is required. Further to the question of whether the person or body falls within the definition of foreign representative, Article 16(1) provides a presumption that the evidence provided under article 15 indicates that the foreign representative is such within the meaning of article 2(d). It must be noted that the court retains the discretion to decline to rely on the presumption or to conclude that contrary evidence prevails. In Ms G's case she has been appointed as an authorised officer by the DFG. Under article 48(3) of the DGF Law the DFG is empowered 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*". Further, 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.*" Ms G can be said to meet the criteria set forth in Article 35(1) as she is described as a "leading bank liquidation professional" and pursuant to the DFG's authority to delegate its powers as liquidator, Ms G has been appropriately appointed under the laws of Country A to act as an authorised officer of the DFG to whom powers of the DFG as liquidator were delegated. Ms G is not appointed by a court, but as already discussed above this is not necessary and the appointment can be made by a special agency other than the court. The DFG is clearly a special agency in this instance with its authority to act and to delegate its powers being specifically mandated by statute in its country of origin. Ms G can therefore be said to be "authorised in a foreign proceeding to administer the reorganisation or the liquidation of the debtor's assets or affairs, or to act as a representative of the foreign proceedings" in line with the definition of a foreign representative under article 2(d).

Illustrative of the effect of qualifying as a foreign representative for purposes of English law is the case of *Candey Ltd v Crumpler*¹⁴. The English court in the *Candey Ltd v Crumpler* held that based on the provisions of the CBIR, a recognition order would not have the effect that the foreign representatives are thereafter treated as either acting as or acting in the capacity of an English liquidator. The court explained that a foreign representative as defined by the MLCBI as including a person or body authorised in a foreign proceeding to administer the liquidation of the debtor's assets or affairs can be juxtaposed with the definition of a "British insolvency office holder" which includes a person acting as an insolvency practitioner within the meaning of section 388 of the Insolvency Act of 1986, other than an administrative receiver.¹⁵ When foreign representatives make such an application, they are exercising the right conferred on them by article 21(1)(g) and not the right conferred on them by section 168 of the English Insolvency Act.¹⁶ If the effect of the recognition order was to deem a foreign representative to have the same abilities and powers of an insolvency practitioner under English law, article 21 of the MLCBI would be redundant because the foreign representative would automatically have the powers that article 21(1)(g) confers.

In applying the above exposition of the requirements to qualify as a "foreign representative", it is clear that Ms G, under the delegated authority of the DFG, can be considered a foreign representative under article 2(d) of the MLCBI.

The definition of foreign representative does not require the person or body to declare a conflict of interest or indicate how they may be interested in the particular proceedings which

¹⁴ *Candey Ltd v Crumpler and another (as joint liquidators of Peak Hotels and Resorts Ltd (in liquidation))* [2020] EWCA Civ 26, 23 January 2020.

¹⁵ *Ibid* at para 18.

¹⁶ *Ibid* at para 22

they are involved in. However, based on the facts of the above matter, the DFG Law provides that 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. Usually, a person or body who has a direct interest in the proceedings (for example, a creditor) would nonetheless be allowed to act as a foreign representative bringing action against the debtor in foreign proceedings, as article 2(d) is silent on this point. However, as there is a requirement under the law of Country A which specifically precludes an authorised person to act in that capacity if they have a conflict of interest, for Ms G to qualify as an authorised person under the law of her country, and accordingly to be seen as being authorised in foreign proceeding to administer the reorganisation or liquidation of the debtor's assets for purposes of article 2(d) of the MLCBI, she must not have a conflict of interest. So in this instance if Ms G was a direct creditor of the Bank, she would be interested in the proceedings, and this would not preclude her from acting as a "foreign representative" in the foreign proceedings against the Bank as she would not be considered to be an "authorised person" under the law of Country A for purposes of the proceedings there (ie the foreign proceedings).

Very good answer

*** End of Assessment ***