



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: 32 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] 8 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.

The date of the commencement of the foreign proceeding is the appropriate date for determining the COMI of a debtor or whether an establishment exists, as set out in paragraphs 157 – 160 of the GEI. NB, the MLCBI does not specifically address the issue of the “appropriate date” for determining the COMI of a debtor.

Using the date of commencement of the foreign proceeding as the appropriate date for determining the COMI of a debtor or whether an establishment exists is a sensible approach, as it is an objective test that can be applied to all foreign insolvency proceedings.

In addition to the above, courts have made reference to several possible dates as being the most relevant to that determination, including; the date of the application for recognition, the date the court is called upon to decide the application, and a date determined by reference to the operational history of the debtor.

Question 2.2 [maximum 3 marks] 3 marks

The following **three (3) statements** relate to particular provisions / concepts to be found in the Model Law. Indicate the name of the provision / concept (as well as the relevant Model Law article), addressed in each statement.

Statement 1 *“This Article provides guidance in case of concurrence of two foreign non-main proceedings.”*

Statement 2 *“The rule in this Article does not affect secured claims.”*

Statement 3 *“This Article contains a rebuttable presumption in respect of an undefined key concept in the MLCBI.”*

Statement 1

This relates to concurrent foreign non-main proceedings. In accordance with Article 30(c) of Chapter V of the Model Law, no foreign proceeding is treated preferentially in the case of more than one foreign non-main proceeding.

Statement 2

In accordance with Article 32 of Chapter V of the Model Law, the rule does not affect the ranking of claims as established under the law of the enacting State. This is known as the hotchpot rule.

Statement 3

In accordance with Article 16(3) of the Model Law, there is a rebuttable presumption that the place of the registered office of the debtor is the place of its COMI – a key concept and term that is not defined in the Model Law and instead, is set out in paragraphs 157 – 160 of The GEI.

Alternatively, in accordance with Article 31 of the Model Law, there is a rebuttable presumption of insolvency – a key concept and term that is not defined in the Model Law.

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.**

In the *IBA* case appeal, the English Court of Appeal (“CoA”) upheld the decision that the court should not exercise its power to grant the indefinite Moratorium Continuation (“iMC”). The CoA decided that the case did not involve jurisdictional issues but that if it were to grant an iMC:

- 1) It would preclude English creditors (i.e. in the case of *IBA*, the Challenging Creditors) from enforcing their (English law) rights in accordance with the Gibbs Rule*; and
- 2) Prolong the stay after the foreign (or in the case of *IBA*, the Azeri) proceedings had ended.

* By way of background, the Gibbs Rule states that a debt governed by English law cannot be discharged or compromised by a foreign insolvency proceeding – a debt (under the insolvency

law of a foreign country) is only considered discharged in England if it is a discharge under the law applicable to the contract.

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] 1

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

Article 21 of the MLCBI sets out the court's discretionary power to provide post-recognition relief and states that 'relief that may be granted upon recognition of a foreign proceeding' and paragraph 1 states the following:

"Upon recognition of a foreign proceeding, whether main or non-main, where necessary to protect the assets of the debtor or the interests of the creditors, the court may, at the request of the foreign representative, grant any appropriate relief, including:

- (a) Staying the commencement or continuation of individual actions or individual proceedings concerning the debtor's assets, rights, obligations or liabilities, to the extent they have not been stayed under paragraph 1(a) of Article 20;
- (b) Staying execution against the debtor's assets to the extent it has not been stayed under paragraph 1(b) of Article 20;
- (c) Suspending the right to transfer, encumber, or otherwise dispose of any assets of the debtor to the extent this right has not been suspended under paragraph 1(c) of Article 20;
- (d) 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;
- (e) Entrusting the administration or realisation of all or part of the debtor's assets located in this State to the foreign representative, or another person designated by the court;
- (f) Extending relief granted under paragraph 1 of Article 19;
- (g) Granting any additional relief that may be available to *[insert the title of a person or body administering a reorganisation or liquidation under the law of the enacting State]* under the laws of this State.

Article 25 of the MLCBI relates to 'cooperation and direct communication between a court of this State and foreign courts or foreign representatives'. In accordance with Article 25(1), the court is to cooperate to the maximum extent possible with foreign courts or foreign representatives – either directly, or through a *[insert the title of a person or body administering a reorganisation or liquidation under the law of the enacting State]*. In addition and in accordance with Article 25(2), the court is entitled to communicate directly with, or to request information or assistance directly from, foreign courts or foreign representatives.

The correct answer is art. 29 (a)

Article 18 of the MLCBI relates to an 'ongoing obligation to update court on developments' and specifically relates to a foreign representative's obligation to keep the domestic court up date with any relevant changes.

As noted in Article 28 of Chapter V, "after recognition of a foreign main proceeding, a proceeding under [identify laws of the enacting State relating to insolvency] may be commenced only if the debtor has assets in this State; the effects of that proceeding shall be restricted to the assets of the debtor that are located in this state and, to the extent necessary to implement cooperation and coordination under articles 25, 26, and 27, to other assets of the debtor that, under the law of this State, should be administered in that proceeding."

QUESTION 3 (essay-type questions) [15 marks in total] 8 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?

Article 9 of Chapter II of the MLCBI relates to 'right of direct access' and states that a foreign representative is entitled to apply directly to a court in this State. The foreign representative of a foreign proceeding opened in State B can seek to access information on the Debtor in addition to relief prior to making a recognition application in State A, without having a duty to reciprocate, due to the implemented Model Law of State A not containing any reciprocity provision. NB, whilst there is no reciprocity requirement, there is an ongoing duty to keep the court updated on developments in accordance with Article 18 of the MLCBI as noted in 2.4, above.

As noted in my response for 2.4, Article 25 of Chapter II of the MLCBI relates to 'cooperation and direct communication between a court of this State and foreign courts or foreign representatives'. In accordance with Article 25(1), the court (i.e. in State A) is to cooperate to the maximum extent possible with foreign courts or foreign representatives (i.e. in State B). In addition and in accordance with Article 25(2), the court is entitled to communicate directly with, or to request information or assistance directly from, foreign courts or foreign representatives. The foreign representative of a foreign proceeding opened in State B can benefit from such rights in State A.

The cooperation referred to above may be implemented (under Article 27 of Chapter II of the MLCBI) by any appropriate means, including; coordination of the administration and supervision of the Debtor's assets and affairs, approval or implementation by courts of agreements concerning the coordination of proceedings, and coordination of concurrent proceedings regarding the same debtor. The foreign representative of a foreign proceeding opened in State B can benefit from the above.

For full marks on this question, reference should also be made to art. 11 and should include a conclusion that access and coordination rights are time and cost preserving

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.

Foreign proceedings and foreign representative

For the purposes of Article 2(a) of the MLCBI, “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 reorganisation or liquidation.

For the purposes of Article 2(d) of the MLCBI, “foreign representative” means a person or body, including one appointed on an interim basis, authorised in a foreign proceeding to administer the reorganisation of the liquidation of the debtor’s assets or affairs or to act as a representative of the foreign proceeding.

Evidence

Article 15 of the MLCBI (“Article 15”) covers the evidential requirements for recognition of a foreign proceeding – providing these requirements are met, in accordance with Article 17 of the MLCBI (“Article 17”), recognition will be granted.

Under Article 15, an application for recognition shall be accompanied by:

- (a) A certified copy of the decision commencing the foreign proceeding and appointing the foreign representative (i.e. court order); 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 sub-paragraphs a) and b), any other evidence acceptable to the court of the existence of the foreign proceeding and the appointment of the foreign representative.

Article 15(3) requires the foreign representative to append a statement identifying all foreign proceedings in respect of the debtor of which he is aware to the application for recognition.

Article 15(4) notes that the court may require a translation of any of the above mentioned supporting documentation into an official language of State A (in the event that the language is different in State B).

Restrictions

Article 28 of the MLCBI relates to the supremacy of domestic insolvency proceedings – namely, that the recognition of a foreign main proceeding does not prevent the initiation of domestic insolvency proceedings in the enacting State, so long as the debtor holds assets in the same.

Notwithstanding the above, it would not be unusual for the enacting State to adopt a more restrictive test – i.e. for the Debtor to have at least one establishment in the enacting State before domestic insolvency proceedings can be opened.

Article 17(3) notes that an application for recognition of a foreign proceeding must be decided upon at the earliest possible time. Article 17(4) states that recognition can be modified or terminated if it is shown that the grounds for granting it were fully or partially lacking, or have ceased to exist.

Assuming recognition is granted, Article 17(2)(a) confirms that the foreign proceedings will be recognised as ‘foreign main proceedings’ if they take place in the State where the debtor has its COMI – if the Debtor only has an establishment in the foreign State where the foreign proceedings are being opened, then these will be recognised as ‘foreign non-main proceedings’ in the enacting state, in accordance with Article 17(2)(b). We cannot determine from the facts of the question whether the proceedings will be ‘foreign main proceedings’ or foreign non-main proceedings’.

Judicial scrutiny

Article 22 of the MLCBI relates to “balancing interests” – the concept that the court in the enacting State is required to strike a balance between the relief that may be granted to the foreign representative, and the interests of the person(s) that may be affected by such relief.

Further judicial scrutiny can be seen in the Agrokor case. A foreign representative is obligated to provide full and frank disclosure to the court to which a recognition application is being made, under the MLCBI. A breach of such disclosure may amount to an abuse of process and result in a recognition application (under the MLCBI) being denied, based on the “public policy exception” (see Article 6 of the MLCBI) – as demonstrated in the Agrokor case. NB, the MLCBI does not contain any provisions as regards abuse of process, instead, it leaves it to domestic law and the procedural rules of the enacting State to determine what constitutes the same.

For full marks on this question, the following should 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. **Restrictions:- Existing international obligations of State A:** Based on Article 3 of the Model Law, the court in State A should also check if there are no existing international obligations of State A (under a treaty or otherwise) that may conflict with granting the recognition application under the implemented Model Law in State A.

Question 3.3 [maximum 5 marks] 2 marks

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

Article 19 of the MLCBI (“Article 19”)

Article 19 relates to interim collective relief prior to the recognition of a foreign proceeding (i.e. pre-recognition relief) and relates to both foreign main, and foreign non-main proceedings.

In instances where relief is urgently required to protect the interests of a debtor's creditors, or the assets of the debtor, the court of the enacting State may grant provisional relief from the time of the filing of the recognition application (at the request of the foreign representative) until the application is decided upon. Such interim relief may include:

- "A stay of execution against the debtor's assets;
- Post-recognition relief provided for in Article 21(1)(c) – see the section relating to Article 21 of the MLCBI ("Article 21") below;
- Post-recognition relief provided for in Article 21(1)(d) – see the section relating to Article 21 below;
- Post-recognition relief provided for in Article 21(1)(g) – see the section relating to Article 21 below; and
- Permitting the foreign representative/another person designated by the court to administer and/or realise all or part of the debtor's assets located in the designated State in order to protect and preserve the value of assets that (due to their nature or circumstances) may be in jeopardy, perishable, or susceptible to devaluation. Such powers are similar to those that may be granted to a provisional Liquidator under English insolvency law."

In this instance, the foreign representative may be granted pre-recognition relief under Article 19 – for example, urgent interim relief (before obtaining formal recognition via the courts) in order to allow said representative to take initial steps in State A. Urgent interim relief can include the granting of disclosure and/or freezing orders to allow the foreign representative to obtain information and/or lessen the risk of assets dissipating whilst formal recognition is being sought.

In this context, we would need to establish whether the foreign representative is aware of in terms of the assets the Debtor (including the nature of any such assets), if any, and what information is held by the foreign representative as regards the same before determining whether interim relief would be required.

Article 20 of the MLCBI ("Article 20")

Article 20 relates to automatic relief when a foreign main proceeding (i.e. where the debtor's centre of main interest is in the jurisdiction where the foreign proceeding has been commenced) is recognised. The recognition of a foreign main proceeding triggers the following automatic effects:

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

The intention of these automatic effects is to allow sufficient time for a fair and orderly cross-border insolvency proceeding to be organised.

Article 21

Article 21 sets out the court's discretionary power to provide post-recognition relief and states that 'relief that may be granted upon recognition of a foreign proceeding' and paragraph 1 states the following:

"Upon recognition of a foreign proceeding, whether main or non-main, where necessary to protect the assets of the debtor or the interests of the creditors, the court may, at the request of the foreign representative, grant any appropriate relief, including:

- (a) Staying the commencement or continuation of individual actions or individual proceedings concerning the debtor's assets, rights, obligations or liabilities, to the extent they have not been stayed under paragraph 1(a) of Article 20;
- (b) Staying execution against the debtor's assets to the extent it has not been stayed under paragraph 1(b) of Article 20;
- (c) Suspending the right to transfer, encumber, or otherwise dispose of any assets of the debtor to the extent this right has not been suspended under paragraph 1(c) of Article 20;
- (d) 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;
- (e) Entrusting the administration or realisation of all or part of the debtor's assets located in this State to the foreign representative, or another person designated by the court;
- (f) Extending relief granted under paragraph 1 of Article 19;
- (g) Granting any additional relief that may be available to [*insert the title of a person or body administering a reorganisation or liquidation under the law of the enacting State*] under the laws of this State.

For full mark on this question, the answer should include the following:

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

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?

As noted in 3.3, the foreign representative may be granted pre-recognition relief under Article 19 – for example, urgent interim relief (before obtaining formal recognition via the courts). Urgent interim relief can include the granting of disclosure and/or freezing orders to allow the foreign representative to obtain information and/or lessen the risk of assets dissipating whilst formal recognition is being sought.

To reiterate, Article 19 relates to interim collective relief prior to the recognition of a foreign proceeding (i.e. pre-recognition relief) and relates to both foreign main, and foreign non-main proceedings.

In instances where relief is urgently required to protect the interests of a debtor's creditors, or the assets of the debtor, the court of the enacting State may grant provisional relief from the time of the filing of the recognition application (at the request of the foreign representative) until the application is decided upon. As such, a worldwide freezing order granted as pre-recognition interim relief under Article 19 would cease upon the application being decided upon.

Whilst Article 21(1) is wide spanning, the “appropriate relief” the court in the enacting State is able to grant is not unlimited. To this end, a worldwide freezing order is far reaching and is therefore unlikely to continue, post-recognition.

QUESTION 4 (fact-based application-type question) [15 marks in total] 9 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]; 5 marks** and
- 4.1.2 whether the Applicants fall within the description of "foreign representatives" as defined by article 2(d) of the MLCBI **[maximum 5 marks]. 4 marks**

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

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

4.1.1

Liquidation

The Bank was formally classified by the NB as “troubled” on 19 January 2015, entered provisional administration on 17 September 2015, and subsequently entered liquidation on 18 December 2015.

Definition of “foreign proceeding”

For the purposes of Article 2(a) of the MLCBI, “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 reorganisation or liquidation.

collective judicial or administrative proceeding

In this instance, the liquidation of the Bank (despite the appointment being resolved by the DGF, and not by way of a court order) **is** considered a “collective judicial or administrative proceeding”.

in a foreign State

In this instance, the Bank’s registered office is situated in Country A (which has not adopted the MLCBI). Whilst the MLCBI does not have a definition of Centre of Main Interest (“COMI”), Article 16(3) of the MLCBI presumes that, in absence of proof to the contrary, a debtor’s registered office (or habitual residence in the case of an individual) is the debtor’s COMI. To this end, for the purposes of answering this question, it could be presumed that the Bank’s COMI is Country A.

NB, the date of the commencement of the foreign proceeding is the appropriate date for determining the COMI of a debtor or whether an establishment exists, as set out in paragraphs 157 – 160 of the GEI.

The facts of the question also state that the liquidation is based in Country A, i.e., not the UK, and therefore the collective judicial or administrative proceeding **is** in a foreign State.

including an interim proceeding

As noted above, the Bank entered liquidation on 17 December 2015. As such, this requirement **is not** applicable as “liquidation” is a terminal procedure and cannot be classed as an “interim proceeding”.

pursuant to a law relating to insolvency

We note from the facts of the question that the Bank was formally classified by the NB as “troubled” on 19 January 2015 and entered provisional administration on 17 September 2015.

As noted in ‘Legal Aspects of Regulatory Treatment of Banks in Distress’, “provisional administration is a bank administration procedure for managing and operating a bank in distress back to compliance with prudential requirements, or for preserving the value of the bank while it is being prepared for the transfer to another institution by sale or merger, or for liquidation.”¹

Furthermore, the Affidavit sets out a detailed summary of the legislation of Country A’s specific insolvency procedure for Banks and 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.

As a result of the above, it can be confirmed that the collective judicial or administrative proceeding is in a foreign State and is pursuant to a law relating to insolvency.

¹ <https://www.elibrary.imf.org/view/books/071/04246-9781557759726-en/C09.xml>

in which proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign court

On 18 December 2015, The Deposit Guarantee Fund (“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.

NB, the DGF is a governmental body of Country A tasked principally with providing deposit insurance to bank depositors in Country A.

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.

The appointed liquidator 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 Bank.

As noted previously, the Affidavit sets out a detailed summary of the legislation of Country A's specific insolvency procedure for Banks and confirms that the DGF acquired the full powers of a liquidator under the law of Country A. Given that the DGF is a governmental body of Country A, it is inferred that the assets and affairs of the debtor (i.e. the Bank) are subject to control or supervision by a foreign court (i.e. Country A)/the jurisdiction of the court in Country A.

for the purpose of reorganisation or liquidation

The facts of the question state that 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 – this suggests that collective judicial or administrative proceeding in a foreign State, 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, is for the purpose of reorganisation or liquidation.

Decision

Based on the facts and findings set out above, I am of the opinion that the Bank's liquidation comprises a "foreign proceeding" within the meaning of article 2(a) of the MLCBI.

This answer should have included a much more detailed explanation along the following lines:
Recognition of the Bank's liquidation under the CBIR

1. In order to be recognised, the Bank's liquidation must meet the definition of "*foreign proceeding*" set out in article 2(a) of the MLCBI.
2. Here reference can also be made to paragraphs 6.4.1 and 6.4.2 of the Guidance Text and in particular the *Agrokor* case discussed there.

"Collective proceeding"

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

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

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

"evaluating whether a given proceeding is *collective* for the purpose of the Model Law, a key consideration is whether substantially all of the assets and liabilities of the debtor are dealt with in the proceeding, subject to local priorities and statutory

exceptions, and to local exclusions relating to the rights of secured creditors. A proceeding should not be considered to fail the test of collectivity purely because a class of creditors' rights is unaffected by it."

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

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

6. The collective proceeding, must be "*judicial or administrative*" where "*the assets and affairs of the debtor are subject to control or supervision by a foreign court*".
7. The term "*foreign court*" is defined at article 2(e) of the MLCBI and means: "*a judicial or other authority competent to control or supervise a foreign proceeding*".
8. The Guide to Enactment notes: "*87) A foreign proceeding that meets the requisites of article 2, subparagraph (a), should receive the same treatment irrespective of whether it has been commenced and supervised by a judicial body or an administrative body. Therefore, in order to obviate the need to refer to a foreign non-judicial authority whenever reference is made to a foreign court, the definition of "foreign court" in subparagraph (e) includes also non-judicial authorities.*"
9. In ***Re Sanko Steamship Co Ltd*** [2015] EWHC 1031 (Ch) Simon Barker QC, noted that a foreign proceeding may be recognised where the control or supervision of the proceeding is undertaken by a non-judicial administrative body.
10. The Guide to Enactment states: "*74) The Model Law specifies neither the level of control or supervision required to satisfy this aspect of the definition nor the time at which that control or supervision should arise. Although it is intended that the control or supervision required under subparagraph (a) should be formal in nature, it may be potential rather than actual. As noted in paragraph 71, a proceeding in which the debtor retains some measure of control over its assets, albeit under court supervision, such as a debtor-in-possession would satisfy this requirement. Control or supervision may be exercised not only directly by the court but also by an insolvency representative where, for example, the insolvency representative is subject to control or supervision by the court. Mere supervision of an insolvency representative by a licensing authority would not be sufficient.*"
11. In this case the DGF has control of all of the Bank's assets and overall control of the liquidation.
12. 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.
13. 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.
14. Taking these factors into account, the Bank's liquidation is *administrative*. The assets and affairs of the Bank are subject to the control of the DGF, an official body which exercises its powers in the liquidation free from intervention by government or the NB and which should be considered, for the purposes of the definition set out in article 2(e) of the MLCBI, as a "*foreign court*".

"Pursuant to a law relating to insolvency"

15. The Guide to Enactment provides at paragraph 48:

“Acknowledging that different jurisdictions might have different notions of what falls within the term “insolvency proceedings”, the Model Law does not define the term “insolvency”. However, as used in the Model Law, the word “insolvency” refers to various types of collective proceedings commenced with respect to debtors that are in severe financial distress or insolvent.”

Further explanation is provided at paragraph 73:

“This formulation is used in the Model Law to acknowledge the fact that liquidation and reorganization might be conducted under law that is not labelled as insolvency law (e.g. company law), but which nevertheless deals with or addresses insolvency or severe financial distress. The purpose was to find a description that was sufficiently broad to encompass a range of insolvency rules irrespective of the type of statute or law in which they might be contained and irrespective of whether the law that contained the rules related exclusively to insolvency.”

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

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

Having determined that the DGF falls within the definition of “*foreign court*”, I am satisfied, that by virtue of the legislative provisions set out above, it has control of all of the Bank’s asse

4.1.2

The Applicants

Ms G, in her capacity as authorised officer of the DGF of Country A in respect of the liquidation of the Bank, together with the DGF 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.

Definition of “foreign representatives”

For the purposes of Article 2(d) of the MLCBI, “foreign representative” means a person or body, including one appointed on an interim basis, authorised in a foreign proceeding to administer the reorganisation of the liquidation of the debtor’s assets or affairs or to act as a representative of the foreign proceeding.

a person or body

Ms G is a ‘person’ and the DGF is a ‘body’.

authorised in a foreign proceeding

As noted in my response at 4.1.1, based on the facts and findings set out above, I am of the opinion that the Bank’s liquidation comprises a “foreign proceeding” within the meaning of

article 2(a) of the MLCBI. Providing my assumption is correct, the Applicants **are** authorised in a foreign proceeding.

to administer the reorganisation of the liquidation of the debtor's assets or affairs

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.

The appointed liquidator 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:

- (vii) the power to exercise management powers and take over management of the property (including the money) of the bank;
- (viii) the power to compile a register of creditor claims and to seek to satisfy those claims;
- (ix) the power to take steps to find, identify and recover property belonging to the bank;
- (x) the power to dismiss employees and withdraw from/terminate contracts;
- (xi) the power to dispose of the bank's assets; and
- (xii) 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 Bank.

Based on the above, the Applicants (in particular, the DGF) **are** a person or body, including one appointed on an interim basis, authorised in a foreign proceeding to administer the reorganisation of the liquidation of the debtor's assets or affairs.

or to act as a representative of the foreign proceeding

As you are aware, Ms C was replaced as authorised officer with effect from 17 August 2020 by Ms G.

Ms G's appointment was pursuant to Resolution 1513 – a resolution that 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.

Based on the above, the Applicants (in particular, Ms G) **are** a person or body, including one appointed on an interim basis, authorised in a foreign proceeding to administer the reorganisation of the liquidation of the debtor's assets or affairs or to act as a representative of the foreign proceeding.

Decision

Based on the facts and findings set out above, I am of the opinion that the Applicants fall within the description of “foreign representatives” as defined by article 2(d) of the MLCBI.

For full marks on this question a more elaborate answer should be provided regarding the authorisation and qualifications of the parties.

*** End of Assessment ***