



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 remarks: 26,5 out of 50

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

QUESTION 1 (multiple-choice questions) [10 marks in total] Total marks: 6/10

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.

The correct answer is D

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.

The correct answer is D

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.

The correct answer is A

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).

The correct answer is C

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] Total marks 6,5/10

Question 2.1 [maximum 3 marks] 2/3 marks

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

[Part II of the UNCITRAL Guide to Enactment and Interpretation deals with the issue. Para 157 of the text requires that COMI at the date of commencement of the foreign proceeding is the appropriate date for determining COMI. In cases where business activity of the debtor

has ceased after commencement of the foreign proceeding, in such cases too date of the commencement of the foreign proceeding is to be seen as the appropriate date for COMI]

For full marks on this question it should be noted that the MLCBI does not explicitly indicate the relevant time and there are some jurisdictions who take a slightly different approach, hence the US.

Question 2.2 [maximum 3 marks] 2/3 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- Article 30

Statement 2- Article 32

Statement 3- Article 31] **The correct answer is art. 16(3)**

Question 2.3 [2 marks] 1,5/2

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 Gibbs case it was laid down that English law-governed debt cannot be discharged under a foreign insolvency proceeding unless the creditors have voluntarily submitted to that proceeding. International Bank of Azerbaijan (IBA) case an application to extend the moratorium was moved to restrain certain creditors in England from pursuing their claims in England once the Azeri restructuring proceeding had come to an end. The Court enquired whether that moratorium was: (a) necessary to protect the interests of creditors; and (b) an appropriate means of achieving that protection. The Court found that neither of those conditions were satisfied. The Court also noted that it was material that the IBA could have run a parallel scheme of arrangement but chose not to do so; and that there is nothing in article 21 of the CBIR to suggest that the procedural power to grant a stay could substantively circumvent the creditors’ English law rights; and that extending the moratorium after the restructuring proceeding terminated would be inconsistent with the ‘procedural and supportive’ role of the Model Law.]

For full marks on this question reference should be made to art. 18 and the English Courts interpretation hereof

Question 2.4 [2 marks] 1/2

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

[Both the issues have been dealt with under Article 20 and 18 of MLCBI. Under Article 20, upon recognition of a foreign proceeding as a foreign main proceeding, domestic court would stay or suspend commencement or continuation of individual actions or individual proceedings concerning the debtor's assets, rights, obligations or liabilities; as also execution against debtor's assets and injunct transfer, creating encumbrance or otherwise disposal of assets of the debtor

Under Article 18 upon recognition of foreign main proceedings, the foreign representative shall inform the court of:

(a) Any substantial change in the status of the recognized foreign proceeding or the status of the foreign representative's appointment; and

(b) Any other foreign proceeding regarding the same debtor that becomes known to the foreign representative.]

For full marks on this question reference should be made to Article 29(a)

QUESTION 3 (essay-type questions) [15 marks in total] 5/15

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] 0/4 marks

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

[How access and co-ordination rights in State A can benefit the foreign representative:

The biggest issue in a cross-border insolvency is how to protect the interest of creditor and assets located in other jurisdictions so that such assets of the debtor could be utilised in an efficient and effective manner for the benefit of all the stakeholders and to avoid the complications which may arise if parallel proceedings for insolvency of a debtor is continued parallelly in different jurisdictions.

Recognition of a foreign proceeding, enables a foreign representative not only to achieve the above objective but also to obtain appropriate relief, including:

(a) Staying the commencement or continuation of individual actions or individual proceedings concerning the debtor's assets, rights, obligations or liabilities, under Article 20;

(b) Staying execution against the debtor's assets.

(c) Suspending the right to transfer, encumber or otherwise dispose of any assets of the debtor.

(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 realization 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) and other reliefs under Article 19;

(g) entrust the distribution of all or part of the debtor's assets located in this State to the foreign representative.

Thus, it is vital for proper and efficient management of insolvency of a debtor having cross border ramifications and also to protect interest and assets of the debtor that application for recognition of foreign proceedings should be made.]

The question relates to rights available *before* recognition. For full marks the question should be answer along the following:

- Legal standing (Article 9 MLCBI): The key access for the foreign representative is set forth in Article 9 MLCBI. In the capacity of foreign representative, the foreign representative has automatically standing before the courts in State A without having to meet any formal requirements such as a license or any consular action. In other words, the "status" in State B of the foreign representative is automatically recognised in State A for the purpose of granting the foreign representative standing before the courts in State A. This allows the foreign representative to safeguard and pursue assets of the debtor estate in State A before its courts.
- Opening domestic insolvency proceedings (Article 11 MLCBI): The foreign representative is further specifically entitled to apply for the opening of domestic insolvency proceedings in State A, as reflected in Article 11 of the MLCBI. Whether or not the foreign representative would wish to do this will depend on what the requirements are for opening such domestic proceedings. Can these requirements be met? On the other hand, it will depend on what the foreign representative believes he/she can get in terms of (interim) relief for the foreign proceedings in State B. In other words, are domestic insolvency proceedings really needed, or just additional time and costs that should be avoided?
- Cooperation: Similar to access rights, the cooperation provisions in the MLCBI (articles 25-27) also operate independently of recognition and it is not a prerequisite to the use of the cooperation provisions that recognition of the foreign proceedings is obtained in advance. Courts in State A can freely cooperate with the foreign representative without having to worry whether the status in State B of the foreign representative can be recognised in State A.
- Save Time & Costs: The key benefits of both the access provisions and the cooperation provisions are that they save time and therefore also costs, as a result of which value destruction can be avoided and value enhancement is being promoted.

Question 3.2 [maximum 5 marks] 2/5 marks

For a recognition application in State A to be successful, the foreign proceeding opened in State B must qualify as a “foreign proceeding” within the meaning of article 2(a) of the MLCBI and the “foreign representative” must qualify as a foreign representative within the meaning of article 2(d) of the MLCBI. Assuming both qualify as such, list and briefly explain (with reference to the relevant MLCBI articles) any other evidence, restrictions, exclusions and limitations that must be considered, as well as the judicial scrutiny that must be overcome for a recognition application to be successful.

[Article 17] of MLCBI deal with the decisions of the Court to recognize a foreign proceeding and it requires that a foreign proceeding shall be recognized if: (a) The foreign proceeding is a proceeding within the meaning of subparagraph (a) of article 2 i.e. it needs to qualify as collective judicial or administrative proceeding in a foreign State pursuant to a law relating to insolvency for the purpose of reorganization or liquidation.

Secondly, the person or body moving such an application needs to qualify as the foreign representative within the meaning of subparagraph (d) of article 2 as per which, person or body must be authorised to administer reorganization or liquidation of the debtor’s assets or affairs or to act as a representative of the foreign proceeding.

Therefore, the Court considering such an application for recognition of the foreign insolvency proceedings must be satisfied about the above two basic qualifications are satisfied.

Additionally, the foreign representative applying to the court for recognition of the foreign proceeding, needs to supply the following documents (as required under **articles 15 of MLCBI**) to the Court along with the application

(a) A certified copy of the decision commencing the foreign proceeding and appointing the foreign representative; or

(b) A certificate from the foreign court affirming the existence of the foreign proceeding and of the appointment of the foreign representative; or

(c) In the absence of evidence referred to in subparagraphs (a) and (b), any other evidence acceptable to the court of the existence of the foreign proceeding and of the appointment of the foreign representative.

Under Article 15, an application for recognition is also required to be supported by a statement identifying all foreign proceedings in respect of the debtor that are known to the foreign representative, along with translation of documents supplied into an official language of this State.

Challenges and limitation in such cases may arise on account of requirement of reciprocity, and the issue relating to determination of “foreign main proceedings” and “foreign non-main proceedings” to understand, determine and demarcate the level of control that a foreign jurisdiction can exercise over the insolvency process and the type and extent of relief that can be granted by court in relation to such foreign proceedings.

The factors which would determine Centre of Main Interests are also critical. While there may be presumption that the corporate debtor's registered office is its COMI but in cases where the registered office been moved to another State prior to the commencement of insolvency

proceedings, then challenges may arise, and various other relevant information would need to be gone into including timing of such movement of registered office.

For full marks the answer should include:

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.
3. Sufficient evidence: Article 15 of the Model Law sets forth in paragraph 2 what evidence in respect of the commencement of the foreign proceedings and the appointment of the foreign representative must accompany the recognition application. A statement identifying all foreign proceedings in respect of the debtor that are known to the foreign representative must also accompany the recognition application (Article 15(3) of the Model Law).
4. Judicial scrutiny: While the court in State A is able to rely on the rebuttable presumptions set forth in Article 16 of the Model Law, in the context of Article 17 of the Model Law the court will have to assess whether either the COMI or at least an establishment of the debtor is located in State B where the foreign proceedings were opened. If the COMI of the debtor is in State B the foreign proceedings should be recognised as foreign main proceedings and if only an establishment of the debtor is in State B the foreign proceedings should be recognised as foreign non-main proceedings. Without a COMI or at least an establishment of the debtor in State B, recognition cannot be granted by the court in State A.
5. Public policy exception: Finally, the court in State A should also ensure based on Article 6 of the Model Law that the recognition application is not manifestly contrary to public policy of State A.

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.

[In a cross-border insolvency, the biggest challenge arise if assets of the debtor are located under different jurisdictions and action that might be initiated in such jurisdictions by creditor of the debtor. Such actions might not only impact smooth implementation of resolution of debtor but could also nullify the effect of resolution if the insolvency proceedings are not recognised in such other jurisdictions where assets of the debtor might the located.

The biggest advantage of recognition of a foreign proceeding is that it will entitle the foreign representative to obtain certain reliefs under Article 20 and 21 of MLCBI. Such reliefs will, inter alia, include:

- (a) stay of commencement or continuation of individual actions or individual proceedings concerning the debtor's assets, rights, obligations or liabilities;

- (b) Execution against the debtor's assets is stayed; and
- (c) suspension of the right of debtor to transfer, encumber or otherwise dispose of any assets.
- (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) relief may also include entrusting the administration or realization 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 **Article 19**;
- (g) Granting any additional relief that may be available to a person or body administering a reorganization or liquidation under the law of the enacting State under the laws of the State.

However, under Article 22 of MLCBI, the court may, at the request of the foreign representative or a person affected by relief granted under article 19 or 21, or at its own motion, modify or terminate such relief.

Additionally, the relief that could be considered by the Court will be subject to the provisions of law of the enacting State relating to insolvency. Further, such reliefs shall not affect the right to commence individual actions or proceedings to the extent necessary to preserve a claim against the debtor and the right to file claims in such a proceeding.

Further, before such reliefs are granted it would be essential to satisfy the Court that the relief relates to assets that, under the law of this State, should be administered in the foreign non-main proceeding or concerns information required in that proceeding and that the interests of the creditors and other interested persons, including the debtor, are adequately protected (Article 22)]

For full marks the following should be included:

1. **Pre-recognition interim relief:** From the time of filing the recognition application until the recognition decision has been made certain interim relief as set forth in Article 19(1)(a), (b) and (c) of the Model Law can be requested. The foreign representative will have to demonstrate to the court that such relief is urgently needed to protect the assets of the debtor or the interests of the creditors. If the foreign proceedings are non-main proceedings, the court may refuse to grant interim relief if it would interfere with the administration of a foreign main proceeding (Article 19(4) of the Model Law).
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 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 reason why post recognition a worldwide freezing order granted as pre-recognition interim relief, is unlikely to continue as the Court may entrust the distribution of all or part of the debtor's assets located in the State to the foreign representative or another person designated by the court, if the interests of creditors in this State are adequately protected.]

QUESTION 4 (fact-based application-type question) [15 marks in total] 9/15 marks

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

(1) Background

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

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

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

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

Classification of the bank as troubled

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

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

Classification of the bank as insolvent

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

- (i) the bank's regulatory capital amount or standard capital ratios have reduced to one third of the minimum level specified by law;
- (ii) within five consecutive working days, the bank has failed to meet 2% or more of its obligations to depositors or creditors; and

- (iii) the bank, having been declared as troubled, then fails to comply with an order or decision of the NB and / or a request by the NB to remedy violations of the banking law.

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

Provisional administration

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

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

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

Liquidation

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

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

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

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

- (i) the power to exercise management powers and take over management of the property (including the money) of the bank;

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

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

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

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

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

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

(2) The Bank's liquidation

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

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

Those operations included:

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

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

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

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

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

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

QUESTION 4.1 [maximum 15 marks]

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

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

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

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

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

4.1.1 whether the Bank’s liquidation comprises a “foreign proceeding” within the meaning of article 2(a) of the MLCBI

Factual matrix of the Case:

The Commercial Bank of Business Corporation Ltd (CBBC), has registered office in Country A with about 95% of shares being held by Mr Z and connected corporate entities some of which are located in England. On account of multi-million dollar fraud by way of diversion of money to overseas entities including those located in England, CBBC entered provisions administration on 17th September, 2015.

Proceedings were also commenced in the High Court of England and Wales against various defendants on 11 February 2021.

The issue is primarily governed by the Law of Country A on Banks and Banking Activity (LBBA) and DGF Law and the two bodies involved in the process are National Bank and DGF of the Country A. Both the bodies namely NB and DGF have various powers under the above-mentioned laws of Country A to deal with the instances of Bank being declared insolvent as per the parameter set out in Article 76 of LBBA. Article 77 of LBBA provides that a bank can be liquidated by NB directly by invoking its licence.

On the other hand, DGF is a governmental body (with operational independence) which also has powers of winding down operation of a bank via liquidation. As per Article 34 of DGF Law, DGF can begin the process of removing the bank from market once a bank is classified as insolvent. DGF is obliged to commence liquidation against a bank on or before the next working day after the NB revokes the bank’s licence. DGF automatically becomes liquidator of a bank on the date it receives confirmation of NB revoking the Bank’s licence, with full powers of liquidator under the law of Country A, with various powers to deal with the assets and affairs of the Bank. This includes power to find, identify and recover property belonging to the Bank and bring claims for compensation against persons for harm inflicted on the insolvent bank.

Following the procedure, CBBC was declared insolvent by NB on 17 September 2015 and later on, on 17 December 2015 NB formally revoked CBBC’s licence and on the following day liquidation process of the Bank was initiated by DGF by appointing Ms C as authorised person with powers of liquidator, who was later on replaced by Ms G on 17 August 2020. Ms C was delegated powers except those powers relating to claiming damages from a related party of the Bank or make a claim against NBF that raised money as loans or deposits from individuals

and powers to arrange for sale of assets of the Bank. These excluded powers were retained with DGF as formally appointed Liquidator of the Bank.

DGF and Ms G, in her capacity as authorised officer of DGF applied for recognition of the liquidation of the Bank before the English Court based on the Cross-Border Insolvency Regulations 2006 (CBIR), the adopted version of MLCBI in England.

Issue: In this context, the issue which has arisen for determination is:

“Whether the Bank’s liquidation comprises a “foreign proceeding” within the meaning of article 2(a) of the MLCBI in the light of the fact that Bank is not excluded from the scope of MLCBI by article 1(2) of MLCBI.”

Analysis of Legal Position and issues:

Since, the issue primarily falls within the realm of the provisions of Article 2 of MLCBI, therefore, it would be relevant to see **what constitute a foreign proceed under MLCBI.**

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

The definition of the term “foreign proceeding” as appearing under Article 2 of MLCBI, is very wide as it includes both ‘judicial’ and ‘administrative’ proceedings in a foreign state. Additionally, such proceedings could be interim or otherwise regular proceedings initiated for reorganization or liquidation of debtor.

Thus, in order to be eligible for recognition under the MLCBI, a foreign proceeding must satisfy the requirement of the definition in subparagraph (a), i.e. ***it must either be a judicial or administrative proceeding with its basis in insolvency-related law of the enacting State;*** for the purpose of ***reorganization or liquidation of the debtor.***

The first requirement is that the foreign proceedings be either judicial or administrative in nature. That means the foreign proceeding need to be any one type and only one of those characteristics is required to be satisfied.

Another important factor that needs to be satisfied is that the “proceeding” is under a statutory framework that constrains a company’s actions and that regulates the final distribution of a company’s assets” and that the insolvency proceeding should be “collective” so as to achieving a coordinated, global solution for all stakeholders of an insolvency proceeding.

Coming to the second critical requirement under Article 2(a), the **insolvency proceeding in foreign state should be for the purpose of liquidation or reorganization of the debtor.**

Proceedings in which the foreign representative does not have the authority to liquidate and distribute assets to satisfy creditor claims and proceedings and is only designed to allow a certain party to collect its debts, will not satisfy this requirement of article 2. In the case of ***New Paragon Investments Limited [2012] BCC 371*** in England, the court found that “foreign proceeding” included an extrajudicial or administrative proceeding provided it related to liquidation.

Analysis of Facts & Conclusion:

If we examine the facts and legal aspect of the present case in the light of the legal position as analysed above, we find that the entire process concerning insolvency and liquidation of a

Bank is governed by the Law of Country A on Banks and Banking Activity and DGF Law and the two bodies involved in the process namely National Bank and DGF have been conferred powers under the above mentioned laws of Country A to initiate and conduct the proceedings for liquidation of the Bank under the laid down circumstance and conditions.

Under Article 34 of DGF Law, DGF is obliged to commence liquidation against a bank on or before the next working day after the NB revokes the bank's licence, with full powers of liquidator under the law of Country A,

While process of liquidation is driven by administrative bodies but the same is governed by the due process of law (Law of Country A on Banks and Banking Activity and DGF Law) of the Country. Further, such proceedings are primarily being conducted by the competent authority for the purpose of liquidation of the Bank. As administrative proceedings for liquidation of debtor Bank are not excluded rather specifically covered under Article 2 (a) of MLCBI, therefore, it can safely be concluded that liquidation proceedings of the Bank in this case are "foreign proceedings" within the meaning of article 2(a) of MLCBI.

For full marks the following should also be addressed:

- Clearer conclusion and inclusion of the fact of the case whether the proceeding is collective
- A brief discussion on whether DFG is independent and qualifies as a controlling body
- Explanation of what can be countered as law of *insolvency* and a comment on whether this one is

4.1.2 whether the Applicants fall within the description of "foreign representatives" as defined by article 2(d) of the MLCBI

As per Article 2 (d) of MLCBI, "Foreign representative" means a person or body, including one appointed on an interim basis, authorized in a foreign proceeding to administer the reorganization or the liquidation of the debtor's assets or affairs or to act as a representative of the foreign proceeding.

Thus, under the above article definition of 'foreign representative' is wide and includes appointments that might be made by a special agency other than the court as there is no condition that such representative should be appointed by Court or under judicial process. The emphasis is on the representative being an authorised person or body to administer the reorganization or the liquidation of the debtor's assets or affairs.

Further, the Article 16 enables the court to presume the facts indicated in the documents provided under article 15 which includes those concerning the appointment of the foreign representative. Though MLCBI does not define the words "person" or "body", courts have found that a foreign representative might be a firm. The word "body" has been interpreted as meaning "an artificial person created by a legal authority". Further, appointment of the foreign representative in the foreign proceeding to act in either or both of those capacities is sufficient for the purposes of the MLCBI.

However, such person or body must have the power to administer the reorganization or liquidation of the debtor's assets or affairs at the time of the application for recognition. Where a foreign representative does not have those powers at the time of the application for recognition, he cannot be recognised as 'foreign representative' for the purpose of article 2.

While in the present case, Ms G has not been conferred with certain powers but since, the Liquidator body has also jointly moved the application, therefore, defect on this count stands cured, thus there is no impediment from MLCBI point of view in recognising Ms G and DGF as "foreign representative" for the purpose of article 2(d) of MLCBI.]

For full marks on this question the answer should also include a discussion on the delegated powers and its consequences for both Ms G and the DGF.

*** End of Assessment ***