



**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: 42,5 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]**

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]

### 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.

#### Ref:

UNCITRAL Model Law with Guide to enactment and Interpretation (2014), Para. 158-160, pp. 75.

UNCITRAL Digest of Case Law on the UNCITRAL Model Law on Cross-Border Insolvency (2021), Article 17, pp. 49-50.

The two key factors for determining COMI under the Model Law are:

- the location where the central administration of the debtor takes place; and
- which is readily ascertainable as such by creditors of the debtor.

Many possible dates have been suggested for determining the debtor’s COMI and have been put forward in courts:

- (a) The date of commencement of the foreign proceeding for which recognition is sought;
- (b) The date of the application for recognition of the foreign proceeding;
- (c) The date the court is called upon to decide the application for recognition of the foreign proceeding;
- (d) A date determined by reference to the operational history of the debtor.

The guide to Enactment and Interpretation suggests that, the date for determining the debtor's COMI, or whether an establishment exists, is the date of commencement of the foreign proceeding.

However, the COMI of a debtor can move, if such a move is closer to the date (timing-wise) of the commencement of the foreign proceedings, the appropriate evidence for this will be harder to establish, in particular the requirement that the COMI must be readily ascertainable by third parties, such as creditors of the debtor, hence the date of commencement of the foreign proceeding could be more appropriate. This will also make it harder for tactical change.

Even in the case, the business activity of the debtor has ceased after the commencement of the foreign proceeding, all that may exist at the time of the application for recognition to indicate the debtor's centre of main interests is that foreign proceeding and the activity of the foreign representative in administering the insolvency estate.

In such a case, determination of the centre of the debtor's main interests by reference to the date of the commencement of those proceedings would again be the appropriate date.

**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."*

Answer:

**Statement 1 –**

**Ref:**

UNCITRAL Model Law on Cross-Border Insolvency Law with Guide to Enactment and Interpretation (2014), pp. 104.

INSOL INTERNATIONAL (2021) Module 2A Guidance Text, pp. 44-45.

*"This Article provides guidance in case of concurrence of two foreign non-main proceedings."*

**Article 30. Coordination of more than one foreign proceeding**

Article 30(c) If, after recognition of a foreign non-main proceeding, another foreign non-main proceeding is recognized, the court shall grant, modify or terminate relief for the purpose of facilitating coordination of the proceedings.

Article 30 is applicable when the debtor is subject to insolvency proceedings in more than one foreign State and the foreign representatives of more than one foreign proceeding seek recognition or relief in the enacting State.

However, the Model Law does not contain any rule of preference between concurrent foreign non-main proceedings.

### **Statement 2 –**

**Ref:**

UNCITRAL Model Law on Cross-Border Insolvency Law with Guide to Enactment and Interpretation (2014), pp. 106.

INSOL INTERNATIONAL (2021) Module 2A Guidance Text, pp. 45.

*“The rule in this Article does not affect secured claims.”*

### **Article 32. Rule of payment in concurrent proceedings**

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

This is also called the “hotchpot” rule

The hotchpot rule is used 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.

Where the creditor receives a part payment of its claim from foreign proceedings of the same debtor, it may not receive payment in the Enacting state for the same claim until all creditors in the same class have been paid proportionally to the payment the creditor has already received.

### **Statement 3 –**

**Ref:**

UNCITRAL Model Law on Cross-Border Insolvency Law with Guide to Enactment and Interpretation (2014), pp. 68-70.

INSOL INTERNATIONAL (2021) Module 2A Guidance Text, pp. 24.

*“This Article contains a rebuttable presumption in respect of an undefined key concept in the MLCBI.”*

### **Article 16. Presumptions concerning recognition**



Article 16( 3) In the absence of proof to the contrary, the debtor's registered office, or habitual residence in the case of an individual, is presumed to be the centre of the debtor's main interests.

The presumption in article 16, paragraph 3 has resulted in a lot of discussion, regarding the proof required for the presumption to be rebutted. In the case where the debtor's centre of main interests is at the same location as its place of registration, there is no issue concerning rebuttal of the presumption. However, when a foreign representative seeks recognition of a foreign proceeding as a main proceeding and there appears to be a separation between the place of the debtor's registered office and its claimed centre of main interests, the party claiming the centre of main interests is not at the place of registration will be required to satisfy the court as to the location of the centre of main interests.

### **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.**

**Ref:**

INSOL INTERNATIONAL (2021) Module 2A Guidance Text, pp. 34-39.

*IBA case*

The Court of Appeal, held that the case did not involve an issue of jurisdiction in the strict sense. The court felt that in this case 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, where doing so would:

- (a) prevent the English creditors from enforcing their English law rights in accordance with the Gibbs Rule; and / or
- (b) prolong the stay after the Azeri reconstruction has come to an end.

The Court of Appeal answered both (a) and (b) in favour of the respondents (the Challenging Creditors).

In the issue of (a) above, the court of appeal held that an English court could only grant an indefinite moratorium continuation, if it were satisfied that

- a) The stay is necessary to protect the interests of IBA creditors
- b) They stay would be an appropriate way to achieve this.

The court held that in this case neither of the conditions were satisfied and that the IBA creditors needed no further protection for the foreign proceeding to achieve its purpose. The court held that the proposition that "creditors who participated in the restructuring plan would be prejudiced if the IBA were unable to pay the new corporate bonds due to English creditors" successful enforcement of their stayed claims was farfetched and does not satisfy the article 21(1) of the model law.

In the case of (b) the court considered the foreign representatives information obligation contained in Article 18 of the Model law regarding a substantial change in the foreign proceeding and the status of the representative's appointment, requires the foreign proceeding to be in office. The court held that once the foreign proceeding has come to an end and the representative does not hold office any more, there is no scope for the further

orders in support of the foreign proceeding to be made and relief previously granted under the model law should terminate. The court held that if relief was to be continued after the end of the relevant foreign proceeding, this would have been addressed in the Model law.

**Question 2.4 [2 marks] 2 marks**

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

**Ref:**

UNCITRAL Model Law on Cross-Border Insolvency Law with Guide to Enactment and Interpretation (2014), pp. 102.

INSOL INTERNATIONAL (2021) Module 2A Guidance Text, pp. 44.

**Article 29. Coordination of a proceeding under [identify laws of the enacting State relating to insolvency] and a foreign proceeding**

Where a foreign proceeding and a proceeding under laws of the enacting State relating to insolvency are taking place concurrently regarding the same debtor, the court shall seek cooperation and coordination under articles 25, 26 and 27, and the following shall apply:

(a) When the proceeding in this State is taking place at the time the application for recognition of the foreign proceeding is filed,

(i) Any relief granted under article 19 or 21 must be consistent with the proceeding in this State; and

(ii) If the foreign proceeding is recognized in this State as a foreign main proceeding, article 20 does not apply;

In the given situation, any relief granted under either article 19 or article 21 shall be reviewed by the court and shall be modified or terminated, if it is inconsistent with the domestic insolvency proceeding.

In the case of the foreign main proceeding, the same applies to any automatic relief that had been granted under Article 20.

**The duties of the foreign representative in the foreign main proceedings are outlined in:**

**Ref:**

UNCITRAL Model Law on Cross-Border Insolvency Law with Guide to Enactment and Interpretation (2014), pp. 78.

INSOL INTERNATIONAL (2021) Module 2A Guidance Text, pp. 28.

**Article 18. Subsequent information**

From the time of filing the application for recognition of the foreign proceeding, the foreign representative shall inform the court promptly of:

(a) Any substantial change in the status of the recognized 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]**

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

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

#### **Question 3.1 [maximum 4 marks] 4 marks**

Prior to making a recognition application in State A, explain how access and co-ordination rights in State A can benefit the foreign representative?

**Ref:**

UNCITRAL Model Law on Cross-Border Insolvency Law with Guide to Enactment and Interpretation (2014), pp. 6, 55-60.

INSOL INTERNATIONAL (2021) Module 2A Guidance Text, pp. 20-23.

Articles 9-14 of the of the Model Law under Chapter II deal with Access.

The foreign representative can benefit from these clauses as highlighted below.

The provisions provide for standing before the courts in the enacting state for the foreign representative, as well as non-discrimination principles in ensuring that foreign creditors have same rights as the local creditors and also benefit from the timely notice of events in the enacting state.

These principles aim to save time and cost, which in turn avoid value depletion and can even enhance value in some cases. They also provide transparency and comfort, which make it easier for the foreign debtor to do business in the enacting state without counter parties of the debtor becoming concerned that the foreign debtor does this.

**Standing: (Locus Standii) Article 9**

The access granted to the foreign representative is primarily standing in the courts of the enacting state without the needs to meet formal requirements such as licenses or consular action.

The Article 9 deals with direct access by a foreign representative to the 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.

Article 11: this article focusses on providing standing to the foreign representative for commencement of a domestic insolvency proceeding in the enacting state without otherwise modifying any of the conditions of opening such a proceeding. In this case no prior recognition of foreign proceeding is needed.

Article 12: it grants the foreign representative with standing, but in this case recognition of the foreign proceeding is required for this standing to be available. Upon recognition the foreign representative will have standing to participate in insolvency related proceedings conducted in the enacting state under their laws in respect of the debtor. He can make petitions, request or submissions covering issues of protection, realization or distribution of assets or cooperation with a foreign proceeding.

Safe Conduct Rule: Article 10

This article provides for safe conduct rule ensuring that the court in the enacting state does not assume jurisdiction over all the assets of the debtor on the sole ground that the foreign representative has made an application for recognition of the foreign proceeding. This article addresses the concerns of foreign representatives about exposure to an all-embracing jurisdiction triggered by an application under the model law

Anti-discrimination Principle: Article 13

Under this article, foreign creditors have the same rights as the local creditors in the enacting state, with regards to commencement of, participation in local proceedings of the debtor in the enacting states' insolvency laws. The claims of the foreign creditors are not given lower ranking than the local creditors in the enacting state.

Timely Notice: Article 14

The model law leaves the discretion with the court to decide otherwise, the foreign creditors if not are entitled to individual notifications of the commencement of local proceedings regarding the debtor under the insolvency laws of the enacting state and to the time limit to file their claims. Equal treatment is accorded to foreign creditors, to be notified whenever local creditors are notified. There is no need for letters rogatory or other formalities. This avoids the diplomatic channels.

Article 23:

This allows the foreign representative the necessary standing to initiate in the enacting State, an action to avoid or otherwise render ineffective, acts detrimental to creditors

Article 24:

This gives the powers to the foreign representative to intervene in any local proceedings in which the debtor is a party.

Cooperation:

Article 25:

Cooperation and direct communication between a court of this State and foreign courts or foreign representatives

In matters referred to in article 1, the court shall cooperate to the maximum extent possible with foreign courts or foreign representatives, either directly or through an appointed person or body administering a reorganization or liquidation under the law of the enacting State.

The court is entitled to communicate directly with, or to request information or assistance directly from, foreign courts or foreign representatives.

Article 26:

Cooperation and direct communication between an appointed person or body administering a reorganization or liquidation under the law of the enacting State and foreign courts or foreign representatives :

In matters referred to in article 1, an appointed person or body administering a reorganization or liquidation under the law of the enacting State shall, in the exercise of its functions and subject to the supervision of the court, cooperate to the maximum extent possible with foreign courts or foreign representatives and is entitled to, communicate directly with foreign courts or foreign representatives.

### **Question 3.2 [maximum 5 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.

#### **Ref:**

UNCITRAL Model Law on Cross-Border Insolvency Law with Guide to Enactment and Interpretation (2014), pp. 8-9, 64-79.

INSOL INTERNATIONAL (2021) Module 2A Guidance Text, pp. 23-25.

The objective of the recognition principle is to avoid lengthy and long-time causing processes by providing prompt resolution of applications for recognition.

The evidential requirements for recognition of a foreign proceeding are set in Article 15 of the Model law. If those requirements are met, recognition is granted pursuant to Article 17.

The court in the enacting state does not have to go into the consideration whether the foreign proceeding was correctly commenced under the applicable law of the foreign state.

Article 15 provides the following:

1. A foreign representative may apply to the court for recognition of the foreign proceeding to which the foreign representative has been appointed.
2. An application for recognition shall be accompanied by:
  - a. a certified copy of the decision, commencing the foreign proceeding and appointing the foreign representative; or
  - b. a certificate from the foreign court affirming the existence of the foreign proceeding and of the appointment of the foreign representative; or
  - c. in the absence of evidence referred to in a) and b) above, any other evidence acceptable to the court of the existence of the foreign proceeding and the appointment of the foreign representative.
3. A statement by the foreign representative identifying all foreign proceedings in respect of the debtor that are known to the foreign representative.
4. The court may require a translation of documents supplied in support of the application into an official language of the enacting State.

Recognition presumption: (Article 16)

Article 16 sets the following presumptions regarding recognition;

- If the decision referred in Article 15 para 2 indicates that the foreign proceeding is as per article 2(a) and the foreign representative is as per article 2(d) of the Model Law, the Court is entitled to presume so. In this case this is applicable. The Court will assume that the documents submitted are genuine even if there are not legalised.
- In the absence of proof to the contrary, the debtor's registered office, or habitual residence in the case of an individual, is presumed to be the debtor's centre of the main interests. This presumption is however, rebuttable.

Recognition decision: Article 17

It makes it clear that the application must be decided at the earliest possible time and that the recognition can be modified or terminated if the grounds for granting it were lacking or non-existent.

In the absence of public policy grounds in the enacting state for denying the application, it shall be granted as a matter of course if the requirements under article 15 (2) are met and the proceeding is as per article 2(a).

If the foreign proceeding takes place in the COMI, then it will be recognised as foreign main proceeding and if the debtor has an establishment in the foreign state where the foreign proceedings are opened it will be recognised in the enacting state as foreign non-main proceeding.

Reciprocity:

In the context of recognition there is no reciprocity requirement under the Model law. Hence it is not envisaged that the foreign proceeding will be denied recognition solely based on the fact that the court in which foreign proceeding was initiated will not provide equivalent relief to an insolvency representative for the enacting state.

COMI

The concept of COMI is fundamental to the operation of the Model law. It is not, however, defined under the Model law.

The two key factors for determining the COMI are:

- the location where the central administration of the debtor takes place; and
- which is readily ascertainable as such by creditors of the debtor.

The date for determining the COMI or whether an establishment exists is the date of the commencement of the foreign proceeding.

The COMI of a debtor can move and if it happens closer to the commencement of the proceeding, it will be harder to ascertain the COMI of the debtor.

Establishment of the COMI is important, as this will define the foreign proceeding as foreign main proceeding or non-main proceeding. This will affect the relief available under articles

20 and 21 of the Model Law. The country of the COMI affects the insolvency laws to be used for the insolvency proceedings.

Abuse of process:

This is not defined in the Model law and is left to the domestic law and procedural rules of the enacting state to determine what constitutes an abuse of process. If for e.g. the foreign representative breaches the obligation for full and frank disclosure by falsely claiming the COMI, the court could decide this as an abuse of process and deny recognition.

In this context Public Policy exception under Article 6 should rarely be used as the basis to deny recognition.

Ongoing obligation to update Court ( Article 18)

Article 18 requires the foreign representative from the time of filing the application for recognition to promptly inform the court in the enacting state if:

- a. any substantial change in the status of the recognised foreign proceeding or the appointment of the foreign representative
- b. any another foreign proceeding which regarding the same debtor becomes known to the foreign representative

Exclusions:

Paragraph 2 of Article 1 allows the enacting State to exclude certain proceedings from the application of the implemented Model Law. Banks and insurance companies are examples of entities that the enacting State might decide to exclude from the Model Law, as they may require to be administered under a special regulatory regime. Public utility companies or consumers/non- traders may also need different solutions in a cross-border context.

Public policy exception (Article 6)

Article 6 has the provision for public policy exception. The exceptions is to provide comfort to the enacting state, as a safeguard to its sovereignty. This should be only applied in extreme circumstances, though.

The Supremacy of other international obligations (Article 3)

Article 3 allows for the principle of supremacy of international obligations of the enacting State over internal law. If the enacted Model Law conflicts with a treaty or other form of multi-State agreement of the enacting State, then that treaty or international agreement prevails.

### **Question 3.3 [maximum 5 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.

Ref:

UNCITRAL Model Law on Cross-Border Insolvency Law with Guide to Enactment and Interpretation (2014), pp. 9-12, 80-94.

INSOL INTERNATIONAL (2021) Module 2A Guidance Text , pp. 28-40.

Even prior to a decision on the recognition application, the court in the enacting State is entitled to grant urgently needed interim relief upon application for the recognition of a foreign proceeding based on Article 19 of the Model Law.

Appropriate relief (Article 21)

Article 21 of the Model Law sets out the court's discretionary power to provide post-recognition relief.

Once a foreign proceeding is recognised, article 21(1) of the Model law provides sthe court in the enacting state discretionary powers where needed, to protect assets of the debtor or the interests of the creditors. On the request of the foreign representative, the court can grant further relief such as:

- a. To stay the commencement of or continuation of individual actions or proceedings concerning the assets of the debtor or rights and obligations to the extent they have not been stayed under Article 20(1) (a).
- b. To stay the execution against the debtor's assets to the extent it has not been stayed, under Article 20(1)(b)
- c. To suspend the right to transfer, encumber or otherwise dispose of any assets of the debtor to the extent this right has not suspended under Article 20(1)(c)
- d. To provide for the examination of witnesses, taking of evidence or the delivery of information concerning the debtor's assets, affairs, rights, obligations or liabilities
- e. Entrusting the administration or realisation of all or part of the debtor's assets in the enacting State to the foreign representative or another person designated by the court
- f. To extend any interim relief granted pursuant to Article 19(1) of the Model Law; and
- g. To grant any additional relief that may be available to a domestic liquidator or office holder under the laws of the enacting State.

Automatic relief when a foreign main proceeding is recognised (Article 20)

Article 20 of the Model Law provides for automatic mandatory relief in case the recognised foreign proceeding qualifies as a foreign main proceeding.

Once the foreign main proceeding is recognised, where the COMI of the debtor is in the jurisdiction where the foreign proceeding was opened, it has the following automatic effects:

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

These automatic consequences are intended to allow time for steps to be taken to organise an orderly and fair cross-border insolvency proceeding.

Some exceptions may exist in the law of the enacting State, for example, the enforcement of claims by secured parties, initiation of court action for any claim that have arisen after the



insolvency proceedings had commenced or after recognition of a foreign main proceeding or the completion of open financial-market transactions.

The article clarifies that the automatic stay and suspension in para 1 does not affect the right to commence individual actions to the extent to preserve a claim against the debtor. Certain domestic proceedings can also be initiated or claims filed.

Interim collective relief prior to recognition of a foreign proceeding (Article 19)

If relief is urgently required to protect the assets of the debtor or the interests of the creditors, the court of the enacting State may, at the request of the foreign representative, grant provisional relief from the time of filing the recognition application until the application is decided upon.

This interim relief – which applies to both foreign main and foreign non-main proceedings - can include:

- a stay of execution against the debtor's assets;
- entrusting the administration or realisation of all or part of the debtor's assets located in the enacting State to the foreign representative or another person designated by the court, in order to protect and preserve the value of assets that, by their nature or because of other circumstances, are perishable, susceptible to devaluation or otherwise in jeopardy;
- any of the following post-recognition relief provided for in Article 21 of the Model Law:
  - (a) suspending the right to transfer, encumber or otherwise dispose of any assets of the debtor
  - (b) providing for the examination of witnesses, the taking of evidence or the delivery of information concerning the debtor's assets, affairs, rights, obligations or liabilities
  - (c) granting any additional relief that may be available to a domestic liquidator / office holder under the laws of the enacting State.

The court can refuse interim relief if it interferes with the administration of a foreign main proceeding, based on Article 19 para 4.

Limits to appropriate relief (Article 21 )

The appropriate relief granted in (Article 21 (1)) by the court in the enacting state is not unlimited.

The English courts have addressed some of these issues in various cases:

In the first case the English Supreme court concludes that the enforcement of an insolvency-related in personam default judgment is not covered by the Model Law.

In the second case, the English first instance Court concludes that – in effect – applying foreign insolvency law to an English law governed contract is outside the scope of appropriate relief the English court can grant .

In the third case, the English court determined that it did not have jurisdiction to grant the Azeri foreign representative of a foreign main proceeding opened in Azerbaijan an indefinite continuation of the automatic moratorium that resulted from an earlier recognition order.

#### Balancing interests (Article 22)

Under Article 22 para 1 of the Model Law it is clarified that, in granting or denying relief based on either Article 19 (interim pre-recognition relief) or Article 21 (discretionary post-recognition relief), the court in the enacting State must be satisfied that the interests of the debtor's creditors and other interested parties are adequately protected.

The court in the enacting state must strike a balance between the relief that it may grant to the foreign representative and the interests of the persons that may be affected by it. The court at the request of the foreign representative or an affected person can further modify or terminate the relief.

#### Power to avoid antecedent transactions (Article 23)

The standing afforded to the foreign representative in Article 23 extends only to actions that are available to the local insolvency representative in the context of an insolvency proceeding.

In reference to Article 23 of the Model Law, the foreign representative obtains standing to initiate actions under the law of the enacting State to avoid or otherwise render ineffective legal acts detrimental to the creditors of the debtor (i.e. claw-back rights and the power to avoid antecedent transactions). It only ensures that a foreign representative is not prevented from initiating any action to avoid antecedent transactions by the sole fact that the foreign representative is not the insolvency representative appointed in the enacting State.

#### Standing (locus standi) to intervene in local proceedings (Article 24)

Another consequence of recognition according to Article 24 of the Model Law, is the right of the foreign representative to intervene in any local proceedings in the enacting State in which the debtor is a party, provided the foreign representative meets the local requirements for this. It is limited to standing only to avoid a denial of standing in the enacting state because the local procedures and legislation may not have catered to the foreign representative having such standing.

The proceedings where the foreign representative may intervene could only be those which have not been stayed under Article 20 or 21 of the Model law.

**For full marks the following should also be mentioned:**

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] 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?

Under article 19 (3) of the MLCBI, the law states that:

3. Unless extended under paragraph 1 (f) of article 21, the relief granted under this article terminates when the application for recognition is decided upon.

Hence, the relief granted pre-recognition, will not continue automatically unless it is extended under article 21 1(f):

(e) Extending relief granted under paragraph 1 of article 19;

For full mark on this question it should be discussed if it might fall under the jurisdiction, but art. 21 provides for other form for protection which makes the freezing order un-warranted.

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

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

##### **(1) Background**

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

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

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

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

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

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

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

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

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

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

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

### ***Provisional administration***

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

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

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

### ***Liquidation***

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

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

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

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

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

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

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

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

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

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

## **(2) The Bank's liquidation**

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

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

Those operations included:

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

Despite initially appearing to improve, by September 2015 the Bank's financial position had deteriorated further with increased losses, a further reduction in regulatory capital and numerous complaints to the NB. On 17 September 2015, the NB classified the Bank as insolvent pursuant to article 76 of the LBBA. On the same day, the DGF passed a resolution commencing the process of withdrawing the Bank from the market and appointing Ms C as interim administrator.

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

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

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

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

**QUESTION 4.1 [maximum 15 marks] 13 marks**

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

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

- 4.1.1 whether the Bank's liquidation comprises a "foreign proceeding" within the meaning of article 2(a) of the MLCBI [maximum 10 marks]; 8 marks and
- 4.1.2 whether the Applicants fall within the description of "foreign representatives" as defined by article 2(d) of the MLCBI [maximum 5 marks]. 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 whether the Bank's liquidation comprises a "foreign proceeding" within the meaning of article 2(a) of the MLCBI [maximum 10 marks];**

**Ref:**

UNCITRAL Model Law on Cross-Border Insolvency Law with Guide to Enactment and Interpretation (2014), pp. 37-45.

INSOL INTERNATIONAL (2021) Module 2A Guidance Text, pp. 3-17.

*Article 2. Definitions*

For the purposes of this Law:

(a) "Foreign proceeding" means a collective judicial or administrative proceeding in a foreign State, including an interim proceeding, pursuant to a law relating to insolvency in which proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganization or liquidation;

(b) "Foreign main proceeding" means a foreign proceeding taking place in the State where the debtor has the centre of its main interests;

(c) "Foreign non-main proceeding" means a foreign proceeding, other than a foreign main proceeding, taking place in a State where the debtor has an establishment within the meaning of subparagraph (f) of this article;

**Foreign Proceeding:**

The definitions of proceedings or persons generating from various foreign jurisdictions avoid the use of expressions that may have different technical meanings in their different legal systems and instead describe their purpose or function.

This technique is used to avoid inadvertently narrowing the range of possible foreign proceedings that might obtain recognition and to avoid unnecessary conflict with terminology used in the laws of the enacting State.

The expression "insolvency proceedings" may have a technical meaning in some legal systems, but is intended in sub paragraph (a) of article 2 to refer broadly to proceedings involving debtors that are in severe financial distress or insolvent.

The attributes required for a foreign proceeding to fall within the scope of the Model Law include the following:

- basis in insolvency-related law of the originating State;
- involvement of creditors collectively;
- control or supervision of the assets and affairs of the debtor by a court or another official body; and
- reorganization or liquidation of the debtor as the purpose of the proceeding (article 2, subparagraph (a)).

Whether a foreign proceeding possesses or possessed those elements would be determined at the time the application for recognition is considered.

As noted in subparagraph (e) of the preamble, the focus of the Model Law is upon severely financially distressed and insolvent debtors and the laws that prevent or address the financial distress of those debtors. These are debtors that would generally fall within the commencement criteria discussed in the *Legislative Guide*, being debtors that are or will be generally unable to pay their debts as they mature or whose liabilities exceed the value of their assets (recommendations 15 and 16 of the legislative guide).

The following paragraphs discuss the various characteristics required of a “foreign proceeding” under article 2. Although discussed separately, these characteristics are cumulative and article 2, subparagraph (a) should be considered as a whole.

For a proceeding to meet the requirements for relief under the Model Law, it must be a collective proceeding, because the Model Law is intended to provide a tool for 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. Nor is it intended that the Model Law serve as a tool for gathering up assets in a winding up or conservation proceeding that does not also provide for addressing the claims of creditors. The Model Law can be an appropriate tool for certain kinds of actions that serve a regulatory purpose, for publicly regulated entities as insurance companies or brokerage firms, provided the proceeding is collective in nature.

If a proceeding is collective it must also satisfy the other elements of the definition, including that it be for the purposes of liquidation or reorganization.

For a given proceeding to be 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.

Within the parameters of the definition of a foreign proceeding, a variety of collective proceedings would be eligible for recognition, be they compulsory or voluntary, corporate or individual, winding-up or reorganization. The definition would also include those proceedings in which the debtor retains some measure of control over its assets, albeit under court supervision

The Model Law provides that, in case of certain issues, insolvency proceedings may be commenced under specific circumstances defined by law even though the debtor is in fact not insolvent. These might include cessation of payments by the debtor or certain actions of the debtor such as a corporate decision, dissipation of its assets or abandonment of its establishment. In jurisdictions where insolvency is a condition for commencing insolvency proceedings, article 31 establishes, upon recognition of foreign main proceedings, a rebuttable presumption of insolvency of the debtor for the purposes of commencing a local insolvency proceeding.



However, none of the Model Law materials state that it is impossible to recognise a single group proceeding as a foreign proceeding in respect of a single debtor.

The Commercial Bank for Business Corporation fulfills the collective proceeding requirement as all the assets are dealt with in the proceeding. In this case corporate winding up is the collective proceeding. The bank was classified as troubled and given 180 days to sort out its delinquencies. The administrator was appointed. The proceedings hence commenced without the bank being insolvent. It is also a Single group proceeding.

Pursuant to a law relating to insolvency

This formulation in the Model Law acknowledges 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.

A simple proceeding for a solvent legal entity that does not seek to restructure the financial affairs of the entity, but rather to dissolve its legal status, is likely not one pursuant to a law relating to insolvency or severe financial distress.

In this case, the National Bank is obliged to classify a bank as insolvent if it meets the criteria set out in article 76 of the Law on Banks and Banking Activity(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.

This can be classified as the Insolvency law for banks in country A and the insolvency proceeding of Commercial Bank for Business Corporation was done under this law.

Control or supervision by a foreign court

The Model Law neither specifies the level of control or supervision required to satisfy this aspect of the definition nor the time at which that control or supervision should begin. Although it is intended that the control or supervision required under subparagraph (a) of Article 2 should be formal in nature, it may be potential rather than actual.

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.

In this case the LBBA provides for DGF which acts as the administrator and liquidator. The DGF appoints DGF's authorised person under its own charter with the powers of the liquidator transferred to this person for managing the liquidation.

"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."

The foreign court here is the National Bank as it is the one to pass the judgement of when the Bank is financially troubled as per the criteria set out for Troubled or Insolvent banks and goes into administration under its supervision and also when the bank is to liquidated.

For the purpose of reorganization or liquidation

Some types of proceeding that may satisfy certain elements of the definition of foreign proceeding in article 2, subparagraph (a) may nevertheless be ineligible for recognition because they are not for the stated purpose of reorganization or liquidation. These could be in various forms, including proceedings that are designed to prevent dissipation and waste, instead of liquidating or reorganizing the insolvency estate; proceedings designed to prevent detriment to investors rather than to all creditors or such proceedings under which the powers given and the duties imposed upon the foreign representative are more limited than the powers or duties typically associated with liquidation or reorganization.

The actions of the NB to appoint the DGF to initially administer the bank with the intent of improving its financial health and then subsequently become the liquidator on the revoking of the licence, in the event the proposed requirements are not met, fulfils the criteria that this proceeding was done with the purpose of liquidation.

Interim proceeding

The definitions in subparagraphs (a) and (d) cover also an "interim proceeding" and a representative "appointed on an interim basis"

The reason is that in the practice of many countries insolvency proceedings are often, or even usually, commenced on an "interim" or "provisional" basis. Except for being labelled as interim, those proceedings meet all the other requisites of the definition in article 2, subparagraph (a)

The DGF's appointment was on an interim basis until the licence was revoked to convert the administration into a liquidation.

Subparagraph (b) – foreign main proceeding

81. A foreign proceeding is deemed to be the "main" proceeding if it has been commenced in the State where "the debtor has the centre of its main interests". The determination that a foreign proceeding is a "main" proceeding may affect the nature of the relief accorded to the foreign representative under articles 20 and 21 and coordination of the foreign proceeding with proceedings that may be commenced in the enacting State under chapter IV and with other concurrent proceedings under chapter V.

The Bank's registered office is situated in Country A, and its operations are located and managed from there, the Proceeding for liquidation of the bank will be classified as the foreign main proceeding.

Subparagraph (c) – foreign non-main proceeding

Subparagraph (c) requires that a “foreign non-main proceeding” take place in the State where the debtor has an “establishment”. Thus, a foreign non-main proceeding susceptible to recognition under article 17, paragraph 2 may be only a proceeding commenced in a State where the debtor has an establishment within the meaning of article 2, subparagraph (f).

For full marks on this question a clearer conclusion should be made and more discussion on whether this is an administrative procedure or judicial as well as references to the DGF's independence and characteristics as “foreign court”.

#### **4.1.2 whether the Applicants fall within the description of “foreign representatives” as defined by article 2(d) of the MLCBI**

**Ref:**

UNCITRAL Model Law on Cross-Border Insolvency Law with Guide to Enactment and Interpretation (2014), pp. 4,37-38,46.

#### Article 2. Definitions

d) “Foreign representative” means a person or body, including one appointed on an interim basis, authorized in a foreign proceeding to administer the reorganization or the liquidation of the debtor's assets or affairs or to act as a representative of the foreign proceeding;

(e) “Foreign court” means a judicial or other authority competent to control or supervise a foreign proceeding;

Subparagraph (d) recognizes that the foreign representative may be a person authorized in the foreign proceedings to administer those proceedings, which would include seeking recognition, relief and cooperation in another jurisdiction, or they may simply be a person authorized specifically for the purposes of representing those proceedings. The Model Law does not specify that the foreign representative must be authorized by the court (as defined in article 2, subparagraph (e)) and the definition is thus sufficiently broad to include appointments that might be made by a special agency other than the court. 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.

The Commercial Bank for Business Corporation:

The law governing the Banks to 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. (The Insolvency law of the country for Banks)

Section 2(e) allows for non judicial authorities to be the foreign court.

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.

Hence the above fulfils the criteria of 2 (d) as DGF is the special agency / body tasked with administration of Insolvent banks and assumes the role of the administrator / Liquidator.

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.

Section 2(d) also approves the representative who is appointed on an interim basis.

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"*.

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

Article 15 requires either a certified copy of the decision appointing the representative, a certificate affirming the appointment or other evidence of that appointment that is acceptable to the receiving court.

This is satisfied by the board resolution 1513 passed appointing Ms.G as the authorized person to whom the powers are delegated to ensure the banks withdrawal from the market.

Hence Ms.G and DGF can apply for recognition as the foreign representative.

**\* End of Assessment \***

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