



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: 43,5 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] 9 marks

Questions 1.1. – 1.10. are multiple-choice questions designed to assess your ability to think critically about the subject. Please read each question carefully before reading the answer options. Be aware that some questions may seem to have more than one right answer, but you are to look for the one that makes the most sense and is the most correct. When you have a clear idea of the question, find your answer and **mark your selection on the answer sheet by highlighting the relevant paragraph in yellow**. Select only **ONE** answer. Candidates who select more than one answer will receive no mark for that specific question.

Question 1.1

Which of the following statements **incorrectly** reflects the main purpose of the Model Law?

- (a) The Model Law provides effective mechanisms for dealing with cases of cross-border insolvency so as to promote a number of objectives, including the protection and maximisation of trade and investment.
- (b) The Model Law provides effective mechanisms for dealing with cases of cross-border insolvency so as to promote a number of objectives, including the fair and efficient administration of cross-border insolvencies that protects the interests of all creditors and other interested persons, not including the debtor.
- (c) The Model Law is a substantive unification of insolvency law so as to promote co-operation between courts of the enacting State and foreign States and facilitation of the rescue of financially troubled businesses.
- (d) All of the above.**

Question 1.2

Which of the following statements is **unlikely** to be a reason for the development of the Model Law?

- (a) The existence of a statutory basis in national (insolvency) laws for co-operation and co-ordination of domestic courts with foreign courts or foreign representatives.**
- (b) The difficulty of agreeing multilateral treaties dealing with insolvency law.
- (c) The practical problems caused by the disharmony among national laws governing cross-border insolvencies, despite the success of protocols in practice.
- (d) None of the above.**

Question 1.3

Which of the following challenges to a recognition application under the Model Law **is most likely to be successful?**

- (a) The registered office of the debtor is not in the jurisdiction where the foreign proceedings were opened, but the debtor has an establishment in the jurisdiction of the enacting State.
- (b) The registered office of the debtor is in the jurisdiction of the enacting State, but the debtor has an establishment in the jurisdiction where the foreign proceedings were opened.
- (c) The debtor has neither its COMI nor an establishment in the jurisdiction where the foreign proceedings were opened.
- (d) The debtor has neither its COMI nor an establishment in the jurisdiction of the enacting State.

Question 1.4

“Cross-border insolvencies are inherently chaotic and value evaporates quickly with the passage of time”. Which of the following rules or concepts set forth in the Model Law **best addresses** this feature of cross-border insolvencies?

- (a) The *locus standi* access rules.
- (b) The public policy exception.
- (c) +The safe conduct rule.
- (d) The “hotchpot” rule.

Question 1.5

For a debtor with its COMI in South Africa and an establishment in Brazil, foreign main proceedings are opened in South Africa and foreign non-main proceedings are opened in Brazil. Both the South African foreign representative and the Brazilian foreign representative have applied for recognition before the relevant court in the UK. Please note that South Africa has implemented the Model Law subject to the so-called principle of reciprocity (based on country designation), Brazil has not implemented the Model Law and the UK has implemented the Model Law without any so-called principle of reciprocity. In this scenario, **which of the following statements is the most correct one?**

- (a) The foreign main proceedings in South Africa will not be recognised in the UK because the UK is not a designated country under South Africa’s principle of reciprocity, but the foreign non-main proceedings in Brazil will be recognised in the UK despite Brazil not having implemented the Model Law.
- (b) Both the foreign main proceedings in South Africa and the foreign non-main proceedings in Brazil will not be recognised in the UK because the UK has no principle of reciprocity and Brazil has not implemented the Model Law.

(c) Both the foreign main proceedings in South Africa and the foreign non-main proceedings in Brazil will be recognised in the UK.

(d) None of the statements in (a), (b) or (c) are correct.

Question 1.6

Which of the following statements regarding concurrent proceedings under the Model Law **is true**?

(a) No interim relief based on Article 19 of the Model Law is available if concurrent domestic insolvency proceedings and foreign proceedings exist at the time of the application of the foreign proceedings in the enacting State.

(b) In the case of a foreign main proceeding, automatic relief under Article 20 of the Model Law applies if concurrent domestic insolvency proceedings and foreign proceedings exist at the time of the application of the foreign proceedings in the enacting State.

(c) The commencement of domestic insolvency proceedings prevents or terminates the recognition of a foreign proceeding.

(d) If only after recognition of the foreign proceedings concurrent domestic insolvency proceedings are opened, then any post-recognition relief granted based on Article 21 of the Model Law will not be either adjusted or terminated if consistent with the domestic insolvency proceedings.

Question 1.7

When using its discretionary power to grant post-recognition relief pursuant to Article 21 of the Model Law, what should the court in the enacting State primarily consider?

(a) The court must be satisfied that the interests of the creditors and other interested parties, excluding the debtor, are adequately protected.

(b) The court should consider whether the relief requested is necessary for the protection of the assets of the debtor or the interests of the creditors and strike an appropriate balance between the relief that may be granted and the persons that may be affected.

(c) The court should consider both (a) and (b).

(d) Neither (a) nor (b) must be considered by the court.

Question 1.8

Which of the statements below regarding the Centre of Main Interest (or COMI) and the Model Law **is incorrect**?

(a) COMI is a defined term in the Model Law.

(b) For a corporate debtor, the Model Law does contain a rebuttable presumption that the debtor's registered office is its COMI.

(c) While (for purposes of the Model Law) the COMI of a debtor can move, the closer such COMI shift is to the commencement of foreign proceedings, the harder it will be to establish that the move was "ascertainable by third parties".

(d) None of the above.

Question 1.9

Which of the following types of relief have, prior to the adoption of the Model Law on Recognition and Enforcement of Insolvency-Related Judgments, been declared beyond the limits of the Model Law?

(a) Enforcement of insolvency-related judgments.

(b) An indefinite moratorium continuation.

(c) Both (a) and (b).

(d) Neither (a) nor (b).

Question 1.10

When for the interpretation of the Model Law “its original origin” is to be considered in accordance with article 8 of the Model Law, which of the following texts is likely to be of relevance?

(a) The UNCITRAL Guide of Enactment and the Practice Guide.

(b) The UNCITRAL Guide of Enactment and the Legislative Guide – Parts One, Two, Three and Four.

(c) The UNCITRAL Guide of Enactment and the Judicial Perspective.

(d) All of the above.

QUESTION 2 (direct questions) [10 marks in total] 8,5 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 UNCITRAL Secretariat has recommended that the appropriate date is for determining the COMI of a debtor, or whether an establishment exists is the date of commencement of the foreign proceedings. This has been generally accepted and applied by the European Courts. However, it must be noted that different countries have taken different approach as to the appropriate date for determining a COMI.

In Australia, the courts have held that the relevant date at which to determine COMI is upon the hearing of the recognition application.

In the US the courts have held that the appropriate date is upon filing of the recognition application in respect of the foreign insolvency proceeding. In the case of *Morning Mist Holdings Ltd. v. Krys No. 11-4376 (2d Cir. 2013)*, the United States Second Circuit held that

COMI should be determined based on the activities or the time or around the time Chapter 15 petition is filed.

In this vein, it is useful to note that the COMI of a debtor can move and that if such move is made in close proximity (timing-wise) to the commencement of insolvency proceedings the appropriate evidence 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.

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.”*

1. Statement 1 relates Concurrent Proceedings at Article 30 (c). Article 30 (c) deals with the coordination of con-current foreign non-main proceedings and provides that in the event of two foreign non-main proceedings, the court must grant, modify or terminate relief for the purpose of co-ordination of the proceedings.
2. Statement 2 relates to the Hotchpot rule at Article 32. This rule acts as a safeguard in the coordination of claims in cross-border proceedings. It is intended to avoid situations creditor who has obtained payment in the intended to avoid situations in which a creditor might obtain more favourable treatment than the other creditors of the same class by obtaining payment of the same claim in insolvency proceedings in different jurisdictions.
3. Statement 3 relates to COMI at Article 16. The word COMI is not defined under the Model law. However, Article 16(3) provides that there is a rebuttable presumption that the registered office of the debtor’s is the place of his COMI. This presumption can be rebutted by evidence to the contrary.

Question 2.3 [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.**

In this case the Court of Appeal heard an appeal of a decision the High Court which upheld the long-standing principle of English common law which provides that a debt governed by English law cannot be discharged or compromised by foreign insolvency proceedings also known as the “*Gibbs Rule*”.

In the High Court, the Court refuse to grant an indefinite moratorium on claims under certain English law debts under the Cross Border Insolvency Rules (“CBIR”). A restructuring plan was approved for IBA which was binding on all creditors. The IBA applied for a continuing moratorium to prevent creditors from going to the UK and enforcing their English Law claims.

In coming to its decision, the Court of Appeal reaffirmed the Gibbs Rule and said as a matter of English law principle the Court would not exercise its power to grant an indefinite moratorium where to do so in substance would prevent the English creditors from enforcing their English law rights in accordance with the Gibbs rule and/or prolong the stay after the restructuring had come to an end. The Court of Appeal also went on to say that the English Court could only grant an indefinite moratorium when two things are satisfied (i) the stay would be necessary to protect the interest of the creditors and the stay would be appropriate to achieve such protection which it did not.

This case highlights that the Courts will not grant a relief where to grant that relief would have the effect of overriding ordinary principles of its common law in this case English law. The Court established that the stay could only be granted in instances whether it is necessary to protect the interest of the creditors and it would be appropriate to achieve such protection.

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] 1,5 mark

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

In instances where a domestic proceeding has already been opened in respect of the debtor, and there is a subsequent recognition of a foreign main proceeding, Article 29 of the Model law empowers the Court in the enacting state with the power to provide relief pursuant to Article 21 where it is necessary to protect the assets or the creditors and the interest of the debtors.

But not if inconsistent with the domestic proceeding in the enacting state.

The Court may grant any of the relief under Article 21 of the MLCBI, which includes staying the commencement or continuation of individual actions or individual proceedings concerning the debtors assets, rights, obligations or liabilities to the extent they have not been automatically stayed under Article 20; staying the execution against the debtors assets to the extent they have not been stayed under Article 20; suspending of the right to transfer, encumber or otherwise dispose of the assets of the debtor to the extent it has not been done under Article 20 etc.

Article 18 of the MLCBI provides that there is an ongoing duty to keep the Court updated on developments from the time of filing of the recognition application for the foreign proceedings and to promptly inform the Court in the enacting State of any substantial change in the status of the foreign proceedings or the status of the status of the foreign representative's appointment and any other foreign proceedings regarding the same debtor.

QUESTION 3 (essay-type questions) [15 marks in total] 12 marks

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

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

Question 3.1 [maximum 4 marks] 4 mark

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

There are several benefits of access and co-ordination rights to the foreign representative. Firstly, access rights in Article 9 of the Model law provides the foreign representative with standing before the Court of State A (the enacting State) without the need for the foreign proceedings opened in State B to be recognised in State A. This access allows the foreign representative to communicate with the court in State A.

Standing before the Court of State A will also allow the foreign representative to seek urgent interim relief which can prevent the dissipation of assets and preserve the status quo until the appropriate measures are taken re the insolvency proceedings.

In addition, Article 11 of the Model law expressly provides that the foreign representative with standing to open domestic insolvency proceedings in the State A provided that all opening requirements are met. This is beneficial as the foreign representative has access to all the right tools without bringing separate proceeding in State A to obtain standing.

It is also important to note that access allows the foreign representative to seek a temporary “breathing space” which allows State A to determine what coordination is required with State B or relief is warranted for the optimal disposition of the insolvency proceedings.

Coordination between Court A and Court B pursuant to articles 25-27 allows the States to cooperate with each other with ease which is likely to result in consistence and efficiency as the proceedings will be streamlined between the States.

Lastly, an overarching benefit is that of access and cooperation is that it saves costs and time.

Question 3.2 [maximum 5 marks] 4 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.

For a recognition application in State A to be successful there are several other factors that must be considered for the for the recognition application to be successful. They are as follows:

1. Article 17 of the MLCBI provides that it is necessary to consider the jurisdiction of the debtors COMI (Centre of Main Interest) and whether there is an establishment in the enacting State. This is important as a foreign proceeding that is not opened in the jurisdiction of the debtor's COMI and does not have at least an establishment in the enacting State, cannot be recognised as a foreign proceeding for purposes of the Model Law.
2. It is also necessary to consider whether there is any international treaty or other form of multi-state agreement of State A (the enacting State) that conflicts with the MLCBI. This is because Article 3 of the MLCBI provides that if the MLCBI conflicts with the treaty or the international law, the treaty or the international law will prevail.
3. Importantly, Article 4 of the MLCBI provides that it is necessary to consider whether the operations of the MLCBI are to be performed by the Court of State A or some other competent authority. Therefore, if the Court of State A is not satisfied that it is the proper person to order the recognition, the application will be denied.
4. Article 6 of the MLCBI is also an important consideration. Article 6 provides that the Court in State A has the discretion to deny applications that are manifestly contrary to the public policy of State A. Therefore, one must consider whether the recognition application accords with the laws of State A. Other issues applicable to recognition that will be considered by the Court in State A are whether the applicant has made a full and frank disclosure in its application, whether the application is an abuse of process and even whether or not the application is made for an improper purpose.
5. The Court will also consider whether the foreign representative has met the evidential recognition requirements under Article 15 of the MLCBI as required by Article 17 of the MLCBI. The Court will therefore consider whether the application for recognition is accompanied by:
 - a. a certified copy of the decision commencing the foreign proceedings in State B and appointing the foreign representative;
 - b. or a certificate from the court of State B confirming the existence of the foreign proceedings and the appointment;
 - c. or in the absence of those pieces of evidence at (a) and (b), any other evidence acceptable to the court of State A of the existence of the proceedings in State B and the appointment of the foreign representative.
 - d. a statement from the foreign representative identifying all foreign proceedings in respect of the debtor that are known to the foreign representative.
6. The Court will also consider whether it should order that documents in language of State B be translated to the official language of State A.
7. The Court will also consider whether the foreign proceeding in State B continues to exist or it has been terminated (Article 17 of the MLCBI). In the case of *Sanko Steamship Co. Ltd [2015] EWHC 1031 (Ch)* the English Court dismissed a recognition application requesting a continuation of recognition after the Japanese proceedings, as foreign proceedings, had terminated.
8. Whether there is any relief being claimed in the application that would be contrary to the laws of State A. For example, the "Gibbs Rule" provides that a debt governed by English law cannot be discharged or compromised by foreign insolvency proceedings.

For full marks on this question, you should also make reference to art. 1(2) exclusions.

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.

Pre-recognition relief:

1. Article 19 of the MLCBI provides the Court of the enacting state is entitled to grant urgently need interim relief to a foreign representative even before a decision is made on the recognition application where it is needed to protect the assets of the debtors or the interest of the creditors. This interim relief is to be granted from the time of the filing the application to the time the application is decided upon and will be terminated.
2. There are several pre-recognition relief that can be considered by State A:
 - a. Pre-recognition relief that could be considered includes a freezing injunction, a stay of execution of the debtors asset, entrusting the administration or realisation of all or parts of the debtors assets located in the enactment State to the foreign representative or other person designated by the Court in order to protect and preserve the value of the asset that by their nature or because of other circumstances, are perishable, susceptible to devaluation or otherwise in jeopardy or any relief under Article 21 of the MLCBI (these are listed later below).
3. One limitation to pre-recognition relief is that the Court in State A may refuse to grant interim relief if the interim relief will interfere with the foreign proceedings if foreign main proceedings) in State B.

Post- recognition relief:

As it relates to post-recognition relief, Article 20 of the MLCBI provides automatic relief upon the recognition of foreign main proceedings. Therefore, if State B is recognised as foreign main proceedings the automatic relief that can be granted under Article 20 of the MLCBI are as follows:

1. A stay the commencement or continuation of individual actions or individual proceedings concerning the debtor's assets, rights, obligations or liabilities; as stay of execution against the debtors assets;
2. A stay of execution of the debtors asset; and
3. A suspension of the right to transfer, encumber or otherwise dispose of any of the assets of the debtor.

Article 21 of the MLCBI also provides that the Court of State B have the discretion to grant various post- recognition relief once it grants the application for recognition. They include but are not limited to the following:

1. A stay the commencement or continuation of individual actions or individual proceedings concerning the debtors assets, rights, obligations or liabilities to the extent they have not been automatically stayed under Article 20;
2. Staying the execution against the debtors assets to the extent they have not been stayed under Article 20;

3. Suspending of the right to transfer, encumber or otherwise dispose of the assets of the debtor to the extent it has not been done under Article 20;
4. 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;
5. Entrusting the administrator or realisation of all or part of the debtor's assets in the enacting State to the foreign representative or another designated by Court
6. Extending any interim relief granted under Article 19;
7. Granting any additional relief that may be available to a domestic liquidator or office holder under the law of the enacting state.

It is necessary to consider whether there are any law of State B that limits the reliefs under this Article. For example in the English court there are various limitations: (i) enforcement of insolvency- related is *in personam*, (ii) default judgment is not governed by the Model law and (iii) a debt governed by English law cannot be discharged or compromised by foreign insolvency proceedings.

It must also be noted that in determining whether to grant relief under Article 19 of the MLCBI and Article 21 of the MLCBI , the court must be satisfied that the interests of the creditors and other interested parties, excluding the debtor, are adequately protected. **Art. 22.**

For full marks, you should also include the following:

1. **Existing international obligations of State A:** Based on Article 3 of the Model Law, the court in State A should again verify that there are no existing international obligations of State A (under a treaty or otherwise) that may conflict with granting the requested relief under the implemented Model Law in State A.
2. **Public policy exception:** The court in State A should, based on Article 6 of the Model Law, also again verify that the relief application is not manifestly contrary to public policy of State A.

Question 3.4 [maximum 1 mark] 1 mark

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

The freezing order is less likely to continue as the MLCBI provides that the purpose of the interim relief in foreign proceedings is to preserve the assets of debtors and of interest of a creditors until the application is decided upon i.e. essentially hold the ring. Therefore, once the application is decided the MLCBI provides post-mechanisms, which includes the court evoking the relevant post-recognition reliefs that is most appropriate.

QUESTION 4 (fact-based application-type question) [15 marks in total] 12 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]; 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]. 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.

In determining whether the Commercial Bank of Business Corporation (the **Bank**) liquidation comprises a "foreign proceeding" within the meaning of 2(a) of the MLCBI, the Court should first consider whether or not the elements of foreign proceeding is satisfied.

Article 2(a) of the MLCBI provides that the foreign proceeding, which may include an interim proceeding, must be collective in nature and that it must be a judicial or administrative insolvency proceedings for the purpose of reorganisation or liquidation that is subject to the control or supervision of the foreign court.

Therefore, the Court must consider the following:

1. Whether the proceeding in Country A is a proceeding that is judicial or administrative and is collective in nature?
2. Whether the proceeding in Country A is in an authorised foreign State or is being conducted under a law related to insolvency?
3. Whether the assets and affairs of the Bank is subject to the control or supervision of a foreign court?
4. Whether or not the proceeding is for the purpose of reorganisation or liquidation?

In determining whether the proceeding is collective in nature it has been accepted that a key consideration is whether substantially all of the assets and liabilities of the debtors are dealt with in the proceedings subject to local priorities and statutory exceptions and to local exclusions relating to the rights of secured creditors. However, it is important to also note that one will not fail the test of collectivity purely because a particular class of creditors rights is unaffected by it.

Having discussed the test for collectivity, it is necessary to consider the powers of DGF under the LBBA and the facts which provides that DGF (the *liquidators*) has full management and supervisory powers including power over the Bank's property and funds.

For completeness the LBBA provides that these 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 facts also provide that on 7 September 2020, the DGF resolved to approve an amended list of creditors' claims totalling approximately USD 1.113 Billion.

Based the nature and extent of the power of DGF and the authority of DGF pursuant to LBBA, it is can be reasonably inferred that DGF had control over all of the assets of the Bank in Country A and that substantially all of the assets and liabilities of the Bank were dealt with in the proceedings in Country A in accordance with the interest of the Bank's creditors . It is therefore clear that the first element as to whether or not the liquidation in Country A is a proceeding that is judicial or administrative and is collective in nature is satisfied.

With that being said, it is then important to consider the extent of the LBBA and the power and scope of DGF, particularly whether it the proceedings relate to reorganisation or insolvency proceedings. Pursuant to Article 77 of LBBA, DGF is automatically appointed as liquidator on the date it receives confirmation of the NB's decision to revoke the Bank's licence. Therefore, it clear that the provisions of the LBBA directly relate to insolvency law specifically liquidation

proceedings. This of course provides that the second at the fourth element as mentioned in the preceding paragraphs have been met.

Lastly and of critical importance is whether the assets and affairs of the Bank is subject to the control or supervision of a foreign court. According to Article 2(e) of the MLCBI, the term “foreign court” means a judicial authority or other authority competent authority whose purpose is to control or supervise the foreign proceedings. Therefore, it has been accepted that control or supervision of a foreign court can include a statutory or regulatory bodies tasked with the function of carrying out insolvency proceedings.

In the matter of Agrokor DD EWHC 2791 (Ch) it was also established that the existence of government controls does not necessarily prevent the proceedings from being subject to the control and supervision of the court. It has also been accepted that the level of court supervision under the model law is low and that it can be potential rather than actual and indirect rather than direct.

Based on the facts, DFG is the statutory/ regulatory insolvency body appointed to regulate the Bank’s liquidation proceedings. DFG then appointed Ms G pursuant to Resolution 1513 to act as a liquidator to carry out the functions of DFG powers in respect of the Bank as 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. The facts also provide that Resolution 1513 expressly exclude 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.

It is therefore clear Ms. G is subject to the control and supervision of DFG and accordingly the test that Bank must be subject to the control or supervision of a foreign court is satisfied.

It is also worthy to note that, Article 37 of the LBBA provides that that DGF is empowered to file property and non-property claims with the Court and bring claims against the parties believed to have caused its downfall. Therefore, arguably the DGF can be seen in some instances being subject to the Court of Country A.

For full marks, you also need a clear discussion on whether the proceedings are for the purposes of reorganisation or liquidation. Also a bit more elaboration, what is actually meant by insolvency.

As it relates to the issue of whether the Applicants are foreign representatives, it is necessary to consider Article 2(d) of the MLCBI which provides that a “foreign representative” means a person or body, including one appointed on an interim basis, authorized in a foreign proceeding to administer the reorganization or liquidation of the debtor’s assets or affairs or to act as a representative of the foreign proceeding.

In considering whether Ms G and DFG (the *Applicants*) fall within the description of “foreign representatives” as defined by Article 2(d) of the MLCBI, the Court must consider whether the Applicants are authorised in a Country A to administer the liquidation of the Bank’s assets or affairs or to act as a representative of the foreign proceedings.

The facts provide that DGF was automatically appointed as liquidator of the Bank the date it receives confirmation of the NB’s decision to revoke the Bank’s licence pursuant to the law of Country A (Article 77 of the LBBA) and that in turn by way of Resolution 1513 they have appointed Ms G to act as liquidator pursuant to DGF Law.

It is clear therefore that both Ms G and DGF are duly authorised to carry out liquidation proceedings in Country A. The facts also provide that they have applied for recognition of the liquidation proceedings of the Bank owing to the fact that investigations into the Bank have revealed that it appears that the Bank have potentially been involved in a multi-million dollar fraud resulting in monies being sent to many overseas companies, including entities incorporated and registered in England.

It should also include a discussion on powers and a conclusion on whether they can be said to “administer”.

*** End of Assessment ***