



SUMMATIVE (FORMAL) ASSESSMENT: MODULE 2A

THE UNCITRAL MODEL LAWS RELATING TO INSOLVENCY

Commented [SL1]: TOTAL = 37

74%

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

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

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

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

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

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

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.

(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?

The date of commencement of the foreign proceeding is the appropriate date for determining the COMI or whether an establishment exists. When a debtor's COMI moves, it is harder to establish the appropriate evidence for it if it occurs close to the commencement of foreign proceedings. Third parties, such as creditors, must readily be able to determine the COMI, particularly if the move occurs close to the commencement of foreign proceedings.

In Morning Mist Holdings Ltd v Kryz (Matter of Fairfield Sentry Ltd), the US Second Circuit of Appeals took a different approach to determining the relevant date for determination of COMI, stating that it should be determined based on its activities at the time of filing the Chapter 15 petition, as well as allowing further relevant activities, including liquidation and administration, to be considered in COMI analysis.

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.

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."*

Statement 1 - According to Article 14 and the equal treatment principle, foreign creditors should be notified whenever local creditors need to be notified in an enacting state. In order to ensure timely notice by expeditious means, Article 14 states "No letters rogatory or other, similar formality is required". A traditional "diplomatic channel" is too cumbersome and time-consuming in the context of insolvency proceedings. Paragraph 3 of Article 14 specifies what

notification to a foreign creditor of the commencement of proceedings in the enacting State should include.

Statement 2 - According to Article 10, the court in the enacting State will not assume jurisdiction over all of the debtor's assets solely due to the fact that a foreign representative has requested recognition of a foreign proceeding. This is referred to as the "safe conduct" rule. Foreign representatives and creditors have expressed concerns about exposure to all-encompassing jurisdiction triggered by applications under the Model Law, and some courts have reiterated the immunity afforded by article 10.

Statement 3 - Article 16 of the Model Law provides for a rebuttable presumption with respect to the COMI.

Question 2.3 [2 marks]

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

In the IBA case appeal, the English Court of Appeal held that the court had jurisdiction to grant the indefinite Moratorium Continuation requested by the foreign representative, and that the court should not exercise its power to grant the indefinite Moratorium Continuation where to do so would prevent the English creditors from enforcing their English law rights in accordance with the Gibbs Rule; and /or prolong the stay after the Azeri reconstruction has come to an end. The Court of Appeal addressed both forementioned concerns and was in favour of the Challenging Creditors.

The Court of Appeal held that the indefinite Moratorium Continuation was not an appropriate way to protect the interests of IBA's creditors. The English court could only properly grant the indefinite Moratorium Continuation if it were satisfied of two things: first, the stay would have to be necessary to protect the interests of IBA's creditors and, secondly, the stay would have to be an appropriate way of achieving such protection.

Question 2.4 [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.

Commented [SL8]: 1.5 marks

Reference to art 18 and court's conclusion in this regard

Commented [SL9]: 1.5 marks

Art 29(a) and art 18

Article 21 of the Model Law sets out the court's discretionary power to provide post-recognition relief. Courts in enacting states must ensure that the interests of creditors and other creditors are adequately protected. Accordingly, the court has the power to impose conditions on relief (paragraph 2) and may further modify or terminate relief at the request of the foreign representative or affected person (paragraph 3).

According to Article 18, the foreign representative shall inform the court in the enacting State, upon filing the recognition application for a foreign proceeding, of (i) any substantial change in the status of the recognised foreign proceeding or the status of the foreign representative's appointment and (ii) any other foreign proceeding regarding the same debtor that becomes known to the foreign representative.

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

Commented [SL10]: SUBTOTAL = 7.5 MARKS

A foreign representative of a foreign proceeding opened in State B in respect of a corporate debtor (the Debtor) is considering whether or not to make a recognition application under the 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] [1 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 access and co-operation, explain how these rights in State A can benefit the foreign representative.

The provisions of Chapter II (Articles 9-14), of the Model Law provide for access to the courts and non-discrimination principles, which should make it easier for the foreign representative and creditors to do business in the enacting State. The access rights and the safe conduct rule of article 10 of the Model Law should give foreign investors comfort because they ensure that local tools are available to the foreign representative without the need for separate proceedings in the enacting State to obtain such standing.

The automatic relief available under the Model Law, specifically the stay of actions or of enforcement proceedings, provides foreign representatives with the ability to seek relief from actions or enforcement proceedings, and to suspend transfers, which is essential to prevent fraud and protect the legitimate interests of the parties involved. Foreign representatives can seek discretionary relief under the Model Law, giving them maximum flexibility and allowing them to devise bespoke solutions tailored to the debtor's circumstances. Preliminary

relief can be sought as soon as an application for recognition is filed, preventing asset dissipation and preserving the status quo until the application is heard for the benefit of all stakeholders.

Access rights and recognition of foreign proceedings facilitate cooperation between courts and insolvency representatives from two or more countries and help promote consistency of treatment of stakeholders in cross-border insolvencies across jurisdictions.

Chapter IV (Article 25-27) of the Model Law deals with cross-border co-operation. [1] This fills a gap in the law by empowering courts to extend co-operation in certain specific areas. Insolvency representatives from two or more coalitions are able to work efficiently and effectively together and to help promote consistency of treatment of stakeholders in cross-border insolvencies across jurisdictions.

Your answer must include the following:

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

Question 3.2 [maximum 5 marks] [3.5 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.

Based on the assumption that both "foreign proceeding" and "foreign representative" are qualified for a recognition application, there are other evidence, restrictions, exclusions and limitations that must be considered as follows to overcome any difficulties in the application:

1) *Main or non-main proceedings - a foreign proceeding that is not opened in the jurisdiction of the debtor's COMI and does not have at least an establishment in the enacting State, cannot be recognised as a foreign proceeding for the purposes of the Model Law; [½] - **Article 17 (refer to relevant Article)***

2) *Article 3 Supremacy of other international obligations - if the enacted Model Law conflicts with a treaty or other form of multi-state agreement of the enacting State, then the treaty or international agreement prevails.*

3) *Article 6 - the public policy exception, which should be interpreted restrictively and only apply to matters of fundamental importance to the enacting state. [1]*

4) *Article 15, the evidential requirements for recognizing a foreign proceeding are outlined. Further, the court in the enacting State is limited to the jurisdictional preconditions in deciding whether the foreign proceeding should be recognised. [1]*

5) *According to paragraph 2 of Article 1, State A may exclude certain proceedings from the MLCBI's application. For instance, if the debtor is a bank, insurance company, public utility company, consumer, or non-trader. [1]*

The Model Law does not require reciprocity. Reciprocity provisions have however been incorporated by some States into the Model Law when it comes to recognition. As a result of these reciprocity requirements, the Model Law is significantly less effective than it could be, and in some cases it does not have any practical effect at all after it has been adopted.

Your answer must also include a brief discussion on the following elements:

1. 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.

- 2. **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.*
- 3. **Public policy exception:** Finally, the court in State A should also ensure based on Article 6 of the Model Law that the recognition application is not manifestly contrary to public policy of State A.*

Question 3.3 [maximum 5 marks] [2 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 deals with interim collective relief prior to the recognition of a foreign proceeding to protect the debtor's assets or creditors' interests. In both main and foreign non-main proceedings, the court of the enacting State can grant relief of a provisional nature at the request of the foreign representative from the time the recognition application is filed until the application is decided. - can include:

- a stay of execution against the debtor's assets;*
- entrusting the administration or realisation of all or part of the debtor's assets located in the enacting 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.*

According to Article 20, a recognised foreign proceeding qualifies as a foreign main proceeding if it includes:

- stay of individual actions or proceedings;*
- stay of execution against the debtor's assets;*

- *Suspending right to transfer, encumber or dispose of assets.*

Article 21 deals with the following post recognition relief:

(a) suspending the right to transfer, encumber or otherwise dispose of any assets of the debtor;

(b) providing for the examination of witnesses, the taking of evidence or the delivery of information concerning the debtor's assets, affairs, rights, obligations or liabilities; and

(c) granting any additional relief that may be available to a domestic liquidator / office holder under the laws of the enacting State.

There are case laws addressed in which the English court has determined certain limits to the appropriate relief under the Model Law, which is summarised below:

- *Insolvency-related personal default judgments are not covered by the Model Law;*
- *An English court cannot grant appropriate relief to a contract governed by foreign insolvency law;*
- *English court may not be able to grant an indefinite continuation of the automatic moratorium that resulted from an earlier recognition order.*

Your answer should have also included the following elements:

1. Post-recognition relief (automatic or discretionary): *In case of a foreign main proceeding, there will be automatic relief as set forth in Article 20 of the Model Law. For both foreign main and non-main proceedings, article 21 of the Model Law set forth what post-recognition relief can be requested by the foreign representative. Appropriate relief under Article 21(1) of the Model Law must be necessary to protect the assets of the debtor or the interests of the creditors. The relief set forth in Article 21(2) of the Model Law requires the court to be satisfied that the interests of the creditors in State A are adequately protected. In case of a foreign non-main proceeding there is an additional requirement that needs to be met before relief can be granted. According to Article 21(3) of the Model Law the court in such a case must also be satisfied that the relief relates to assets that, under the law of State A, should be administered in the foreign non-main proceeding or concerns information required in that proceeding.*

[In this context of relief, the foreign representative of State B could also think about the need to exercise any anti-avoidance powers in State A based on article 23 of the MLCB]

2. Adequate protection: *Pursuant to Article 22 of the Model Law any interim relief under Article 19 of the Model Law or any post-recognition relief under Article 21*

of the Model Law require the court in State A to be satisfied that the interests of the creditors and the other interested persons, including the debtor, are adequately protected and any relief may be subject to conditions as the court considers appropriate.

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

Question 3.4 [maximum 1 mark] [1 mark]

Briefly explain - 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?

In a recent English case between Igor Vitalievich Protasov and Khadzhi-Murat Derev, the question was whether under article 21 MLCBI a worldwide freezing order that was granted as provisional relief under article 19 MLCBI could continue after the recognition in the UK of a Russian bankruptcy as a foreign main proceeding. Although the English court held that it had jurisdiction in the strict sense to grant discretionary relief post-recognition, it found that relevant restrictions and limitations hindered its proper exercise. In the English bankruptcy regime, there are other forms of protection, so a freezing order or similar injunction is simply not warranted. As a result of the Model Law, a foreign trustee or bankruptcy manager is expected to be treated the same as an officeholder appointed under domestic law insofar as practicable. In accordance with this, recognition of a foreign main proceeding creates an infrastructure that is similar to that of an insolvency proceeding.

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.

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] [13 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 [8.5 out of 10]

To qualify for recognition under the MLCBI, a foreign proceeding must satisfy all of the elements in Article 2 (a). These are: a judicial or administrative proceeding that is based on the insolvency-related law of the enacting State; involvement of creditors collectively; control or supervision of the assets and affairs of the debtor by a court or another official body; and reorganization or liquidation of the debtor as the purpose of the proceeding.

1) Judicial or administrative proceeding [please note that "judicial or administrative" and "proceedings" are 2 separate elements that need to be met]

Even though some proceedings have both judicial and administrative components, several courts have suggested only one of those characteristics is required. Based on the facts provided, the Bank entered provisional administration on 17 September 2015 and liquidation on 17 December 2015. Country A's Deposit Guarantee Fund (DGF) is a government agency responsible for the process of withdrawing insolvent banks from the market and winding down their operations through liquidation. And proceedings were commenced in the High Court of England and Wales (Chancery Dividend) against various defendants on 11 February 202. The above facts support that there is a judicial proceeding.

[Regarding “judicial”, couldn’t it be argued that the liquidation of the bank is an administrative proceeding, invoking the powers given to the NB and DGF pursuant to the laws in Country A?]

2) collective insolvency proceeding

“Collective” insolvency proceedings are based on the desire to achieve a coordinated and global solution for all stakeholders. It is not intended that the MLCBI be used simply as a collection device for a particular creditor or group of creditors who may have initiated a collection proceeding in another State, or for gathered assets in winding up or conservation proceedings that do not include provisions for addressing creditors' claims. In the Bank Liquidation, the English Proceedings are against various defendants for the monies being sent to many overseas companies, including entities incorporated and registered in England.

See comments below.

3) pursuant to a law relating to insolvency

The MLCBI includes the requirement that the foreign proceeding is “pursuant to a law relating to insolvency” to acknowledge the fact that liquidation and reorganization may be conducted under law that isn’t labelled as insolvency law (e.g., company law), but that nevertheless deals with or addresses insolvency or severe financial distress. According to the Bank liquidation, the Bank has been insolvent since 17 September 2015.

See comments below.

4) in which the assets and affairs of the debtor are subject to control or supervision by a foreign court

MLCBI does not specify the level of control or supervision required to meet this aspect of the definition, nor when that control or supervision should be initiated. Control or supervision may be exercised not only by the court directly, but also indirectly by an insolvency representative. This is where, for example, the insolvency representative itself is subject to control and supervision by the court or other regulatory authority. Since the Bank was classified as troubled by NB on 19 January 2015, subsequently under supervision by DGF who started the process of directing the bank's affairs during the provisional administration. DGF has full and exclusive authority to manage the bank and to exercise all the bank's powers. Following the provisional administration, the DGG commenced liquidation proceedings against the Bank. According to Article 77 of the LBBA, the DGF automatically constitutes the liquidation of the bank. In its role as Liquidator, the DGF has extensive powers to deal with the Bank's assets and liabilities, conduct investigations, and compile a register of creditors' claims (which are not limited to these powers). The liquidation of the Bank is under the control of DGF and its authorised person with limited direct control by the Court.

5) for the purposes of liquidation or reorganization

Despite satisfying certain elements of the definition of foreign proceedings, some types of proceedings are not eligible for recognition. This is because they are not for the stated purpose of reorganization or liquidation. Instead of liquidating or reorganizing the insolvency estate, these proceedings are designed to prevent waste and dissipation, or to protect investors. In proceedings where the foreign representative is granted powers and duties that are more limited than those typically associated with liquidation or reorganization or does no more than preserve assets, the foreign representative is restricted. In a bank liquidation scenario, English proceedings are used to pursue claims against various parties for dissipated money, not for recognition or liquidation.

The “in a foreign State” element of the “foreign proceeding” definition should have been briefly addressed as well.

For full marks, your response should address each element in sufficient detail, provide guidance and source references as appropriate, and apply the facts. In your discussion of elements 2 and 3 more guidance and source references could be used. For element 2, for example, we are looking for something along the following lines:

- 1. UNCITRAL’s guide for judiciary, “The Model Law on Insolvency: The Judicial Perspective” (2013) explains the requirement for proceedings to be “collective”:**

“The UNCITRAL Model Law was intended to apply only to particular types of insolvency proceedings. The Guide to Enactment and Interpretation indicates that the notion of a “collective” insolvency proceeding is based on the desirability of achieving a coordinated, global solution for all stakeholders of an insolvency proceeding. It is not intended that the Model Law be used merely as a collection device for a particular creditor or group of creditors who might have initiated a collection proceeding in another State, or as a tool for gathering up assets in a winding up or conservation proceeding that does not also include provision for addressing the claims of creditors. The Model Law may be an appropriate tool for certain kinds of actions that serve a regulatory purpose, such as receiverships for such publicly regulated entities as insurance companies or brokerage firms, provided the proceeding is collective as that term is used in the Model Law.”

- 2. The Guide to Enactment and Interpretation of the UNCITRAL Model Law (2014) explains that when:**

“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, subject to local priorities and statutory exceptions, and to local exclusions relating to the rights of secured creditors. A proceeding should not be considered to fail the test of collectivity purely because a class of creditors’ rights is unaffected by it.”

- 3. Based on the facts provided the understanding is that *all* of the Bank’s creditors are entitled to claim in the liquidation and that their claims are met from available assets, according to the statutory order of priorities. Consequently, the conclusion can be reached that the Bank’s liquidation is a “collective proceeding”.**

4.1.2 whether the Applicants fall within the description of “foreign representatives” as defined by article 2(d) of the MLCBI [maximum 5 marks]. [4.5 out of 5]

“Foreign representative” refers to a person or body authorized to administer the reorganization or liquidation of the debtor's assets or to represent the foreign proceeding in a foreign proceeding. Article 2 (d) deals with this definition.

The Model Law does not specify that a foreign representative must be authorised by a foreign court.

In the Bank liquidation, Ms G is authorised by a Decision of the Executive Board of the Directors of the DGF. DGF delegated Mr G all liquidation powers in respect of the bank set out in the DGG Law with some exclusions. DGF has powers to claim damages from a related party of the Bank, the owner 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 and these powers.

Rather than focusing on who provided the authorization, courts have indicated that it was provided "in the course of" or "in the context of" the proceeding. The court, the law or even the debtor itself may provide authorization, such as the board of directors.

A foreign representative, if otherwise qualified, can be a firm of accountants, even though the MLCBI does not define the words "person" or "body." The term "body" means "an artificial person that is created by a legal authority" (citing Black's law dictionary). In accordance with DGF Article 35(1), which specifies the qualifications of an authorised person, Mr G was authorised by DGF under the DGF, which assumed that Ms G would have these qualifications.

Notwithstanding the above, both Ms G and DFG have the power to administer the reorganization or liquidation of the debtor's assets or affairs at the time of the application for recognition. In my view, both Applicants fall within the description of "foreign representatives".

Excellent response. For full marks, your response should also address the assumption of article 16(1) MLCBI.

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 *