



**SUMMATIVE (FORMAL) ASSESSMENT: MODULE 2A**

**THE UNCITRAL MODEL LAWS RELATING TO INSOLVENCY**

Commented [SL1]: TOTAL = 41.5

83%

*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: 202223-336.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 2023. The assessment submission portal will close at 23:00 (11 pm) GMT on 1 March 2023. 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 2023 or by 23:00 (11 pm) BST (GMT +1) on 31 July 2023. If you elect to submit by 1 March 2023, you may not**

*submit the assessment again by 31 July 2023 (for example, in order to achieve a higher mark).*

7. *Prior to being populated with your answers, this assessment consists of 14 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]**

Commented [SL2]: SUBTOTAL = 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 does not reflect the purpose of the Model Law?

- (a) The purpose of the Model Law is to provide greater legal certainty for trade and investment.
- (b) The purpose of the Model Law is to provide protection and maximization of the value of the debtor's assets.
- (c) **The purpose of the Model Law is to facilitate the rescue of a financially troubled business, by providing a substantive unification of insolvency law.**
- (d) The purpose of the Model Law is to provide a fair and efficient administration of cross-border insolvencies that protects all creditors and the debtor

Question 1.2

Which of the following statements are reasons for the development of the Model Law?

- (a) The increased risk of fraud due to the interconnected world.
- (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) **All 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

Commented [SL3]: Correct answer is (b).

**Which of the following rules or concepts set forth in the Model Law ensures that fundamental principles of law are upheld?**

- (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 Argentina, foreign main proceedings are opened in South Africa and foreign non-main proceedings are opened in Argentina. Both the South African foreign representative and the Argentinian 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), Argentina 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 Argentina will be recognised in the UK despite Argentina not having implemented the Model Law.*
- (b) *Both the foreign main proceedings in South Africa and the foreign non-main proceedings in Argentina will not be recognised in the UK because the UK has no principle of reciprocity and Argentina has not implemented the Model Law.*
- (c) **Both the foreign main proceedings in South Africa and the foreign non-main proceedings in Argentina 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 be satisfied that the foreign proceeding is a main proceeding.**

**(d) All of the above.**

Question 1.8

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

**(a) COMI is not 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) For an individual debtor, the Model Law does contain a rebuttable presumption that the debtor's habitual residence is its COMI.**

**(d) All of the above.**

Question 1.9

Commented [SL4]: Correct answer is (c).

**An automatic stay of execution according to article 20 in the Model Law covers:**

**(a) Court proceedings.**

**(b) Arbitral Tribunals.**

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

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

Question 1.10

**Article 13 grants access to the creditors in a foreign proceeding. Which of the following statements correctly describes the protection granted in Article 13?**

**(a) A foreign creditor has the same rights regarding the commencement of, and participation in, a proceeding as creditors in this State.**

**(b) A foreign creditor has the same rights as it has in its home state.**

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**(c) All foreign creditors' claims are, as a minimum, considered to be unsecured claims.**

**(d) Article 13 contains a uniform ranking system to avoid discrimination.**

**QUESTION 2** (direct questions) [10 marks in total]

Commented [SL5]: SUBTOTAL = 8.5 MARKS

**Question 2.1** [maximum 3 marks]

Commented [SL6]: 3 marks

**Under the MLCBI, explain and discuss what the appropriate date is for determining the COMI of a debtor?**

*COMI is not defined under the MLCBI but must be determined by reference to certain factors which correspond with or which point to the location of what is referred to as the debtor's centre of main interest. There are a number of factors which a court may take into consideration when determining the debtor's COMI, however under the MLCBI the two main factors are:*

- 1. The place where the debtor's central administration takes place; and*
- 2. such place which is readily ascertainable by the debtor's creditors.*

*Accordingly, such factors may include the debtor's registered office (in the case of a corporate debtor) or the habitual residence (in the case of an individual); - in fact Article 16 provides rebuttable presumptions to this effect.*

*Determining the COMI is important because it determines where the judicial proceedings will be held, and in the case of concurrent proceedings, it determines which proceeding should be designated as the main proceeding. Such determination aims to ensure a fair and efficient insolvency proceedings.*

*Because the COMI can change and/or be manipulated at any time, by relocation for example, the appropriate date for determining the COMI requires careful analysis. Generally, the appropriate date for determining the COMI is the date of commencement of the foreign proceedings. In practice, this means that the existence of certain factors (e.g. registered office) in the particular state at the time of the commencement will most likely mean that that state is the debtor's COMI. In other words, this type of COMI analysis seeks evidence that supports the regularity and ascertainability of the debtors COMI. However, it is noted that there are slightly different approaches towards the date for determining the COMI. In the recent USA case *Morning Mist Holdings Ltd v Kryz*<sup>1</sup> it was held that determination of the debtor's COMI should be based on debtor's activities at or around the time of the filing of the Chapter 15 petition. Interestingly, these activities could include liquidation activities or administrative functions.*

<sup>1</sup> 2<sup>nd</sup> Cir Appeals Apr. 16, 2013



*In essence there needs to be close proximity (time wise) between the commencement date of the foreign proceeding and the relevant business activities of the debtor. The less proximate the relevant business activities the weaker and more difficult the evidence to support the notion of regularity or ascertainability of the COMI.*

**Question 2.2 [maximum 3 marks]**

**Commented [SL7]:** 2.5 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.**

3 = Art 16(3)

**Statement 1** *"This Article lays down the requirements of notification of creditors."*

**Statement 2** *"This Article is referred to as the 'Safe Conduct Rule'."*

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

**Article 14 - Notification to foreign creditors of a proceeding under [laws of enacting State relating to insolvency]**

*This article ensures that all creditors are treated equally as it relates to being notified and receiving timely notification of the proceedings. The article stipulates how creditors should be notified and removes any encumbrances for foreign creditors.*

**Article 10 - Limited Jurisdiction**

*This article also known as the "Safe Conduct Rule" limits the enacting state's jurisdiction over the foreign representative and the debtor's foreign assets when the foreign representative makes an application for recognition. Importantly, the article provides immunity against exposure of the debtor's assets to an all-embracing state; such exposure being possible when triggered by an application for recognition. The UNCITRAL Model Law on Cross-Border Insolvency with Guide to Enactment and Interpretation at paragraph 110 states that:*

*The limitation on jurisdiction over the foreign representative embodied in article 10 is not absolute. It is only intended to shield the foreign representative to the extent necessary to make court access a meaningful proposition. It does so by providing that an appearance in the courts of the enacting State for the purpose of requesting recognition would not expose the entire estate under the supervision of the foreign representative to the jurisdiction of those courts.<sup>2</sup>*

<sup>2</sup> UNCITRAL Model Law on Cross-Border Insolvency with Guide to Enactment and Interpretation

**Article 16 - Presumption concerning Recognition**

*This Article contains the rebuttable presumption in respect of the debtor's centre of main interest or COMI, which is a fundamental but undefined key concept in the Model Law. In the case of a corporate director, the presumed COMI is its registered office. In the case of an individual, the presumed COMI is the habitual place of residence.*

*The COMI is fundamental to the operation of the Model Law because proceedings commenced in that jurisdiction are given greater deference and more immediate, automatic relief. The concept is however undefined so that the essential attributes that would determine where the proceedings is likely to commence can be more liberally ascribed without a restrictive definition.*

*The Article 16 presumptions helps to expedite the evidentiary process in a case.*

**Question 2.3 [2 marks]**

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

*Cross-Border Insolvency Regulations 2006 (CBIR), which implemented the UNCITRAL Model Law on Cross-Border Insolvency in the UK provides the English court with a discretionary procedural power to grant appropriate relief where such relief would be necessary to protect the assets of the debtor or the interest of the creditors. Granting such relief could also be justified under the principles of universalism, in particular, to assists foreign insolvency processes and also in support of the rescue culture - which are key purposes of the Model Law. Accordingly, appropriate relief could be continuation of a moratorium, as long as it was necessary to protect the assets of the debtor or interests of creditors and advance the principles of universalism. It is noted that what is appropriate relief is not specified under the Model Law.*

*IBA sought an indefinite moratorium continuation in the UK courts to prevent two of its creditors from enforcing their English law governed claims. Article 20 of the MLCBI (through the CBIR) initially afforded IBA an automatic stay following its successful recognition application as a foreign main proceeding. Such stay was to last until the completion of IBA's Azerbaijan restructuring process. However, IBA's application for the indefinite moratorium aimed to prevent the two creditors from enforcing their claims against IBA beyond the Azerbaijan restructuring process;- i.e a permanent moratorium which would have the effect of discharging the English law governed debts. Such an outcome was prevented by Gibbs Rule which said that an English law debt cannot be discharged by a foreign proceeding without consent.*

**Commented [SL8]: 1 mark**

In respect of each issue, the English Court of Appeal held that:  
1. The UK court would need to be convinced that (a) the indefinite stay is necessary to protect the interests of IBA's creditors and (b) an indefinite stay is the appropriate way of achieving such protection.  
2. Based on Article 18 of the MLCBI, the English Court of Appeal in the IBA case appeal held that had the MLCBI ever contemplated the continuance of relief after the end of the relevant foreign proceeding, it would have addressed the question explicitly and provided appropriate machinery for that purpose.

*The Court of Appeal refused to grant the indefinite moratorium because notably, Articles 20 and 21 were designed to give debtors limited, modest breathing space necessary to organise an orderly and fair insolvency/restructuring;- the temporary moratorium was appropriate relief during IBA's restructuring process. IBA's restructuring ended and they resumed trading thus an indefinite moratorium was not necessary nor the appropriate way to protect their assets or interests of creditors. Furthermore, the CBIR's procedural power could not be used to effectively extinguish the rights of the two English law creditor claims, such rights being guaranteed by the Gibbs Rule. Moreover, it would inconsistent with the purpose of the Model Law for a stay to outlast the foreign proceeding to which the stay relates.*

**Question 2.4 [2 marks]**

Commented [SL9]: 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 proceeding? In your answer you should mention the most relevant article of the MLCBI. What (ongoing) duty of information does the foreign representative in the foreign main proceeding have towards the court in the enacting State? Here too you are required to mention the most relevant article of the MLCBI.***

*Article 29(a)(i)-(ii) provides that where a domestic proceeding is taking place at the time of the recognition of a foreign proceeding, the court should grant any relief under Article 19 or Article 21, however such relief must be consistent with the domestic proceeding. If the foreign proceeding is designated a foreign main proceeding, then article 20 does not apply, i.e. the domestic proceeding cannot be stayed for example.*

*Furthermore, Article 29(c) provides that where the court is granting relief in a foreign non-main proceeding, the court must be satisfied that the relief relates to assets that, under the law of the enacting State, should be administered in the foreign non-main proceeding; or the relief concerns information required in the foreign non-main proceeding.*

*The Guide to Enactment and Interpretation (GEI) notes that Article 29 maintains the pre-eminence of the local insolvency proceeding over the foreign proceeding by:*

- (a) requiring relief granted to the foreign proceeding to be consistent with the local proceeding;*
- (b) any relief already granted to the foreign proceeding must be reviewed and modified or terminated to ensure consistency with the local proceeding;*

(c) *if the foreign proceeding is a main proceeding, the automatic effects of recognition under article 20 are to be modified or terminated if inconsistent with the local proceeding; and*

(d) *if a local proceeding pending at the time the foreign proceeding is recognised as a main proceeding, the foreign proceeding does not enjoy the automatic effects of article 20.*

*Article 18 provides that the foreign representative has an ongoing obligation to inform the 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.*

*The principle is that such changes could have affected the decision for relief or recognition had those facts been known at the time of the decision or application.*

*Notably a substantial change would be the termination of the foreign proceedings. The difficulty in such a scenario is that (as enunciated by *Bakhshiyeva v Sberbank of Russia*) the obligation to inform under Article 18 falls upon the foreign representative, who is no longer in office.<sup>3</sup> In the Australian case *Yakushiji (No. 2)* it was found that in such a circumstance, the obligation to inform the court might appropriately fall upon the debtor.<sup>4</sup> In terms of relief, as there would be no scope for further orders in support of the foreign proceeding to be made any relief previously granted under the Model Law should terminate.*

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

Commented [SL10]: SUBTOTAL = 11 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] [3 out of 4 marks]

***The foreign representative is considering his options to secure the value of the debtor's assets located in State A. With reference to the Model Law's provisions on***

<sup>3</sup> [2018] EWCA Civ 2802

<sup>4</sup> [2016] FCA 1277

**access and co-operation, explain how these rights in State A can benefit the foreign representative.**

*Article 9 will give the foreign representative direct access rights by giving him standing before the court without the need for meeting formal requirements, consular action or recognition in the State A.[1] However, this article will not give him any other rights or powers to deal with the debtor's assets in the jurisdiction; notably Article 9 does not specify that any relief must be given.*

*Article 11 will also give the foreign representative similar access rights but additionally empowers him to request the opening of domestic insolvency proceedings, again without the need for recognition. [1] This would however be subject to all the requirements for opening a domestic proceeding being met. Article 11 may be useful option to protect debtor's assets especially on an urgent basis.*

*Article 12 will also give the foreign representative access rights and standing before the court to participate any insolvency proceeding in State A. This article however, does not specify what participation encompasses, however the GEI suggests it may include making petitions, requests or make submissions concerning protection, realization or distribution of debtor's assets or request for cooperation with the foreign proceeding.*

*Article 17 provides that foreign proceedings should be granted recognition as a matter of course, provided that the recognition is not contrary to the state's public policy. A successful recognition application gives the foreign proceedings certain automatic relief under Article 20 which includes staying execution against the debtor's assets. If designated a foreign main proceeding the foreign representative will have access to the domestic tools to secure the value of the assets in State A.*

*Article 19 provides interim relief while the Article 17 Recognition application is pending. Such pre-recognition relief are discretionary and may include:*

- a) Staying execution against the debtor's assets;*
- b) Entrusting the administration or realization of all or part of the debtor's assets located in this State to the foreign representative or another person designated by the court, 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;*

*In respect of co-operation Articles 25 and 26 mandates the court, and persons or bodies administering a reorganization or liquidation under the law of the enacting state, to co-operate to the maximum extent possible with the foreign court or foreign representative. [1] The requirement for co-operation is not linked to recognition of the foreign proceeding. In fact, co-operation may also*

*be available to proceedings which do not qualify as a foreign main or foreign non-main. Co-operation may be available on the basis of the presence of assets in the state.*

*Article 26 further provides that persons or bodies administering a reorganization or liquidation under the law of the enacting State are entitled, in the exercise of their functions and subject to the supervision of the court, to communicate directly with foreign courts or foreign representatives. Again, direct communication may be available to proceedings which do not qualify as a foreign main or foreign non-main and may be available on the basis of the presence of assets in the state.*

*Article 27 provides a non-exhaustive list of forms of co-operation which may be implemented under Articles 25 and 26 by any appropriate means. These include the following:*

- (a) Appointment of a person or body to act at the direction of the court;*
- (b) Communication of information by any means considered appropriate by the court;*
- (c) Coordination of the administration and supervision of the debtor's assets and affairs;*
- (d) Approval or implementation by courts of agreements concerning the coordination of proceedings;*
- (e) Coordination of concurrent proceedings regarding the same debtor;*

***For full marks you must refer to the key benefits of both the access provision and the cooperation provision in that they save time and therefore also costs, and as a result of which value destruction can be avoided and value enhancement be promoted.***

Question 3.2 [maximum 5 marks] [3 out of 5 marks]

***For a recognition application in State A to be successful, the foreign proceeding opened in State B must qualify as a "foreign proceeding" within the meaning of article 2(a) of the MLCBI and the "foreign representative" must qualify as a foreign representative within the meaning of article 2(d) of the MLCBI. Assuming that 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.***

*After being satisfied that both the foreign proceeding and the foreign representative have met the Article 2 qualifications, the court must further consider the following in order to approve an application for recognition.*

Public Policy consideration

*Article 17 states that recognition should be granted provided it is not contrary to public policy of the State as provided under Article 6. [1] Although there is no uniform definition for the concept of public policy it is noted that the concept is interpreted narrowly and applied consistently in exceptional circumstances. The GEI notes that the word 'manifestly' acts as a qualifier for the public policy expression and restricts the interpretation to matters which are of fundamental importance for the enacting state and not merely matters which are considered contrary or incompatible with the Model Law. The following are principles extrapolated from case law which can be considered when considering whether a recognition proceeding is manifestly contrary to public policy:<sup>5</sup>*

- (a) The mere fact of a conflict between foreign law and local law, absent other considerations, is insufficient to support the invocation of the public policy exception;*
- (b) Deference to a foreign proceeding should not be afforded in a recognition proceeding where the procedural fairness of the foreign proceeding is in doubt or cannot be cured by the adoption of additional protections;*
- (c) An action should not be taken in a recognition proceeding where taking that action would frustrate the ability of the courts to administer the recognition proceeding and/or impinge severely on a local constitutional or statutory right, particularly if a party continues to enjoy the benefits of the recognition proceeding.*

#### Procedural Requirements

*The court should ensure the core procedural requirements set out in Article 15 are complied with. This information will assist the court in granting the appropriate relief in support of the foreign proceedings and ensures consistency with other proceedings relating to the debtor. [1] The court is not expected to embark on considerable enquiry as to the legitimacy of the foreign proceeding, the authorisation of the foreign representative or the authenticity of the supporting documents. The court can rely on Article 16(1) presumptions - that the foreign proceedings is a proceeding within the meaning of Article 2(a), that the foreign representative is a person or body within the meaning of Article 2(d); and Article 16(2) presumption - that the documents provided in support of the recognition application are authentic, whether legalised or not.*

#### Designation of Foreign Proceeding

*State A will need to determine whether the foreign proceeding is a foreign main proceeding Article 17(2)(a) or a foreign non-main proceeding 17(2)(b). It is important to make the distinction between a main and non-main foreign proceeding because different consequences flow from the recognition of the two types of proceedings. [1]*

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<sup>5</sup> Digest of Case Law on the UNCITRAL Model Law on Cross-Border Insolvency, pg 20

Safe Conduct Rule

*Article 10 provides for what is referred to as the 'Safe Conduct Rule' which is basically a limitation on the court's jurisdiction over the debtor's assets. It aims to ensure that the court does not assume jurisdiction over all the debtor's assets on the sole ground that the foreign representative made and recognition application. However, the limitation is not absolute and only provides immunity to the extent that it is necessary to make access to the court a meaningful proposition.*

**With reference to the question, your answer should have included a discussion on the following:**

- 1. Exclusions:** *If the debtor is an entity that is subject to a special insolvency regime in State B, the foreign representative should first check if the foreign proceedings regarding that type of a debtor are excluded in State A based on Article 1(2) of the implemented Model Law in State A.*
- 2. Restrictions: Existing international obligations of State A:** *Based on Article 3 of the Model Law, the court in State A should also check if there are no existing international obligations of State A (under a treaty or otherwise) that may conflict with granting the recognition application under the implemented Model Law in State A.*
- 3. Judicial scrutiny:** *While the court in State A is able to rely on the rebuttable presumptions set forth in Article 16 of the Model Law, in the context of Article 17 of the Model Law the court will have to assess whether either the COMI or at least an establishment of the debtor is located in State B where the foreign proceedings were opened. If the COMI of the debtor is in State B the foreign proceedings should be recognised as foreign main proceedings and if only an establishment of the debtor is in State B the foreign proceedings should be recognised as foreign non-main proceedings. Without a COMI or at least an establishment of the debtor in State B, recognition cannot be granted by the court in State A.*

Question 3.3 [maximum 5 marks] [4 out of 5 marks]

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

*Article 19 provides the court with the power to grant pre-recognition relief, i.e. relief while an Article 17 recognition application is pending. This provision is useful where relief is urgently needed to protect the assets of the debtor or the interests of its creditors. These pre-recognition reliefs are discretionary and may include:*



- c) *Staying execution against the debtor's assets;*
- d) *Entrusting the administration or realization of all or part of the debtor's assets located in this State to the foreign representative or another person designated by the court, 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;*
- e) *Any relief mentioned in paragraph 1 (c), (d) and (g) of Article 21.*

*Although Article 19 is discretionary it is not without limitations. The relief must be necessary to protect the assets of the debtor or the interests of the creditors. Furthermore paragraph 4 requires the court to consider whether granting such relief will interfere with the administration of a foreign main proceeding; the aim being to foster coordination of pre-recognition relief with any foreign main proceedings. If there will be an interference the court can refuse to grant the relief.*

*Conditions for application of Article 19 are:*

- a) *an Article 17 Recognition application must be made*
- b) *court must satisfy itself that the interest of debtor's creditors and other interested parties are adequately protected.*

*A successful Article 17 recognition application gives the foreign proceedings certain automatic relief under Article 20 and will terminate the operation of Article 19.*

*Article 21 provides the court with discretionary power to grant post-recognition relief, i.e. relief following a successful recognition application. Note however, that Article 20 relief will become applicable and the Article 21 provision may only be applicable to the extent that certain relief was not automatically applicable under Article 20.*

*The Article 21 relief is broader than the Article 19 relief but is still discretionary. The following is the non-exhaustive list of forms of relief provided in Article 21 which could be implemented.*

- (a) *Staying the commencement or continuation of individual actions or individual proceedings concerning the debtor's assets, rights, obligations or liabilities, to the extent they have not been stayed under paragraph 1 (a) of Article 20;*
- (b) *Staying execution against the debtor's assets to the extent it has not been stayed under paragraph 1 (b) of Article 20;*
- (c) *Suspending the right to transfer, encumber or otherwise dispose of any assets of the debtor to the extent this right has not been suspended under paragraph 1 (c) of Article 20;*

- (d) *Providing for the examination of witnesses, the taking of evidence or the delivery of information concerning the debtor's assets, affairs, rights, obligations or liabilities;*
- (e) *Entrusting the administration or realization of all or part of the debtor's assets located in this State to the foreign representative or another person designated by the court;*
- (f) *Extending relief granted under paragraph 1 of Article 19;*
- (g) *Granting any additional relief that may be available to a person or body administering a reorganization or liquidation under the law of the enacting state.*

*Although the Article allows the court a degree of flexibility in granting relief, the power is not unlimited. The court will be obliged to make certain consideration including the following*

- a) whether the relief is manifestly contrary to public policy;*
- b) the appropriateness of the relief;*
- c) the necessity of the relief;*
- d) whether other relief is available,*
- e) the balancing requirement of Article 22.*

*Furthermore, the court can subject the relief granted to certain conditions.*

*The Digest of Case Law on the UNCITRAL Model Law on Cross-Border Insolvency canvases that Article 21:-*

*"...is circumscribed in several ways: it must be necessary to protect the interests of the creditors (meaning the interests of the general body of creditors as a whole)<sup>6</sup> or, as an alternative, to protect the assets of the debtor;<sup>7</sup> it would be subject to the public policy exception under article 6;<sup>8</sup> and regard must be had to article 22, paragraph 1, which emphasizes the need to tailor relief and conditions so as to balance the relief granted to the foreign representative and the interests of those affected by such relief, without unduly favouring one group of creditors over another.<sup>9</sup>"*

*Subparagraph 1 (e) set out a limitation that the assets in question should be assets located in the recognizing state.*

***For full marks, your answer must include a brief discussion on the following element: Existing international obligations of State A: Based on Article 3 of the Model Law, the court in State A should again verify that there are no existing international obligations***

<sup>6</sup> England: Larsen v Navios International Inc [2011] EWHC 878

<sup>7</sup> England: Pan Ocean Co Ltd [2014] EWHC 2124

<sup>8</sup> England: Pan Ocean Co Ltd [2014] EWHC 2124

<sup>9</sup> United States: Lavie v Ran (In re Ran), 607 F.3d 1017, 1026 (5th Cir. 2010)

**of State A (under a treaty or otherwise) that may conflict with granting the requested relief under the implemented Model Law in State A.**

Question 3.4 [maximum 1 mark] [1 mark]

**Briefly explain - with reference to case law - 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?**

*Article 21 provides post-recognition discretionary relief. Article 21(1)(f) includes discretion to extend relief granted under paragraph 1 of Article 19. The court would need to be satisfied that such relief is necessary.*

*In Igor Vitalievich Protasov and Khadzhi-Murat Derev<sup>10</sup> a post recognition application under Article 21 for the continuation of a worldwide freezing order previously granted under Article 19 was unsuccessful because the court held that there were restrictions and limitations on the court's jurisdiction to apply Article 21. The court noted that the scheme of the MLCBI aimed to put foreign representatives (following recognition) in the same position, as far as practicable, as domestic insolvency officeholder. Such officeholder would have access to tools available in the UK insolvency framework. i.e. the UK bankruptcy regime offered other forms of protection which the foreign representative now had access to following recognition. Therefore, the continued freezing order would not be necessary, justified or appropriate, there being no exceptional or special reasons.*

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

**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.**

<sup>10</sup> Order of 24 February 2021 by Mr Justice Ada Johnson, [2021] EWHC 392 (CH)(the *Protasov v Derev Case*)

**Proceedings were commenced 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 by 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] [14 out of 15]

**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 [9 out of 10]**

**For the bank's liquidation to be determined a "foreign proceeding" within the meaning of Article 2(a) of the MLCBI it has to satisfy the following characteristics or requirements:**

Collective: **the proceeding must be collective in nature. The GEI states that "In evaluating whether a given proceeding is collective for the purpose of the Model Law, a key consideration is whether substantially all of the assets and liabilities of the debtor are dealt with in the proceeding..."<sup>11</sup>. In *Betcorp (case no. 5)*, the court held that the voluntary liquidation was realizing assets for the benefit of all the debtor's creditors and as such the requisite aspect of a "collective" proceeding was present. Therefore, the rights and obligations of all creditors must be taken into account. Note however, that a proceeding should not fail the "collectiveness" test simply because a particular class of creditor's right is unaffected by the proceeding e.g. where an encumbered asset is excluded from the proceeding.**

**It is submitted that the proceeding is collective in nature. Article 34, 35 and 36 of the DGF Law gives DGF as liquidator all powers to deal with all the Bank's asset and all creditor claims including**

<sup>11</sup> UNCITRAL Model Law on Cross-Border Insolvency Law with Guide to Enactment and Interpretation, para 70, pg 40



*such other powers that are necessary to complete the liquidation of the Bank. In order to execute their duties as liquidator DGF will have to consider all the assets for the benefit of all the creditors - Gold & Honey (case no. 15). The collective proceeding would include proceedings which are interim, judicial or administrative, voluntary or compulsory, individual or corporate, for re-organization or wind-up proceedings. It is noted that this proceeding is administrative.*

Pursuant to a law relating to insolvency:

*“Insolvency proceedings” in Article 2(a) is referring to proceedings involving debtors which are insolvent or in severe financial distress. On 17 September 2015 the NB classified the Bank as insolvent pursuant to Article 76 of the LBBA.*

*For the purpose of the CBIR recognition application the proceeding must be a proceeding which is conducted under insolvency law/rule of a foreign state. It must be a proceeding which addresses or deals with the debtor’s severe financial distress or insolvency. This means that the proceeding can be pursuant to a law which is not necessarily label ‘insolvency law’ but can be pursuant to a range of insolvency rules which deals with the debtor’s financial distress or insolvency. Put another way, laws or rules which regulated the whole life-cycle of a corporation which includes insolvency can be rightly said to be a law relating to insolvency. The breadth of this interpretation also means that laws or rules which allow decisions to be made on just and equitable grounds, allowing a court to consider the insolvency of a debtor, would also be a law relating to insolvency; see Stanford International Bank case.*

*Note that insolvency proceedings can commence in circumstances defined by law which do not necessarily mean that the debtor is insolvent, e.g. the debtor’s cessation of payments, debtor’s corporate decision abandonment of debtor’s establishment or dissipation of debtor’s assets.*

*The GEI states that a proceeding that is seeking to dissolve a solvent entity is likely not one pursuant to a law relating to insolvency or severe financial distress for the purposes of article 2(a).*

*It is submitted that although the LBBA is not label as ‘insolvency law’ it is nevertheless a law that deals with the severe financial distress or insolvency of an entity. In fact, the NB can classify and*

*has classified the Bank as insolvent by reference to certain insolvency factors set out in the LBBA. The proceedings are therefore pursuant to a law relating to insolvency.*

Asset and affairs under the control or supervision by a foreign court:

*The “control or supervision” concept has received limited judicial scrutiny. However, courts have pointed out that both the affairs and assets of the debtor must be under the control or supervision of the foreign court in order to satisfy the definition.*

*The GEI notes that the Model Law does not specify the level of control or supervision or the timing at which such control or supervision arises. Nevertheless, the GEI noted that it is intended that the control or supervision should be formal in nature and it may be potential rather than actual.*

*Control or supervision does not need to be exercised directly by the court but can be by an insolvency representative who is subject to the control or supervision of the court.*

*The UNCITRAL Model Law on Cross-Border Insolvency: The Judicial Perspective noted that the requirement for control and supervision can be met in a variety of situations, including:*

- where liquidators can proceed with their duties largely without court involvement;*
- where the relevant law gives the court various control and supervisory roles with respect to liquidation proceedings;*
- where the court may ultimately become involved because the debtor is found to be insolvent and the nature of the proceeding has to change...<sup>12</sup>*

*Betcorp (case no. 5) held that a proceeding could be subject to supervision by a judicial authority where:*

- a) there is the ability of liquidators and creditors in a voluntary liquidation to seek court determination of any question arising in the liquidation;*
- b) there is the general supervisory jurisdiction of [the court] over actions of liquidators; and*

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<sup>12</sup> The UNCITRAL Model Law on Cross-Border Insolvency: The Judicial Perspective, Pg 30

c) *there is the ability of any person “aggrieved by any act, omission or decision” of a liquidator to appeal to [the court], which could “confirm, reverse or modify the act or decision or remedy the omission, as the case may be”*

*It is submitted that the assets and affairs of the Banks are under the supervision or control of the court of State A. Article 37 DGF Law states that the DGF has extensive powers including to file property and non-property claims with the court. The provision proves that the DGF has the ability to seek court determination of any question arising in the liquidation and as such the DGF is subject to the control or supervision of the court.*

The proceeding must be for the liquidation or reorganization:

*The purpose of the proceeding will need to be carefully considered because some proceedings may address the financial distress of the company but nevertheless are not dealing with the liquidating or reorganising the debtor.*

*Courts have confirmed that proceedings designed to prevent dissipation and waste, or to prevent detriment to investors, rather than to liquidate or reorganize the insolvency estate; proceedings in which the foreign representative does not have the authority to liquidate and distribute assets to satisfy creditor claims and proceedings designed to allow a certain party to collect its debts, do not satisfy this requirement of Article 2<sup>13</sup>*

*The proceeding is to liquidate the Bank. On or around 17 December 2015 the DGF initiated the liquidation procedure. .*

*If all the above elements are not satisfied an application under the CBIR will be denied.*

*It is submitted that all the characteristics or requirements are present to designate the Bank’s liquidation as a foreign proceeding for the purposes of Article 2(a) of Model Law (CBIR).*

***The elements you have addressed in your response are all addressed in a detailed way, with appropriate guidance and source references and you also apply the facts. However, for full marks, your response should also have explicitly addressed the following additional elements: the “proceedings” element, the “judicial or administrative” element” and “in a foreign State” element.***

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<sup>13</sup> Digest of Case Law on the UNCITRAL Model Law on Cross-Border Insolvency, pg 8

**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]. [5 out 5]**

*For the Applicants to be determined a “foreign representative” within the meaning of Article 2(d) of the MLCBI they have to satisfy the following characteristics or requirements:*

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

*The GEI states that Article 2(d) recognises that the foreign representative may be a person authorized 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 authorized specifically for the purposes of representing those proceedings.*

*The foreign representative does not need to be authorized by the court and the provision is broad enough to include appointments by special agencies. The appointment needs to be evidenced by certified copies of the decision appointing the representative, a certificate affirming the appointment or other evidence acceptable to the receiving court. The court can rely on the Article 16 presumption which allows the court to presume that the facts in the provided documents are true.*

*The focus is on the authorization granted to the foreign representative in the course of or the context of the proceeding rather than upon the body granting the authorization. Once the foreign representative is appointed and authorized there is no requirement to satisfy a disinterested test or conflict of interest test. Notably, the debtor can be appointed by the board of directors.*

*The MLCBI does not define the words ‘body’ or ‘person’ but the courts have found that a foreign representative can be a firm or an artificial person created by a legal authority. Accordingly, the Applicants would satisfy this element of the definition; clearly Ms. G is a person and DGF is a government body created by a legal authority.*

*Article 2(d) MLCBI is broad enough to include both DGF’s authorisation and Ms. G’s appointment to administer the foreign proceedings; DGF was automatically authorised by Article 77 LBBA when it received confirmation of NB’s decision to revoke the Bank’s license on 17 December 2015 and Ms. G’s appointment (effective 17 Aug 2020) was pursuant to a decision of the Executive Board of directors of DGF. Their respective authorisations will need to be evidenced by certified copies of the decision, certificate affirmation of the appointment or*

*other acceptable evidence by the English court. The English court can rely on Article 16 MLCBI presumption which would allow them to presume that the facts in the authorisation documents are true.*

*Once the court is satisfied about the appointments there is no requirement to satisfy a disinterested or conflict of interest test. Their authorisation would cover seeking recognition, relief and cooperation in England.*

*It is submitted that although Ms. G's appointment is restricted to certain acts that would not invalidate her appointment for the purpose of Article 2(d) as it is recognition a foreign representative may simply be a person authorized specifically for the purposes of representing the foreign proceedings. She remains under delegated authority of DGF which remains responsible for her actions.*

*It is therefore concluded that the Applicants fall within the description of "foreign representatives" as defined by Article 2(d) of the MLCBI.*

**[Excellent response!]**

While not all facts provided in the fact pattern given for this 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.**

\* End of Assessment \*