



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

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] 8 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] 9 marks

Question 2.1 [maximum 3 marks] 2 marks

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

The MLCBI does not expressly indicate the relevant date for determining the COMI of a debtor or whether an establishment exists.¹

However, according to the Guide to Enactment and Interpretation of the UNCITRAL Model Law on Cross-Border Insolvency (“GEI”), the appropriate date for determining the COMI of a debtor or whether an establishment exists is the date of commencement of the foreign proceeding.² This is taking into account the evidence required to accompany an application for recognition under Article 15 of the MLCBI and the relevance accorded the decision commencing the foreign proceeding and appointing the foreign representative.

¹ Paragraph 157, Guide to Enactment and Interpretation of the UNCITRAL Model Law on Cross-Border Insolvency.

² Paragraphs 159 and 160, Guide to Enactment and Interpretation of the UNCITRAL Model Law on Cross-Border Insolvency.

The GEI further justifies the date of commencement of the foreign proceeding as the appropriate date for determining COMI of a debtor or whether an establishment exists on the following grounds³ –

- (a) where the business activity of the debtor ceases after commencement of the foreign proceeding, all that may exist at the time of the application for recognition to indicate the debtor's COMI or establishment is the foreign proceeding and the activity of the foreign representative in administering the debtor's estate. In such a case, the determination of COMI or establishment with reference to the date of commencement of the foreign proceedings would produce a clear result; and
- (b) taking the date of commencement of the foreign proceeding to determine COMI or establishment of the debtor provides a test that can be applied with certainty to all insolvency proceedings.

You should also discuss whether this is the approach taken everywhere.

Question 2.2 [maximum 3 marks] 3 marks

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

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

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

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

Statement 1 relates to the coordination of more than one foreign proceeding in Article 30 of the UNCITRAL Model Law on Cross-Border Insolvency ("MLCBI"). In particular, Article 30(c) MLCBI provides for guidance in case of concurrence of two foreign non-main proceedings by stipulating that if, after recognition of a foreign non-main proceeding, another foreign non-main proceeding is recognised, the court shall grant, modify or terminate relief for the purpose of coordination of the proceedings. Where there are two foreign non-main proceedings, Article 30(c) does not treat any of the proceedings preferentially but instead has the objective of promoting cooperation, coordination and consistency of the relief granted in the different proceedings by appropriately tailoring the relief to be granted or by modifying or terminating relief already granted.⁴

Statement 2 relates to the rule of payment in concurrent proceedings, sometimes referred to as the hotch-potch or hotchpot rule⁵ in Article 32 MLCBI. Article 32 MLCBI provides that a creditor who has received part payment in respect of its claim in an insolvency proceeding in a foreign state may not receive a payment for the same claim in an insolvency proceeding in the enacting state regarding the same debtor, so long as the payment to the other creditors of

³ Paragraphs 159 and 160, Guide to Enactment and Interpretation of the UNCITRAL Model Law on Cross-Border Insolvency.

⁴ Paragraph 234, Guide to Enactment and Interpretation of the UNCITRAL Model Law on Cross-Border Insolvency.

⁵ Paragraph 239, Guide to Enactment and Interpretation of the UNCITRAL Model Law on Cross-Border Insolvency.

the same class is proportionately less than the payment the creditor has already received. This rule in Article 32 MLCBI does not affect secured claims or rights *in rem*.

Statement 3 relates to the rebuttable presumption on the debtor's centre of main interests or COMI in Article 16 MLCBI. COMI is an undefined key concept in the MLCBI. However, Article 16(3) MLCBI provides for a rebuttable presumption in respect of the concept of COMI by stipulating that in the absence of proof to be contrary, the debtor's registered office, or habitual residence in the case of an individual, is presumed to be the centre of the debtor's main interests.

Question 2.3 [2 marks] 2 marks

In the *IBA* case appeal, the English Court of Appeal upheld the decision that the court should not exercise its power to grant the indefinite Moratorium Continuation. **Please explain.**

The *IBA* case relates to the "Gibbs Rule" derived from the case of *Antony Gibbs & Sons v La Societe Industrielle et Commerciale des Metaux*⁶ which stands for the proposition that a debt governed by English law cannot be discharged or compromised by a foreign insolvency proceeding unless the creditors have voluntarily submitted to the foreign insolvency proceeding.

In the *IBA* case, the foreign representative of an insolvency proceeding in Azerbaijan, following an earlier recognition order under the English Cross-Border Insolvency Regulations 2006 (CBIR), requested for relief under Article 21 MLCBI in the form of an indefinite continuation of the automatic moratorium that resulted from the earlier recognition order ("Moratorium Continuation"). The foreign insolvency proceeding in Azerbaijan was a restructuring plan which, pursuant to Azeri law, was binding on all creditors. The Moratorium Continuation application was contested by two (2) creditors who had unpaid claims against IBA under debt instruments governed by English law and had not submitted to the foreign insolvency proceeding in Azerbaijan.

The High Court in the *IBA* case found that the Moratorium Continuation application sought an order which had the effect of forever preventing the challenging creditors from exercising their English law right. Hence, in effect, the relief sought would operate as a discharge of the claims of the challenging creditors and thus contravene the Gibbs Rule. The High Court dismissed the Moratorium Continuation application.

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. The Court of Appeal's focus was on the jurisdictional question of "*in what sense it may be said that the English court lacks jurisdiction to grant the indefinite stay requested by the foreign representative*".⁷ The Court of Appeal found that the issue in the *IBA* case appeal was not one of jurisdiction in the strict sense but "*whether as a matter of settled practice the court should not exercise its power to grant a stay under those paragraphs [Article 21 MLCBI], going beyond the automatic stay under article 20 where to do so –*

- (a) *would in substance prevent English creditors from enforcing their English law rights in accordance with the Gibbs Rule; and/or*
- (b) *would prolong the stay after the Azeri reconstruction has come to an end.*"⁸

⁶ (1890) LR 25 QBD 399

⁷ *Bakskiyeva (Foreign Representative of the OJSC International Bank of Azerbaijan) v Sberbank of Russia & Ors* [2018] EWCA Civ 2802 at paragraph 83.

⁸ *Bakskiyeva (Foreign Representative of the OJSC International Bank of Azerbaijan) v Sberbank of Russia & Ors* [2018] EWCA Civ 2802 at paragraph 85.

The English Court of Appeal held that a stay which is intended to prevent English creditors from enforcing their English law rights indefinitely could only be granted if the court were satisfied that the stay would be necessary to protect the interests of IBA creditors and the stay would be an appropriate way of achieving such protection. The Court of Appeal found that neither of these conditions were satisfied.

The Court of Appeal went on to further highlight that the scope of the MLCBI is limited to some procedural aspects of cross-border insolvency and that it does not attempt a substantive unification of insolvency law and if the power to grant a stay under Article 21 had been intended to override substantive rights of creditors under the proper law governing their debts, it would have been made explicit in the MLCBI.⁹

Question 2.4 [2 marks] 2 marks

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

When a domestic proceeding has already been opened in respect of the debtor at the time the application for recognition of the foreign proceeding is filed, Article 29(a) MLCBI will apply. The court of the enacting State must ensure that any relief granted under Article 19 or 21 MLCBI is consistent with the domestic proceeding in the enacting State (Article 29(a)(i) MLCBI). Further, since the foreign proceeding is recognised as a foreign main proceeding in the enacting State, the automatic stay in Article 20 MLCBI will not apply (Article 29(a)(ii) MLCBI).

In respect of the duty of information, Article 15(3) MLCBI requires the foreign representative, in an application for recognition, to include a statement identifying all foreign proceedings in respect of the debtor that are known to the foreign representative. Further, pursuant to Article 18 MLCBI, from the time of filing the application for recognition of the foreign proceeding, the foreign representative must inform the court of the enacting state promptly of –

- (a) any substantial change in the status of the recognised foreign proceeding or the status of the foreign representative's appointment; and
- (b) any other foreign proceeding regarding the same debtor that becomes known to the foreign representative.

Hence, the duty to inform the court of the enacting State of any other foreign proceeding regarding the same debtor is an ongoing duty of information that the foreign representative has towards the court of the enacting State.

QUESTION 3 (essay-type questions) [15 marks in total] 10,5 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

⁹ *Bakskiyeva (Foreign Representative of the OJSC International Bank of Azerbaijan) v Sberbank of Russia & Ors* [2018] EWCA Civ 2802 at paragraph 89.

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] 3,5 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?

Prior to making a recognition application in State A, the foreign representative may rely on the following access and coordination rights of State A which do not require prior recognition of the foreign proceeding –

- (a) the right of direct access in Article 9 of the MLCBI for access to the courts in State A. One of the main objectives of MLCBI is to provide foreign representatives with expedited and direct access to the courts of the enacting State. In this regard, Article 9 MLCBI provides that a foreign representative is entitled to apply directly to a court in the enacting State and thus frees the foreign representative from having to meet formal requirements such as licences or consular action.¹⁰ However, it must be noted that such access does not automatically give the foreign representative any other rights or powers;
- (b) Article 11 of the MLCBI which entitles the foreign representative to apply to commence insolvency proceedings under the laws of State A if the conditions for commencing such a proceeding are met. National laws of a State may not explicitly provide for a foreign representative as person who has standing to request to commence insolvency proceedings in the State. The MLCBI, by way of Article 11, ensures that a foreign representative has standing to request the commencement of an insolvency proceeding in State A.¹¹ Hence, provided all conditions for commencement of an insolvency proceeding in State A have been satisfied, the foreign representative may request to commence an insolvency proceeding in State A;
- (c) Article 25 of the MLCBI which requires the courts of State A to cooperate to the maximum extent possible with foreign courts or foreign representatives, either directly or through the insolvency office-holder of State A; and
- (d) Article 26 of the MLCBI which requires the insolvency office-holder of State A, in the exercise of its functions and subject to the supervision of the courts of State A, to cooperate to the maximum extent possible with foreign courts or foreign representatives.

For full marks, you should address that these rights save time and costs.

Question 3.2 [maximum 5 marks] 3 marks

For a recognition application in State A to be successful, the foreign proceeding opened in State B must qualify as a “foreign proceeding” within the meaning of article 2(a) of the MLCBI and the “foreign representative” must qualify as a foreign representative within the meaning of

¹⁰ Paragraph 108, Guide to Enactment and Interpretation of the UNCITRAL Model Law on Cross-Border Insolvency.

¹¹ Paragraphs 112 and 113, Guide to Enactment and Interpretation of the UNCITRAL Model Law on Cross-Border Insolvency.

article 2(d) of the MLCBI. Assuming both qualify as such, list and briefly explain (with reference to the relevant MLCBI articles) any other evidence, restrictions, exclusions and limitations that must be considered, as well as the judicial scrutiny that must be overcome for a recognition application to be successful.

Once State A is satisfied that the foreign proceeding opened in State B qualifies as a “foreign proceeding” and the foreign representative qualifies as a “foreign representative” within the meaning of Article 2 MLCBI, the following must be considered for the recognition application to be successful –

- (a) the recognition application must meet the requirements in Article 15(2) MLCBI (Article 17(1)(c) MLCBI).

The foreign representative must ensure the application for recognition is accompanied by –

- (i) a certified copy of the decision commencing the foreign proceeding and appointing the foreign representative; or
- (ii) a certificate from the court of State B affirming the existence of the foreign proceeding and of the appointment of the foreign representative; or
- (iii) in the absence of evidence referred to in subparagraphs (i) and (ii) above, any other evidence acceptable to the court of the existence of the foreign proceeding and of the appointment of the foreign representative.

- (b) the application for recognition must be submitted to the court in State A as set out in Article 4 MLCBI (Article 17(1)(d) MLCBI).

- (c) whether the Debtor has its centre of main interests (“COMI”) or an establishment in State B.

The facts of the case state that the Debtor is a corporate debtor. Though there is no definition of COMI in the MLCBI, Article 16(3) MLCBI provides for a rebuttable presumption that the Debtor’s registered office is its COMI. If the Debtor has its registered office in State B, in the absence of proof to the contrary, it will be presumed that the Debtor has its COMI in State B. If the court in State A finds that the Debtor has its COMI in State B, the foreign proceeding opened in State B will be recognised as a foreign main proceeding (Article 17(2)(a) MLCBI).

If the court in State A finds that the Debtor does not have its COMI in State B, it has to be determined if the Debtor has an establishment in State B. Article 2(f) MLCBI defines “establishment” as any place of operations where the debtor carries out a non-transitory economic activity with human means and goods or services. If the court in State A finds that the Debtor has an “establishment” in State B, the foreign proceeding opened in State B will be recognised as a foreign non-main proceeding (Article 17(2)(b) MLCBI).

If the Debtor has neither its COMI in State B nor an establishment in State B, the foreign proceeding opened in State B will not be recognised in State A under the MLCBI.

- (d) whether recognition of the foreign proceeding opened in State B would be manifestly contrary to the public policy of State B.

Article 17(1) MLCBI provides that subject to Article 6 MLCBI, a foreign proceeding shall be recognised if it satisfies the requirements in Article 17(1) MLCBI. Thus, even if the foreign proceeding satisfies the requirements in Article 17(1) MLCBI, before granting

recognition, the court in State A must consider whether recognition of the foreign proceeding opened in State B would be manifestly contrary to the public policy of State A as provided for in Article 6 MLCBI.

The MLCBI does not provide for a uniform definition of what amounts to public policy since the concept of public policy is grounded in national law and may differ from state to state.¹² However, by the use of the word “manifestly” in Article 6, the MLCBI emphasises that the public policy exception should be interpreted restrictively and that Article 6 MLCBI is only intended to be invoked under exceptional circumstances concerning matters of fundamental importance for the enacting State.¹³ The GEI further goes on to state that as a general rule, Article 6 MLCBI should rarely be the basis for refusing an application for recognition, even though it might be a basis for limiting the nature of relief accorded.¹⁴

- (e) whether there has been an abuse of process, bad faith, fraud or improper purpose in the application for recognition.

Whilst the MLCBI itself does not contain any express provision on abuse of process, the MLCBI also does not explicitly prevent the courts of State A from applying domestic law or procedural rules to address a perceived abuse of process.¹⁵ The GEI gives an applicant’s false claim that the debtor’s centre of main interests is in a particular State as an example of an abuse of process that may entitle the courts of State A to apply domestic law or procedural law in response to such an abuse of process.¹⁶

The following may also be grounds for the courts in State A to refuse to grant recognition to the insolvency proceeding commenced in State B –

- (i) the foreign decision was the result of corruption;¹⁷
- (ii) the Debtor is attempting to evade its legitimate foreign creditors;¹⁸ and
- (iii) where improper forum shopping and frustration of an existing judgment were the only apparent reasons for the recognition application and hence, the recognition was being sought for an improper purpose.¹⁹

You should also discuss art. 1(2) and art. 3.

Question 3.3 [maximum 5 marks] 3 marks

As far as relief is concerned, briefly explain (with reference to the relevant MLCBI articles) what pre- and post-recognition relief can be considered in the context of the MLCBI, as well

¹² Paragraph 101, Guide to Enactment and Interpretation of the UNCITRAL Model Law on Cross-Border Insolvency.

¹³ Paragraph 104, Guide to Enactment and Interpretation of the UNCITRAL Model Law on Cross-Border Insolvency.

¹⁴ Paragraph 161, Guide to Enactment and Interpretation of the UNCITRAL Model Law on Cross-Border Insolvency.

¹⁵ Paragraph 161, Guide to Enactment and Interpretation of the UNCITRAL Model Law on Cross-Border Insolvency.

¹⁶ Paragraph 162, Guide to Enactment and Interpretation of the UNCITRAL Model Law on Cross-Border Insolvency.

¹⁷ *United States: Gerova Financial Group, Ltd.*, 482 B.R. 86, 94 (Bankr. S.D.N.Y. 2013), CLOUT 1275; JP [para. 57]

¹⁸ *United States: Perry H. Koplik & Sons, Inc*, 357 BR 213 (Bankr. S.D.N.Y. 2006)

¹⁹ *United States: Octaviar Administration Pty Ltd*, 511 B.R. 361, 374 (Bankr. S.D.N.Y. 2014), CLOUT 1483 – citing *Morning Mist Holdings Ltd. V Krys (In re Fairfield Sentry Ltd.)*, 714 F.3d 127, 132 (2d Cir. Apr. 16, 2013), CLOUT 1339.

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.

The foreign representative of the insolvency proceeding opened in State B may seek for the following reliefs under the MLCBI in State A –

- (a) upon filing the application for recognition but prior to the decision on the recognition application, the courts in State A may grant the foreign representative urgently needed interim relief under Article 19 MLCBI.

Where relief is urgently needed to protect the assets of the Debtor or the interest of the creditors, pursuant to Article 19(1) MLCBI, the courts in State A may grant the following reliefs of a provisional nature –

- (i) staying execution against the Debtor's assets;
- (ii) entrusting the administration or realisation of all or part of the Debtor's assets located in State A to the foreign representative or another person designated by the court, in order to protect and preserve the value of assets that, by their nature or because of other circumstances, are perishable, susceptible to devaluation or otherwise in jeopardy;
- (iii) suspending the right to transfer, encumber or otherwise dispose of any assets of the Debtor;
- (iv) 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; and
- (v) granting any additional relief that may be available to an insolvency office-holder under the laws of State A.

It must be noted that unless extended under the post-recognition relief provision in Article 21(1)(f) MLCBI, the reliefs granted under Article 19 MLCBI will terminate once the recognition application has been decided upon.

In considering any relief under Article 19 MLCBI, the courts of State A –

- (i) may refuse to grant a relief if such a relief would interfere with the administration of a foreign main proceeding (Article 19(4) MLCBI); and
- (ii) must be satisfied that the interests of the creditors and other interested persons, including the Debtor, are adequately protected (Article 22(1) MLCBI).

- (b) upon recognition, if the insolvency proceeding in State B is recognised in State A as a foreign main proceeding, pursuant to Article 20 MLCBI, an automatic stay will be imposed on –

- (i) the commencement or continuation of individual actions or individual proceedings concerning the Debtor's assets, rights, obligations or liabilities;
- (ii) execution against the Debtor's assets; and
- (iii) the right to transfer, encumber or otherwise dispose of any assets of the Debtor.

However, the stay –

- (i) will be subject to the insolvency laws of State A that apply to exceptions, limitation, modifications or termination in respect of the stay (Article 20(2) MLCBI);
- (ii) will not affect the right to commence individual actions or proceedings to the extent necessary to preserve a claim against the Debtor (Article 20(3) MLCBI); and
- (iii) will not affect the right to request the commencement of a proceeding under the insolvency laws of State A or the right to file claims in such a proceeding (Article 20(4) MLCBI).

- (c) upon State A's recognition of the insolvency proceeding in State B whether as a foreign main proceeding or foreign non-main proceeding, the foreign representative may seek for the post-recognition reliefs under Article 21 MLCBI.

If the reliefs are necessary to protect the assets of the Debtor or the interests of the creditors, the discretionary post-recognition reliefs that may be granted under Article 21(1) include –

- (i) staying the commencement or continuation of individual actions or individual proceedings concerning the Debtor's assets, rights, obligations or liabilities;
- (ii) staying execution against the Debtor's assets;
- (iii) suspending the right to transfer, encumber or otherwise dispose of any assets of the Debtor;
- (iv) 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;
- (v) entrusting the administration or realisation of all or part of the Debtor's assets located in State A to the foreign representative or another person designated by the court;
- (vi) extending the interim relief granted under Article 19; and
- (vii) granting any additional relief that may be available to an insolvency office-holder under the laws of State A.

Upon recognition, the court of State A may also, at the request of the foreign representative, entrust the distribution of all or part of the Debtor's assets located in State A to the foreign representative or another person designated by the court, provided the court in State A is satisfied that the interests of creditors in State A are adequately protected.

In granting any relief under Article 21 MLCBI, the courts of State A must take into account the following –

- (i) if the foreign proceeding in State B is recognised as a foreign non-main proceeding in State A, the court in State A must be satisfied that the relief relates to assets that, under the law of State A, should be administered in the foreign proceeding in State B or concerns information required in the proceeding (Article 21(3) MLCBI); and
- (ii) the court in State A must be satisfied that the interests of the creditors and other interested persons, including the Debtor, are adequately protected (Article 22(1) MLCBI).

You should also address art. 3 and 6.

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?

A worldwide freezing order granted as a pre-recognition interim relief under Article 19 MLCBI will terminate once the recognition application has been decided upon, unless extended under Article 21(1)(f) MLCBI (Article 19(3) MLCBI). Further, the reliefs granted under Article 19 MLCBI is unlikely to continue post-recognition under Article 21 MLCBI due to the fact that if the foreign proceeding is recognised as a foreign main proceeding, the automatic stay under Article 20 MLCBI will apply rendering a freezing order under Article 21 MLCBI unnecessary.

QUESTION 4 (fact-based application-type question) [15 marks in total] 14 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.

We will first determine whether the Bank's liquidation comprises a "foreign proceeding" within the meaning of Article 2(a) of the MLCBI.

Article 2(a) of the MLCBI defines "foreign proceeding" as a collective judicial or administrative proceeding in a foreign State, including an interim proceeding, pursuant to a law relating to insolvency in which proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganisation or liquidation.

Paragraph 63 of the GEI stipulates that by specifying the required characteristics of a "foreign proceeding", the MLCBI limits the scope of its application. For a proceeding to be subject to recognition under the MLCBI, the foreign proceeding must have the attributes specified in Article 2(a) MLCBI. Paragraph 64 of the GEI goes on to state that proceedings that do not have the attributes stipulated in Article 2(a) would not be eligible for recognition under MLCBI.

Pursuant to Article 2(a), the following attributes must be satisfied in order for a foreign proceeding to fall within the scope of the MLCBI²⁰ -

(a) collective proceeding

The Bank's liquidation must be a collective proceeding. The GEI in paragraph 69 states that for a proceeding to qualify for relief under the MLCBI, it must be a collective proceeding because the MLCBI is intended to provide a tool for achieving a coordinated, global solution for all stakeholders of an insolvency proceeding. It is not intended that the MLCBI be used merely as a collection device for a particular creditor or group of creditors who might have initiated a collection proceeding in another State.

Paragraph 70 of the GEI states that in evaluating whether a given proceeding is collective for the purpose of the MLCBI, a key consideration is whether substantially all of the assets and liabilities of the debtor are dealt with in the proceeding, subject to local priorities and statutory exceptions, and to local exclusions relating to the rights of secured creditors.

The facts of the case state that when the Bank enters liquidation in Country A, all banking activities are terminated, all money liabilities due to the Bank are deemed to become due, the DGF alienates the Bank's property and funds and public encumbrances and restrictions on disposal of the Bank's property are terminated and offsetting of counter-claims is prohibited. Further, as liquidator, the DGF has extensive powers, including the power to exercise management powers and take over management of the property (including the money) of the Bank, the power to compile a register of creditor claims and to seek to satisfy those claims, the power to dispose of the bank's assets and distribute its properties and the power to exercise such other powers as are necessary to complete the liquidation of the Bank.

²⁰ Paragraphs 66 to 78, Guide to Enactment and Interpretation of the UNCITRAL Model Law on Cross-Border Insolvency.

Based on the above facts, the liquidation of the Bank in Country A would be deemed a collective proceeding for purposes of the MLCBI. It must be noted that in a recent case with similar facts, *PJSC Bank Finance and Credit, Re (Cross-Border Insolvency Regulations 2006)*²¹ for recognition of foreign proceedings in the United Kingdom in respect of a liquidation proceeding in a State whose laws are similar to Country A, the High Court of England & Wales found that the liquidation was a collective proceeding for purposes of the MLCBI.

(b) pursuant to a law relating to insolvency

The liquidation proceeding against the Bank in Country A must be pursuant to a law relating to insolvency. Acknowledging the fact that different jurisdictions might have different notions of what falls with the term “insolvency proceeding”, the MLCBI does not define the term “insolvency”. However, as used in the MLCBI, the word “insolvency” refers to various types of collective proceedings commenced with respect to debtors that are in severe financial distress or insolvent.²² Further, paragraph 73 of the GEI states that this formulation is used in the MLCBI to recognise the fact that liquidation and reorganisation might be conducted under law that is not labelled as insolvency law, but which nevertheless deals with or addresses insolvency or severe financial distress.

The facts of the case state that that 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. Further, 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.

Based on the above, the liquidation of the Bank in Country A would satisfy the requirements of being done pursuant to a law relating to insolvency as required under the MLCBI.

(c) control or supervision by a foreign court

The liquidation of the Bank in Country A must be either a judicial or administrative proceeding that is subject to the control or supervision by a foreign court. In this regard, it must be noted that Article 2(e) of the MLCBI defines “foreign court” as a judicial or other authority competent to control or supervise a foreign proceeding. Paragraph 87 of the GEI states the basis for the definition of “foreign court” in Article 2(e) MLCBI in that a foreign proceeding that meets the requisites of Article 2(a) MLCBI should receive the same treatment irrespective of whether it has been commenced and supervised by a judicial body or an administrative body. Hence, the definition of “foreign court” includes also non-judicial authorities.

The facts of the case state that the DGF has control of the assets and liabilities of the Bank and has the power to realise the assets to satisfy claims of debtors. Further, Article 37 of the DGF Law states 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,

²¹ [2021] EWHC 1100 (Ch)

²² Paragraph 48, Guide to Enactment and Interpretation of the UNCITRAL Model Law on Cross-Border Insolvency.

to restrict or terminate the bank's transactions, and to file property and non-property claims with a court. Being an official body which exercises its power in liquidation free from intervention by government or the NB, it is highly likely that pursuant to the definition of "foreign court" in Article 2(e) MLCBI, the DGF would be considered a foreign court under Article 2(a) MLCBI.²³

Hence, the liquidation of the Bank in Country A would satisfy the requirement of being an administrative proceeding in which proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign court.

You should discuss that this supervision and control can be non-formal, see also the Agrogor Case.

(d) for the purpose of reorganisation or liquidation

In order to satisfy the requirement of a foreign proceeding under Article 2(a) MLCBI, the liquidation of the Bank in Country A must be for the purpose of reorganisation or liquidation. The GEI at paragraph 77 states that some types of proceedings that may satisfy certain elements of the definition of foreign proceeding in Article 2(a) MLCBI may nevertheless be ineligible for recognition because they are not for the purpose of reorganisation or liquidation.

The facts of the case clearly state the proceedings against the Bank in Country A is a liquidation proceeding in which –

- (i) the DGF is obliged to commence liquidation proceedings against the Bank on or before the next working day after the NB's decision to revoke the bank's licence;
- (ii) the DGF automatically becomes liquidator of the 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;
- (iii) all powers of the Bank's management and control bodies are terminated, all banking activities are terminated, all money liabilities due to the Bank are deemed to become due and the DGF alienates the Bank's property and funds;
- (iv) the DGF has the power to take over management of the property (including the money) of the Bank, the power to compile a register of creditor claims and to seek to satisfy those claims, the power to take steps to find, identify and recover property belonging to the Bank, the power to dispose of the Bank's assets and the power to exercise such other powers as are necessary to complete the liquidation of the Bank.

Hence, the liquidation proceedings against the Bank in Country A would satisfy the requirement of being for the purpose of liquidation.

In conclusion, having satisfied all of the requirements in Article 2(a) MLCBI, the Bank's liquidation in Country A would comprise a "foreign proceeding" within the meaning of Article 2(a) of the MLCBI. Since the Bank has its registered office in Country A, there would be a rebuttable presumption that the Bank's centre of main interests is in Country A (Article 16(3) MLCBI) and consequentially, the liquidation in Country A would be recognised as a foreign main-proceeding (Articles 2(b) and 17(2)(a) MLCBI).

²³ There was also a similar finding in the case of *PJSC Bank Finance and Credit, Re (Cross-Border Insolvency Regulations 2006)* [2021] EWHC 1100 (Ch) at paragraphs 47 to 55.

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

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

Paragraph 86 of the GEI states that Article 2(d) MLCBI recognises that the foreign representative may be a person authorised in the foreign proceedings to administer those proceedings which would include seeking recognition, relief and cooperation in another jurisdiction, or they may simply be a person authorised specifically for the purposes of representing those proceedings.

The Applicants in this case are the DGF and Ms G, in her capacity as authorised officer of the DGF. The issue is whether the DGF and Ms G, in her capacity as authorised officer of the DGF, fall within the definition of “foreign representative” in Article 2(d) of the MLCBI.

In respect of the DGF, the facts of the case state that –

- (i) the DGF is obliged to commence liquidation proceedings against the Bank on or before the next working day after the NB’s decision to revoke the Bank’s licence;
- (ii) Article 77 of the LBBA provides that the DGF automatically becomes liquidator of the 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;
- (iii) once appointed, the DGF has the necessary powers to administer the liquidation of the assets and affairs of the Bank;
- (iv) on 17 December 2015, the NB formally revoked the Bank’s banking licence and resolved that it be liquidated; and
- (v) on 18 December 2015, the DGF initiated the liquidation procedure.

Being a body authorised in the liquidation of the Bank in Country A to administer the liquidation of the Bank’s assets and affairs, the DGF would fall within the definition of a “foreign representative” under Article 2(d) MLCBI.

The next question is whether Ms G, in her capacity as authorised officer of the DGF, falls within the definition of “foreign representative” in Article 2(d) of the MLCBI. The facts of the case state that –

- (i) the DGF is empowered, by article 48(3) of the DGF Law, to delegate its powers to an “authorised officer” or “authorised person”;
- (ii) on 17 December 2015, the NB formally revoked the Bank’s banking licence and resolved that it be liquidated;
- (iii) on 18 December 2015, 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; and
- (iv) 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 delegates to Ms G all liquidation powers in respect of the Bank set out in 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.

Ms G is appointed and authorised by the DGF to carry out all liquidation powers of the DGF save for certain excluded powers as stated in Resolution 1513. In this regard, the GEI in paragraph 86 states that the MLCBI does not specify that the foreign representative must be authorised by the court (as defined in Article 2(e) MLCBI) and the definition is thus sufficiently broad to include appointments that might be made by a special agency other than the court.

So long as Ms G exercises the specific powers that are delegated to her by Resolution 1513, Ms G would be a person authorised in the liquidation of the Bank in Country A to administer the liquidation of the Bank's assets and affairs. Hence, Ms G would fall within the definition of a "foreign representative" under Article 2(d) MLCBI.

In conclusion, subject to the express limitations on Ms G's powers, both the DGF and Ms G are authorised to administer the liquidation of the Bank and as such both meet the definition of "foreign representative" in Article 2(d). Hence, both Applicants (the DGF and Ms G) have the necessary standing to apply in that capacity, for recognition in the English courts, of the Bank's liquidation in Country A.²⁴

*** End of Assessment ***

Total marks: 41,5 out of 50

²⁴ *PJSC Bank Finance and Credit, Re (Cross-Border Insolvency Regulations 2006)* [2021] EWHC 1100 (Ch) at paragraph 66.