



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

**THE UNCITRAL MODEL LAWS RELATING TO INSOLVENCY**

Commented [SL1]: TOTAL = 42.5

85%

*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 = 10 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

**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

**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 [SL3]: SUBTOTAL = 10 MARKS

**Question 2.1** [maximum 3 marks]

Commented [SL4]: 3 marks

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

*Prima facie, the COMI is to be determined as at the date of commencement of the foreign proceeding.*

*The MLCBI (1) does not define COMI; and (2) contains rebuttable presumptions as to the location of the COMI of a debtor (its registered office) or an individual debtor (their habitual residence) (Art. 16(3)). But in either case, determination of the COMI is to be a holistic exercise, preferably drawing on the factors identified in the UNCITRAL Guide to Enactment and / or the EC Insolvency Regulation, and including in particular the requirement that the COMI be readily ascertainable by third parties including creditors.*

*A potential tension therefore exists between a debtor's registered office (which is relatively easily relocatable at will) and its actual centre of commercial activities and administration (which is generally less so), a tension explored in the 2013 United States *Morning Mist* judgment. *Morning Mist* examined the commercial reality of a debtor's operations in the period between commencement of the foreign proceeding and the application for recognition in the enacting State, the Court's concern being to ensure a debtor had not sought to manipulate its COMI in bad faith. In the UK, the *Morning Mist* "filing approach" was followed in the unpublished 2019 *Re Toisa Limited* judgment - but more recently, in *Li Shu Chung* [2021] EWHC 3346 (Ch), the "commencement approach" was preferred, suggesting the English Courts may now prefer the latter method.*

**Question 2.2** [maximum 3 marks]

Commented [SL5]: 3 marks

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

**Statement 1** *"This Article 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: This statement refers to the regime outlined in Article 14 whereby (subject to the relevant court's discretion) the enacting state's creditor*

*notification requirements are also to be applied to known creditors overseas, who are entitled to individual notice including of the matters set out in Article 14(3), and which sidesteps the usual diplomatic channels in the interests of simplicity and speed.*

*Statement 2: This statement refers to the principle set out in Article 10, i.e. that an application for recognition of a foreign proceeding made in the enacting state does not subject the assets and affairs of the debtor to the jurisdiction of the enacting state for purposes beyond the application.*

*Statement 3: This statement addresses the Article 16(3) presumptions as to the location of a debtor's COMI (its registered office) or an individual debtor (their habitual residence). COMI is not a defined term in the MLCBI.*

**Question 2.3 [2 marks]**

**Commented [SL6]:** 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 the foreign representative, who had obtained the English Court's recognition, sought discretionary relief under Article 21 to continue an automatic moratorium granted under Article 20. The application was opposed by creditors who wished to pursue their English-law debt claims (which they alleged continued to exist pursuant to the Gibbs Rule) contrary to an Azeri-law restructuring under which all creditors' claims had been compromised. The continuation application was aimed at interdicting these creditors' efforts.*

*The first instance Court denied the foreign representative's application. In upholding that decision, the Court of Appeal held (with reference to the necessity test in Article 21(1)) that the proposed continuation was neither a necessary nor appropriate means to protect the interests of IBA's creditors (which the Court held, in effect, was the test for indefinite relief).*

*Doubly fatal to the application was the Court's finding that the Article 18 obligation to update the Court required the foreign proceeding to continue in existence - and by extension, the lack of any clear wording or machinery in the Model Law suggesting that relief should continue beyond the lifetime of the foreign proceeding (and by extension the foreign representative's term in office) meant that the indefinite continuation of a moratorium ought not to be granted. In particular, the Court noted that had the Model Law so intended, it would undoubtedly have dealt with the point explicitly and provided an appropriate mechanism.*

*The Court of Appeal also noted that an "artificial" continuation of the foreign proceeding, beyond the point where it had served its purpose as an insolvency*

*proceeding and into a period when the debtor had resumed normal trading, would not be sufficient to justify a continuation.*

**Question 2.4 [2 marks]**

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

*Chapter V of the MLCBI sets out a clear hierarchy of insolvency proceedings. Where domestic proceedings pre-date the recognition of a foreign main proceeding, Article 29(a) provides that (1) any reliefs granted under Articles 19 or 21 (i.e. the reliefs available upon the making of an application for, or grant of, recognition) must be consistent with those granted in the domestic proceeding; and (2) the automatic reliefs set out in Article 20 (which would normally follow recognition of a foreign main proceeding) do not apply.*

*Article 18 requires the foreign representative, on an ongoing basis from the point of filing the application for recognition of the foreign proceeding with the court of the enacting state and thereafter, to keep the court in the enacting state informed of "any substantial change" in the status of the foreign proceeding and/or his or her own appointment; and of any other foreign proceeding regarding the same debtor of which the foreign representative becomes aware.*

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

Commented [SL8]: 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] [2 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.**

*Access by foreign representatives (and creditors) to the courts of the enacting state is a fundamental principle of the Model Law. Article 9 grants foreign representatives *locus standi* in the local courts (though without more, vests no substantive powers in him or her); [½] Articles 11 and 12 allow the foreign representative to request, on the same terms as local creditor, the commencement of a (and following recognition, participate in an existing) domestic insolvency proceeding [½]*

*Thereafter, Articles 25 to 27 of the Model Law address cross-border cooperation, aimed at overcoming a common lacuna in local laws: the lack of effective mechanisms for coordination between judges in different jurisdictions, and the consequential increase in time and costs of cross-border insolvency. [½]*

*As an aside, the 2022 Judicial Perspective, Guide on Enactment, and Digest on Case Law each include extensive commentary and guidance on the meaning and scope of cooperation, to which our foreign representative might usefully refer.*

*Article 25(1) obliges the court of the enacting state (i.e. State A) to cooperate "to the maximum extent possible" with foreign courts or foreign representatives. The obligation to cooperate:*

- (1) Is, as a result, not only authorised but also mandated ("shall cooperate");*
- (2) Does not depend upon securing formal recognition under the Model Law (and can therefore occur at an early stage and without having made an application for recognition);*
- (3) Is further encouraged by Article 25(2), which entitles the Court to communicate directly with, or request information or assistance directly from, foreign courts or foreign representatives; and*

(4) Is not restricted to foreign proceedings qualifying for recognition via Article 17, meaning cooperation is available on the basis of assets within the enacting state, i.e. beyond the limited scope of foreign main or non-main proceedings.

The obligation to cooperate is not limited to the courts of the enacting state. Instead, Article 26(1) requires local insolvency practitioners to cooperate (subject to the supervision of the local court) "to the maximum extent possible" with foreign courts or foreign representatives, and to do so directly

Article 27 provides that cooperation under Articles 25 and 26 is to be "implemented by any appropriate means", and sets out a non-exhaustive list including the use of court-appointed representatives, coordination of the debtor's assets and affairs, communication by (in the court's view) appropriate means, and implementation or approval of appropriate agreements for coordinating proceedings. [½]

As is obvious from the above, the MLCBI cooperation regime, including its scope, extent and timing, are largely in the discretion of the local courts. The UNCITRAL Digest on Caselaw suggests that, fundamentally, the general principle is that:

*What article 25 envisaged [...] was some form of collaboration, joint enterprise or agreed parallel or complementary action of two or more courts in relation to the exercise of the independent jurisdiction of each within the framework of the law of the States concerned and not that one State should disregard important provisions of its own legal system.*

An important factor in the courts' supervision of cooperation, the commentaries suggest, is that cooperation "should be done carefully and with appropriate safeguards for the protection of the substantive and procedural rights of the parties", openly, with advance notice to and ideally in the presence of concerned parties (see the 2022 Judicial Perspective, for example). Simultaneous hearings, cross-border insolvency agreements, and similar arrangements may be available to our foreign representative.

**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.
- **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] **[4 out 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.**

*The Model Law regime for recognition of foreign proceedings is set out in Articles 15 to 18.*

*Article 15 sets out the evidential requirements for recognition of a foreign proceeding; these largely relate to documentary requirements and in summary require the submission of proof acceptable to the court of the enacting state of the existence of the foreign proceedings and appointment of the foreign representative, and disclosure of any other foreign proceedings of which the foreign representative is aware. **[1]***

*These documentary requirements are important because they also inform the Article 16 provisions regarding the extent to which the enacting state's court is entitled to presume that the foreign proceeding and the foreign representative fall within the scope of Article 2(a) and (d) respectively: if the documents submitted so indicate, the court is entitled so to presume. Article 16 also contains the Model Law's rebuttable presumptions regarding the debtor's COMI (habitual residence for an individual; registered office otherwise). **[1]***

*Thereafter, Article 17 requires that the court determine the application for recognition as soon as possible (Article 17(3)), while leaving the door open for subsequent modification or termination of recognition if it later emerges that either (1) recognition should not have been granted (whether on the terms granted or at all), or (2) the grounds justifying recognition later cease to exist. **[1]** Article 18 imposes an ongoing disclosure obligation on the foreign representative to facilitate this, and generally keep the court up to date on developments. A similar obligation of full and frank disclosure is directed at avoiding abuses of process (see *Nordic Trustee* [2016] EWHC 25 (Ch), for example).*

*Article 17 is mandatory in the sense that if the recognition criteria listed in Article 17(1) are fulfilled, the court is bound (subject to the public policy exception set out in Article 6) to recognise the foreign proceeding. Thereafter, Article 17(2) sets out the different*

classifications of proceeding (foreign main / foreign non-main) that the court may determine and the basis for so deciding, i.e. the presence respectively of the debtor's COMI, or an establishment, in the foreign state. [1]

It should also be noted that a key feature of the Model Law regime are the restrictions imposed on the court of the enacting state. Put simply, the court is not to "reopen" the validity of the commencement of the foreign proceeding under the applicable law in the foreign state. This helps limit to court to the application before it, and avoids the court being obliged to make determinations as to the application of foreign law. In principle, the Model Law also imposes no reciprocity requirement, i.e. recognition is not to be refused purely because a court in the foreign state would decline to provide equivalent relief to an insolvency representative from the enacting state - and states that have sought to include such a requirement in their local implementations of the Model Law (notably, South Africa) have generally seriously impaired the usefulness of the Model Law as a result.

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

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. **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] [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.

The Model Law sets out a regime for relief in relation to foreign proceedings involving interim collective pre-recognition relief (Article 19); automatic relief upon recognition of a foreign main proceeding (Article 20)(1)); and post-recognition discretionary relief (Article 21(1)).

*Pre-recognition relief under Article 19 can include the various powers listed at Article 19(1)(a) to (c), applies to both foreign main and non-main proceedings, and is generally directed at maintaining the *status quo* of the debtor's affairs in the enacting state pending the determination (as soon as possible, under Article 17(3)) of the recognition application. These reliefs can include a stay of execution against the debtor's assets, various routes to protecting vulnerable assets, and a limited selection of the post-recognition discretionary reliefs available under Article 21 (in particular, suspending rights in relation to the debtor's assets, promoting investigation of the debtor's affairs, and granting similar reliefs to those available to local insolvency office-holders).*

*Automatic relief under Article 20(1) where the foreign proceedings are opened in the debtor's COMI (and are therefore foreign main proceedings under Article 2(b)) includes a moratorium on commencement or continuation of claims against the debtor and its assets, a stay of execution against the debtor's assets, and a freeze on dealings with the debtor's assets. The focus here, rather than on preservation *per se*, is on allowing time for an orderly cross-border insolvency proceeding to be organised, albeit there are practical and potentially local statutory limits on the extent to which arbitral proceedings might be restrained - see Article 20(6) of the UK's Cross-Border Insolvency Regulations. Similarly, Articles 20(3) and (4) contain provisions permitting commencement of actions to the extent necessary to protect assets, and preserving the right to commence (and file claims in) domestic proceedings.*

*The post-recognition discretionary relief set out in Article 21(1) may be invoked in both main and non-main foreign proceedings where such relief is necessary to protect the assets of the debtor or the interests of the creditors. The relief can be "any appropriate relief" (and see the English Court of Appeal's decision in the *IBA Case* [2018] EWCA Civ 2802 on the scope of this consideration), including those powers listed in Article 21(a) to (g), which range from suspending execution to granting reliefs similar to those available in domestic proceedings. The foreign representative or a person nominated by the court may also be entrusted with distribution of the debtor's assets within the enacting state, provided that local creditors' rights are adequately protected. But in the case of a foreign non-main proceeding, regardless of the relief granted the court must be content that under the law of the enacting state the assets in question, or information required, properly fall within that proceeding (Article 21(3)) The court is also likely to take a cautious approach where relief sought engages potentially sensitive issues of international law, including enforcement of foreign insolvency-related judgments (*Rubin v Eurofinance* [2010] UKSC 46), application of foreign law principles to local-law contracts (*Pan Ocean* [2014] EWHC 2124 (Ch)) and continuation of pre-recognition relief (*Igor Vitalievich Protasov and Khadzhi-Murat Derev* [2021] EWHC 392 (Ch)).*

*Finally, as an aside, we are told there is no concurrence and can therefore ignore the restrictions on these three species of relief set out in Articles 29(a) and (b) and 30(a) and (b).*



**For full marks, your answer could have included a brief discussion on the following:**

- 1. 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.
- 2. 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 Igor Vitalievich Protasov and Khadzhi-Murat Derev [2021] EWHC 392 (CH) the English Court declined to exercise its discretionary power under Article 21 to continue a pre-recognition worldwide freezing order granted pursuant to Article 19.*

*The Court reasoned that while its jurisdiction to grant freezing relief was not impaired by recognition, given that:*

- (1) Article 19(3) provides that any interim relief expires when the application for recognition is decided unless specifically extended under Article 21(1)(f);*
- (2) Article 20(1)(c) suspends the debtor's right to deal with his assets (which in practice would have a similar effect to the freezing order); and*
- (3) Under the English Insolvency Act 1986 the bankrupt's assets are controlled by the trustee in bankruptcy and the bankruptcy process is subject to the general supervision of the Court, the result being that the temporary suspension of the respondent's dealings with his goods contained in the freezing order was replaced by a permanent suspension of his rights pursuant to Article 20(1).*

*As a result, it was not appropriate to set a new precedent by leaving the pre-recognition freezing order in place - an approach that seems likely to be repeated.*

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] [11.5 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 [7 out of 10]**

**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]**

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 \*

Q4.1.1.

*The fact pattern is reminiscent of the leading case on the English recognition of foreign proceedings and the definition of "foreign proceeding" under the English CBIR implementation of Article 2(a), the Agrokor case (Agrokor DD [2017] EWHC 2791 (Ch)): we have an overseas financial institution in a jurisdiction that (like Croatia in Agrokor) has not adopted the MLCBI, a detailed local law providing for the liquidation of financial institutions, and an application to the English Courts for recognition of the foreign process under the English CBIR. Reference should also be made in this regard to the Judicial Perspective, in particular discussion at paragraphs 73 et seq. thereof of the ingredients for "foreign proceeding".*

*The fact pattern does not appear to raise the foreign group-liquidation issues encountered in Agrokor: although there is a reference to dissipation of the proceeds of an alleged fraud to multiple recipients, including some in England, CBBC's liquidation in Country A under the LBBA and the DGF Law is apparently a process concerning CBBC itself alone.*

#### Country A's characterisation of its laws

*The starting point is jurisdictional, in that the English Court must decide whether the CBBC's liquidation fulfils the criteria for recognition under the CBIR. The CBIR are English regulations and this is therefore a question of English law. The English Court is not bound by how Country A categorises the LBBA, the DGF Law, or CBBC's liquidation generally (whether as an insolvency proceeding or otherwise) and the foreign classification, if any, is irrelevant to the English Court's determination. The English Court must look at the substance, not the form, of the CBBC liquidation.*

#### A law relating to insolvency?

*Article 2(a) requires that CBBC's liquidation be conducted pursuant to a "law relating to insolvency" (the Court noting in Agrokor that "relating to" denotes "wide words of connection"). The UNCITRAL Guide to Enactment explains at paragraph 73 that:*

*"liquidation and reorganisation might be conducted under law that is not labelled as insolvency law (e.g. company law), but which nevertheless deals with or addresses insolvency or severe financial distress."*

*Country A's insolvency regime for financial institutions sets out detailed criteria for determining a bank's insolvency including by reason financial distress (listed at LBBA Article 76); the fact that these criteria might be short-cut by direct revocation of the target's banking licence and (provisional) liquidation under LBBA Article 77 and DGF Law Article 34 does not place this regime outside the scope of Article 2(a).*

As was discussed at length in *Agrokor* with reference to English, Australian, United States and Singaporean case law, a law providing for other routes into liquidation (including on a "just and equitable" basis) is acceptable. Quoting *Re Stanford International Bank Limited* [2011] Ch 33 that "[a] law allowing winding up on the regulatory ground was a law comprehending several grounds, including insolvency, so that it was correct to characterise it as a law relating to insolvency.", the *Agrokor* Court concluded that:

*63. From these authorities and guides to interpretation, it is clear that the requirement that the law under which the proceeding is brought be "an insolvency law" is satisfied if insolvency is one of the grounds on which the proceeding can be commenced, even if [...] insolvency could not actually be demonstrated, and there was another basis for commencing the proceeding. The matter is obviously all the clearer if insolvency can indeed be demonstrated.*

It therefore seems likely that the CBBC liquidation will be held to be conducted under "a law relating to insolvency" within the meaning of Article 2(a).

#### Control or supervision by the foreign court?

Article 2(a) requires that the proceeding be "judicial or administrative" **[this is a separate element]** and that "the assets and affairs of the debtor are subject to control or supervision by a foreign court". The Guide to Enactment explains that the MLCBI sets this bar relatively low:

*"The Model Law specifies neither the level of control or supervision required to satisfy this aspect of the definition nor the time at which that control or supervision should arise. Although it is intended that the control or supervision required [...] should be formal in nature, it may be potential rather than actual [and] a proceeding in which the debtor retains some measure of control over its assets, albeit under court supervision, such as a debtor in possession would satisfy this requirement. Control or supervision may be exercised not only directly by the court and also by an insolvency representative where, for example, the insolvency representative is subject to control or supervision by the court. Mere supervision of an insolvency representative by a licensing authority would not be sufficient." (emphasis added)*

The *Agrokor* Court examined this point in detail in the context of Croatian proceedings which placed a very high degree of control in the hands of the foreign representative. On our facts, the NB and the DGF (both of which are governmental bodies) exercise a similar level of authority over the assets of distressed or insolvent financial institutions in Country A (see the summary of the DGF's extensive powers under Article 37 of the DGF Law). We are told that the DGF enjoys statutory independence from the NB under Articles 3(3) and 3(7) of the DGF Law; we are not told the extent to which the DGF, and



the liquidation process more generally, are accountable to the courts of Country A. As set out in *Agrokor*, this latter issue is the key point:

*92. [That the Bank of England (as regulator) has considerable powers in the winding up of a bank] is nothing to the point because the test which I am to apply is whether the proceeding is subject to the control or supervision of the court, and not whether the government has any particular power in relation to it. If I conclude (taking account of the roles and powers of the various actors) that overall the proceeding is subject to the control and supervision of the court, it is irrelevant that the government also has powers in relation to it.*

More information would probably be required on this point, since on a plain reading of the fact pattern, the CBBC liquidation appears to be virtually exclusively under the control of the NB, the DGF and its delegates: "*neither public authorities [quaere whether that includes the courts] nor the NB have any right to interfere in the exercise of [the DGF's] functions and powers*".

**As for the "subject to control or supervision of a foreign court", please also consider the following:**

- 1. The term "foreign court" is defined at article 2(e) of the MLCBI and means: "a judicial or other authority competent to control or supervise a foreign proceeding".**
- 2. The Guide to Enactment notes: "87) A foreign proceeding that meets the requisites of article 2, subparagraph (a), should receive the same treatment irrespective of whether it has been commenced and supervised by a judicial body or an administrative body. Therefore, in order to obviate the need to refer to a foreign non-judicial authority whenever reference is made to a foreign court, the definition of "foreign court" in subparagraph (e) includes also non-judicial authorities."**
- 3. In *Re Sanko Steamship Co Ltd* [2015] EWHC 1031 (Ch) Simon Barker QC, noted that a foreign proceeding may be recognised where the control or supervision of the proceeding is undertaken by a non-judicial administrative body.**
- 4. In this case the DGF has control of all of the Bank's assets and overall control of the liquidation.**
- 5. 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.**
- 6. 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.**
- 7. The assets and affairs of the Bank are subject to the control of the DGF, an official body which exercises its powers in the liquidation free from intervention by government or the NB and which should be considered, for the purposes of the definition set out in article 2(e) of the MLCBI, as a "foreign court".**

### Purpose of the proceedings

Article 2(a) requires that the proceedings be "for the purpose of reorganisation or liquidation".

*Re Sturgeon Central Asia* [2020] EWHC 123 (Ch) suggests that this requirement should be read purposively, emphasising the goals of insolvency (i.e. an ordered liquidation and the protection of creditors' interests) or recovery from financial distress (including protection for the debtor during any restructuring).

It is difficult to see that the CBBC liquidation fulfils these criteria insofar as reorganisation is concerned. The outcome seems quite fixed: LBBA Article 75 grants "troubled" institutions 180 days (a relatively short period) to rectify any breaches of the LBBA criteria or the NB's regulations, following which the target is either confirmed as compliant or classified as insolvent. Once declared insolvent, the DGF is obliged immediately to commence liquidation, during which its sole end goal is to "remove [the bank] from the market". A short period of provisional administration does not appear to provide an opportunity to restructure the institution: the focus is on an aggressive and irrevocable liquidation, starting with the defenestration of management, termination of normal banking activities and a push towards collection of assets and pursuit of claims.

The Agrokor Court held that a law whose purpose was to protect the stability of the economic system by permitting the restructuring of key companies which were in financial difficulty did not automatically mean that the purpose of the law was to protect important companies at the expense of creditors - but that such a regime would still fall within Article 2(a) because "it can nonetheless be described as a law for the purposes of reorganisation or liquidation within the meaning of the CBIR".

Accordingly, despite its laser focus on liquidation over reorganisation, the CBBC proceedings probably fall with Article 2(a) in this respect.

### Collective in nature

Article 2(a) requires that the proceedings be a "collective **"judicial or administrative"** [as stated already above, this is a separate element] proceeding".

The Judicial Perspective explains that collectivity emphasises achieving a coordinated global solution for all stakeholders, and not "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".

This is difficult to reconcile with the very aggressive approach of the CBBC liquidation and its seeming focus on the orderly dissolution of financial institutions and the

protection of Country A's financial system, which while nodding to identifying existing creditors also includes *inter alia* immediately deeming all debts to be due, alienating the bank's property and funds, terminating any encumbrances on the bank's property and prohibiting offsetting of counterclaims. It would be helpful in this regard to have evidence as to the statutory duties of liquidators in Country A, and the extent to which they are obliged to consider the interests of all creditors (and see for example the focus on creditors' interests in the Australian case *Re Betcorp Ltd* 400 BR 266 (2009)).

**As for the "collective nature" element, please also consider the following:**

- 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".**

### Conclusion

**On the basis of the above, and while there are elements of the CBBC liquidation that clearly satisfy the Article 2(a) definition, there are also areas (primarily, the focus on protecting Country A's economic stability and avoiding or mitigating the effects of the collapse of local financial institutions) where more evidence would be required before saying with complete confidence that it qualifies as a "foreign proceeding" under the English CBIR.**

For full marks your response must address in sufficient detail each of the 7 separate elements of the definition of "foreign proceeding" as set forth in article 2(a) of the MLCBI, provide guidance and source references as appropriate and apply the facts. Your response has not separately addressed the elements of "proceeding", "judicial or administrative" and "in a foreign State".

Q4.1.2.

**Are the Applicants "foreign representatives" ("FRs") under Article 2(d)?**

**With reference to the Article 2(d) definition, the 2021 UNCITRAL Digest of Case Law on the MLCBI notes (at paragraphs 37 to 40) that, to paraphrase:**

- (1) The MLCBI does not require that the FR must be authorized by the foreign court, meaning that appointments made by an agency other than the foreign court are permissible;**
- (2) Instead, the emphasis is on the authorisation being made in the course of or for the purposes of the proceeding, rather than on the body providing the authorisation (which could even include the debtor itself);**
- (3) "A person or body" could include a firm, rather than an individual (e.g. a firm of accountants);**
- (4) To the extent that a FR seeks recognition on the basis that they are authorised to administer the reorganisation or liquidation (as opposed to the second limb of the FR definition, i.e. where the FR's authority stems only from an authorisation to act as a representative of the foreign proceeding), the FR must actually enjoy a power to administer the debtor's assets and affairs (see *Stanford International Bank Ltd* [2010] EWCA Civ. 137).**

**Applying these points to our facts:**

- (1) Ms G's position as applicant arises from her authorisation as delegate of the DGF in the exercise of its powers under Article 48(3) of the DGF Law;**
- (2) She is therefore authorised by the DGF, rather than Country A's courts (though as discussed above, that is no obstacle under Article 2(d) of the MLCBI);**
- (3) Her powers are granted (Article 2(1)(17) of the DGF Law) to allow her "to perform actions to ensure the bank's withdrawal from the market [...] and/or bank liquidation";**
- (4) Her authorisation is therefore made in the context of the liquidation of CBBC (i.e. the first part of the Article 2(d) definition), rather than for the purposes of acting as representative of the foreign proceeding;**
- (5) As mentioned above it will therefore be important to establish that Ms G's powers extend to administration of CBBC's reorganisation or liquidation including of its assets or affairs at the time of the application for recognition;**

*(6) Ms G's powers are extensive but (as we are told) do not extend to the full range of powers enjoyed by the DGF: Resolution 1513 expressly excludes *inter alia* the power to claim damages from related parties, and to arrange the sale of CBBC's assets;*

*(7) The English Court will need to consider whether the reservation of those powers to DGF disqualifies Ms G from being an FR because she is not authorised to administer the bank's assets or affairs within the meaning of the first limb of the Article 2(d) definition;*

*(8) However, as a practical point, this may be of less importance to DGF and the authorities of Country A because the application to the English Courts has been made jointly by Ms G and DGF itself, which may go some way to addressing any absence the Court may identify in the scope of Ms G's powers because those powers are reserved to the other Applicant;*

*(9) It is also, of course, open to the DGF to seek to rectify any issues in this regard by specifically authorising Ms G to act as representative of the CBBC proceeding (i.e. bringing her within the second limb of the Article 2(d) definition) - though this may introduce problems of timing, if that authorisation is granted after the recognition application is filed.*

**Excellent response. For full marks also the assumption of article 16(1) MLCBI should be addressed.**

**END OF ANSWERS**