



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] 9,5 marks

Question 2.1 [maximum 3 marks] 2,5 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 set out the date for determining the COMI of a debtor. Pursuant to the UNCITRAL Guide to Enactment and Interpretation (“Guide to Enactment”),¹ the appropriate date for determining the COMI of a debtor, or whether an establishment exists, is the date of commencement of the foreign proceeding. This is based on the evidence required to accompany an application for recognition of the foreign proceeding (per Article 15, MLCBI) and the relevance accorded to the decision commencing the foreign proceeding and appointing the foreign representative. By taking the date of commencement of the foreign proceeding, there can be a certain result even if the business activity of the debtor ceases after commencement of the foreign proceeding, and this test can also be applied with certainty to all insolvency proceedings.

Where a debtor’s COMI moves near to commencement of the foreign proceeding, this could be an abuse of process and the court should consider all relevant factors and circumstances of the debtor. Movement of COMI after commencement of the foreign proceeding should not

¹ Paragraphs 157-160 of the UNCITRAL Guide to Enactment

affect the determination of COMI as the relevant date is the date of commencement of the foreign proceeding.²

You should address if this approach is being followed, i.e. in the USA.

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 – The relevant provision is Article 30(c) of the Model Law, which provides that the court shall grant, modify or terminate relief for the purpose of facilitating coordination of the proceedings where there are concurrent foreign non-main proceedings. In the case of concurrent foreign non-main proceedings, Article 30(c) does not a priori treat any foreign proceeding preferentially.

Statement 2 – This relates to the hotchpot rule in Article 32 of the Model Law, which provides that a creditor who has received part payment in respect of its claim in a foreign proceeding, may not receive payment for the same claim in a domestic proceeding as long as the payment to other creditors of the same class is proportionally less than the payment the creditor has already received. Secured claims or claims of creditors with rights in rem are not affected by this provision.

Statement 3 – This relates to the rebuttable presumption in Article 16(3) of the Model Law, which provides that in the absence of proof to the contrary, a debtor’s registered office, or habitual residence in the case of an individual, is presumed to be the debtor’s COMI. COMI is a key concept to the operation of the Model Law, but is not defined in the Model Law.

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 English Court of Appeal upheld the decision in the *IBA* case that the court should not exercise its power to grant the indefinite Moratorium Continuation on the following basis:

- (a) The 2 conditions that the stay would be necessary to protect the interests of IBA’s creditors and that the stay would be an appropriate way of achieving such protection, had not been satisfied. The court found that IBA’s creditors did not need protection in order for the restructuring in the foreign proceedings to be achieved. The court also found that IBA could have undertaken a parallel scheme of arrangement in the UK which would have addressed the claims of the challenging creditors (enforcing English law rights), but had chosen not to do so; and

² Paragraphs 148 – 149, UNCITRAL Guide to Enactment.

- (b) Once the foreign proceedings have ended and the foreign representative no longer holds office, there should not be further relief granted under the Model Law to support the foreign proceeding and any relief previously granted should terminate.

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**.

Where there is a domestic proceeding already opened at the time of recognition of a foreign main proceeding, the court must ensure that any relief to be granted (whether interim relief under Article 19 or post-recognition relief under Article 21) must be consistent with the domestic proceeding. This is provided for in Article 29(a) of the MLCBI. The automatic relief for foreign main proceeding in Article 20 will also not apply.

With regard to the ongoing obligation of the foreign representative to update the court in the enacting State, this is set out in Article 18 of the MLCBI. Article 18 provides that, from the time of filing the application for recognition of the foreign proceeding, the foreign representative must inform the said court 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.

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

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

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

Question 3.1 [maximum 4 marks] 4 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?

Even without making a recognition application in State A, the foreign representative has the right of direct access (i.e. *locus standi*) to apply directly to the court in State A (Article 9 of the Model Law). This right enables the foreign representative to have standing in the court in State A without having to meet formal requirements which may otherwise be required. Further, Article 11 of the Model Law provides the foreign representative the right to directly apply for commencement of domestic insolvency proceedings in State A, provided the conditions for commencing such a proceeding under the laws of State A are otherwise met. Again, this right

of access is enjoyed by the foreign representative without having to make a recognition application.

Cooperation rights under the Model Law are not dependent upon recognition and therefore may occur before an application for recognition. Article 25 provides that the court in State A must co-operate to the maximum extent possible with foreign courts or foreign representative, and can communicate directly with, or request information or assistance from, the foreign court or representative. Article 26 then provides for the domestic insolvency office-holder in State A to co-operate to the maximum extent possible with the foreign courts or foreign representative and is entitled to communicate directly with them. In this regard, Articles 25 and 26 not only authorise cross-border cooperation but mandate it by providing that the court and insolvency representative “shall cooperate to the maximum extent possible” with the foreign court or foreign representative.³

These rights of access and co-ordination as mentioned above will benefit the foreign representative as it provides the foreign representative with rights in State A without having to take additional action or separate proceedings, and ensure that State A’s courts and domestic insolvency office-holder will co-operate with the foreign representative. This will save time and costs, and is particularly crucial when there is a matter of urgency.

Question 3.2 [maximum 5 marks] 3 marks

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

On the assumption that the qualifications for “foreign proceeding” and “foreign representative” within the meaning set out in Article 2 are met, Article 15(2) of the MLCBI sets out that a recognition application shall be accompanied by the following evidence:

- (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.

In this regard, Article 16 sets out various presumptions, including that the court is entitled to presume that foreign proceeding and foreign representative are within their relevant meanings set out in Article 2(a) and 2(d) respectively if the decision or certificate above states so, and that the documents submitted to support the recognition application are authentic whether or not they have been legalised.

Even if the submission requirements for a recognition application are met, Article 6 of the MLCBI provides that nothing in the Model Law prevents the court from refusing to take an action governed by the Model Law (which would include granting recognition) if such action would be manifestly contrary to the public policy of the enacting State. Article 6 essentially

³ Paragraphs 212 and 213 of the UNCITRAL Guide to Enactment.

provides an all-encompassing exception which the court can apply to safeguard the enacting State's sovereignty. In this regard, public policy is construed domestically and differs from state to state. However, the expression "manifestly contrary to the public policy" emphasises that public policy exceptions should be interpreted restrictively and that Article 6 is only intended to be invoked under exceptional circumstances concerning matters of fundamental importance for the enacting State.⁴ This higher threshold was addressed by the English court in the *Agrokor*⁵ case, where the court found that differences in respect of priority rules between the Croatian proceeding and the English proceeding is not enough to invoke the exception.

On the other hand, a significant breach of the full and frank disclosure obligation by the foreign representative to the court in State A that amounts to abuse of process may be grounds for denying a recognition application on the public policy exception.⁶

Article 17 provides that if the submission requirements for the recognition application are met and the recognition is not contrary to the public policy of State A, then recognition will be granted.

You should also address 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 as any restrictions, limitations or conditions that should be considered in this context. For purposes of this question, it can be assumed that there is no concurrence of proceedings.

Article 19 of the MLCBI sets out the interim relief that may be granted at the request of the foreign representative, from the time of filing of the recognition application until the application is decided upon, where the relief is urgently needed to protect the assets of the debtor or the interest of the creditors. Such relief is provisional in nature and includes:

- (a) Stay of execution against the debtor's assets;
- (b) Entrusting the administration or realisation of the debtor's assets in State A to the foreign representative or another person designated by the court, to protect and preserve the value of the assets that, by their nature or because of other circumstances, are perishable, susceptible to devaluation or otherwise in jeopardy;
- (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) Granting any additional relief that may be available to the domestic office-holder under the laws of State A.

The reliefs provided under Article 19 are essentially the type of relief that is usually available in collective insolvency proceedings.⁷

Where the foreign proceeding is recognised as a foreign main proceeding, Article 20 provides automatic relief as follows:

⁴ Paragraph 104, UNCITRAL Guide to Enactment.

⁵ *Agrokor DD* [2017] EWHC 2791 (Ch).

⁶ *Nordic Trustee A.S.A & anr v OGX Petroleo e Gas SA* [2016] EWHC 25 (Ch).

⁷ Paragraphs 171 – 172, UNCITRAL Guide to Enactment.

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

Unlike the reliefs provided under Article 19 and 21 which are discretionary, the reliefs in Article 20 are automatic and flows from recognition of the foreign main proceeding. However, the automatic reliefs do not apply if there is an existing concurrent domestic insolvency proceeding.

Finally, Article 21(1) provides that the court may grant any appropriate relief upon recognition of the foreign proceeding, whether main or non-main, where necessary to protect the assets of the debtor or interest of the creditors, including:

- (a) The three (3) reliefs which are set out above in relation to Article 20, to the extent such rights have not been stayed or suspended already under Article 20;
- (b) Providing for the examination of witnesses, taking of evidence or delivery of information concerning the debtor's assets, affairs, rights, obligations or liabilities;
- (c) 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;
- (d) Extending relief granted under paragraph 1 of article 19 (as described above);
- (f) Granting any additional relief that may be available to the to the domestic office-holder under the laws of State A.

The reliefs set out in Article 21(1) above are not exhaustive.

Further, Article 21(2) provides that the court may, at the request of the foreign representative, entrust the distribution of the debtor's assets located in State A to the foreign representative or another person designated by the court, provided that the court is satisfied that the interests of creditors in State A are adequately protected.

There are certain limitations to the appropriate relief which may be granted under Article 21, depending on the laws of the enacting State. For example, in the case of *Fibria Celulose S/A v Pan Ocean Co Ltd*,⁸ the English court found that applying foreign insolvency law to a contract governed by English law is outside the scope of appropriate relief that could be granted. However, such findings may differ in other States.

Article 22 of the MLCBI provides that in granting or denying relief under Article 19 or 21, the court must be satisfied that the interests of the creditors and other interested persons, including the debtor, are adequately protected. The court may impose conditions to reliefs granted under Article 19 or 21 as the court considers appropriate. The court may also, at the request of the foreign representative or persons affected by the relief or on its own motion, modify or terminate such relief. The provisions of Article 22 is to ensure there is a balance between relief that may be granted to the foreign representative and the interests of the persons that may be affected by such relief (e.g. local creditors) and the court may tailor the discretionary relief to the case at hand.

You should also address art. 3 and 6.

Question 3.4 [maximum 1 mark] 1 mark

⁸ [2014] EWHC 2121 (Ch).

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 pre-recognition interim relief under Article 19 must have been due to urgency to protect the assets of the debtor or the interests of creditors, for example where the assets are in jeopardy. Such order would have been provisional in nature and will terminate when the recognition application is decided upon.

While the court has the discretion to extend such interim worldwide freezing order post-recognition under Article 21, it is unlikely to do so as such order is very wide and does not take into account the specific needs of the case at hand. The court must ensure the appropriate relief strikes a balance between relief that may be granted to the foreign representative and the interests of the persons that may be affected by such relief. The relief must be tailored taking into account, among others, that foreign non-main proceeding should not be given unnecessarily broad powers, whether there is adequate protection of the interests of creditors and other interested persons.

QUESTION 4 (fact-based application-type question) [15 marks in total] 13,5 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 "Foreign proceeding"

At the outset, it is assumed that the Bank is not excluded from the scope of MLCBI by article 1(2) of the MLCBI.

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

Whether the Bank's liquidation amounts to a foreign proceeding depends on whether all elements of the definition are met.

Collective judicial or administrative proceeding in a foreign State

The UNCITRAL Guide to Enactment⁹ provides that a proceeding under the Model Law must be a collective proceeding as the Model Law is intended to provide a tool for achieving a coordinated, global solution for all stakeholders of an insolvency proceeding, and not just for a particular creditor or group of creditors. It also recognises that the Model Law may be an appropriate tool for actions that serve a regulatory purpose, such as receiverships for publicly regulated entities as insurance companies or brokerage firms, provided the proceedings are collective.

A key consideration of whether a proceeding is collective is whether substantially all of the assets and the liabilities of the debtor are dealt with in the proceeding. It may still be a collective proceeding even if a particular class of creditors' rights are unaffected by it (e.g. secured creditors claims which may be pursued outside the proceedings).¹⁰

On the facts, in entering liquidation for the Bank, the DGF has full powers of a liquidator including power to compile a list of the Bank's creditor claims and seek to satisfy those claims. The DGF has power to take over and manage property of the Bank, as well as to dispose of

⁹ Paragraphs 69 – 72, UNCITRAL Guide to Enactment.

¹⁰ Paragraph 72, Model Law on Cross-Border Insolvency: The Judicial Perspective

the Bank's assets and of distribution to the creditors. As the liquidation proceedings for the Bank in Country A deals with substantially all of the assets and liabilities of the Bank and satisfaction of the creditor claims, and the liquidation proceedings are for regulatory purpose, it would fulfil the element of collective judicial or administrative proceedings in a foreign State.

Pursuant to a law relating to insolvency

Under the Model Law, this requirement is meant to encompass any law that deals with or addresses insolvency or severe financial distress, regardless whether or not the law is labelled insolvency law. A simple proceeding for a solvent legal entity that does not seek to restructure the financial affairs of the entity, but rather to dissolve its legal status, is likely not one pursuant to a law relating to insolvency or severe financial distress.¹¹

The UNCITRAL Guide to Enactment (paragraph 48) also clarifies that where a proceeding serves several purposes, including the winding-up of a solvent entity, it fulfils the element if the debtor is insolvent or in severe financial distress.

Judicial precedents provide some guidance on how English courts have interpreted this requirement, where the proceeding was not necessarily commenced on insolvency grounds. In the case of *Stanford International Bank*, the English court found that the liquidation of an Antiguan company on the basis that it was just and equitable to do so was "pursuant to a law relating to insolvency". The court found that although the ground for liquidation was confined to regulatory misbehaviour under the applicable legislation, the insolvency was a factor in the Antiguan's court discretion to make the order. This finding was upheld by the English appellate court on the basis that just and equitable grounds included insolvency as well as infringements of regulatory requirements.¹²

In the *Agrokor* case,¹³ the English court found that the requirement of "law relating to insolvency" is satisfied if the law deals with insolvency or severe financial distress. It is fulfilled if insolvency is one of the grounds on which the proceeding could be commenced, even if insolvency could not actually be shown.

In the case of the Bank and taking into consideration the guidance above, I am of the view that the English court would find the requirement of "law relating to insolvency" satisfied on the basis that:

- (a) The grounds for declaring a bank insolvent is upon fulfilment of the criteria in article 76 of the LBBA, one of which is the failure to meet 2% or more of its obligations to depositors or creditors. Failure to meet the obligations to depositors or other creditors amounts to cash-flow insolvency. Thus, the LBBA is an insolvency law as one of the grounds on which liquidation proceedings could be commenced is cash-flow insolvency, even if the Bank was not declared insolvent on this ground.
- (b) Although the Bank was declared as insolvent as it failed to remedy its risky operations after it was classified as "troubled", it is evident from the risky operations identified (including continued worsening of capital beyond minimum requirements, deteriorating financial position, substantial liabilities with questionable repayment, increase in illiquid assets) that the Bank was in severe financial distress when liquidation proceedings commenced.

¹¹ Paragraph 73, UNCITRAL Guide to Enactment.

¹² Paragraph 80, Model Law on Cross-Border Insolvency: The Judicial Perspective.

¹³ *Agrokor DD* [2017] EWHC 2791 (Ch)

The Affidavit also states that the Bank's current estimated deficiency exceeds USD 823 million, although this is after the fact.

Subject to control and supervision of a foreign court

In this case, the assets and liabilities of the Bank are subject to the DGF (as the liquidator, pursuant to article 77 of the LBBA) and the liquidation proceedings are controlled by the DGF. Even if the DGF may delegate some of its powers to an authorised officer or authorised person, such officer or person is still accountable and supervised by the DGF for their actions in the Bank's liquidation. The DGF or its authorised person has extensive powers under article 37 of DGF Law, including powers to exercise managerial and supervisory powers, enter into contracts etc.

The DGF is a governmental body of Country A which is economically independent, and its functions and powers cannot be interfered with by the NB of other public authorities.

A "foreign court" is defined in article 2(e) of the Model Law as a judicial or other authority competent to control or supervise a foreign proceeding. Therefore, this element will be satisfied if the proceedings are controlled or supervised by a judicial body or by an administrative body. This approach is to ensure that those legal systems in which control or supervision was undertaken by non-judicial authorities would still fall within the definition of foreign proceedings.¹⁴

In view of this, the control and supervision of the Bank's liquidation proceedings by the DGF will satisfy this element, even if the DGF is a non-judicial authority. This is further supported by judicial precedent, such as in *Tradex Swiss AG* (384 BR 34 at 42 (2008)) [CLOUT case no. 791], the Swiss Federal Banking Commission was held by the court in the United States of America to be a "foreign court" because it controlled and supervised liquidation of entities in the brokerage trade.¹⁵

For the purpose of liquidation or reorganisation

On the facts, the Bank has entered in liquidation and 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 due and the DGF alienates the Bank's property and funds. The DGF has full powers of the liquidator including the power to dispose of the Bank's assets and of distribution to the Bank's creditors, and all powers as are necessary to complete the liquidation of a bank.

As such, it is clear that the proceedings are for the purpose of the liquidation of the Bank.

In view of the above, it is likely that the liquidation proceedings of the Bank is within the meaning of "foreign proceedings" under article 2(a) of the Model Law.

4.1.2 "Foreign representative"

"Foreign representative" is defined in article 2(d) of the Model Law to mean 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.

¹⁴ Paragraph 84, Model Law on Cross-Border Insolvency: The Judicial Perspective.

¹⁵ Footnote 115 of the Model Law on Cross-Border Insolvency: The Judicial Perspective.

Here, the DGF and Ms G are applying for recognition of the foreign proceedings.

The DGF is appointed as the liquidator of the Bank pursuant to article 77 of the LBBA. Although some of its powers have been delegated to Ms G, the DGF still retains important powers of a liquidator, including in particular the power to arrange for sale of the Bank's assets. As such, the DGF is a body authorised in the Bank's liquidation proceedings to administer the Bank's assets and is a foreign representative within the definition of article 2(d) of the Model Law.

As for Ms G, the DGF has delegated to her all liquidation powers in respect of the Bank save for those powers expressly excluded and retained with the DGF. The powers delegated to Ms G include the power to sign agreements relating to sale of the bank's assets and article 37 which provides that DGF (or its authorised person i.e. Ms G) has extensive powers including powers to exercise managerial and supervisory powers, enter contracts, restrict or terminate bank transactions and to file claims with a court. As such, Ms G is a person authorised by the DGF in the Bank's liquidation proceedings to administer the liquidation of the Bank, and is a foreign representative within the definition of article 2(d) of the Model Law.

As such, both the DGF and Ms G would fall within the meaning of foreign representatives.

For full marks, a bit more elaboration on the requirements as set out and explained in the Guide to Interpretation.

*** End of Assessment ***

Total marks: 43 out of 50