



SUMMATIVE (FORMAL) ASSESSMENT: MODULE 2A

THE UNCITRAL MODEL LAWS RELATING TO INSOLVENCY

Commented [BB1]: TOTAL = 30 MARKS

60%

*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 = 7 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**

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

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 [SL4]: 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

**Which of the following statements regarding concurrent proceedings under the Model Law is true?**

**(a) No interim relief based on Article 19 of the Model Law is available if concurrent domestic insolvency proceedings and foreign proceedings exist at the time of the application of the foreign proceedings in the enacting State.**

**(b) In the case of a foreign main proceeding, automatic relief under Article 20 of the Model Law applies if concurrent domestic insolvency proceedings and foreign proceedings exist at the time of the application of the foreign proceedings in the enacting State.**

**(c) The commencement of domestic insolvency proceedings prevents or terminates the recognition of a foreign proceeding.**

**(d) If only after recognition of the foreign proceedings concurrent domestic insolvency proceedings are opened, then any post-recognition relief granted based on Article 21 of the Model Law will not be either adjusted or terminated if consistent with the domestic insolvency proceedings.**

Question 1.7

**When using its discretionary power to grant post-recognition relief pursuant to Article 21 of the Model Law, what should the court in the enacting State primarily consider?**

- (a) *The court must be satisfied that the interests of the creditors and other interested parties, excluding the debtor, are adequately protected.*
- (b) *The court should consider whether the relief requested is necessary for the protection of the assets of the debtor or the interests of the creditors and strike an appropriate balance between the relief that may be granted and the persons that may be affected.*
- (c) *The court should be satisfied that the foreign proceeding is a main proceeding.*
- (d) *All of the above.*

Question 1.8

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

- (a) *COMI is not a defined term in the Model Law.*
- (b) *For a corporate debtor, the Model Law does contain a rebuttable presumption that the debtor's registered office is its COMI.*
- (c) *For an individual debtor, the Model Law does contain a rebuttable presumption that the debtor's habitual residence is its COMI.*

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

Question 1.9

Commented [SL5]: Correct answer is (c).

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

- (a) *Court proceedings.*
- (b) *Arbitral Tribunals.*
- (c) *Both (a) and (b).*

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

Question 1.10

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

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

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

**(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]

**Question 2.1** [maximum 3 marks]

Commented [SL6]: SUBTOTAL = 9 MARKS

Commented [SL7]: 3 marks

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

**ANS:**

**The Model Law on Cross-Border Insolvency (MLCBI), adopted by the United Nations Commission on International Trade Law (UNCITRAL) in 1997. It is designed to assist States to have their insolvency laws with a modern, harmonized and fair framework. This can address more effectively instances of cross-border proceedings concerning debtors. The instances include cases where the debtor has assets in more than one State or where some of the creditors of the debtor are not from the State in which the insolvency proceeding is taking place. In principle, the proceeding pending in the debtor's centre of main interests (COMI) is expected to have principal responsibility for managing the insolvency of the debtor.**

**Over time, the interpretation of the concept of COMI in article 16 of the MLCBI resulted in uncertainty and unpredictability that led to a proposal to UNCITRAL in 2010 to provide more information and guidance on the concept in the GE.**

**The revisions were based on the deliberations of Working Group V (Insolvency Law) at its thirty-ninth (2010), fortieth (2011), forty-first (2012), forty-second (2012) and forty-third (2013) sessions. Also, deliberations of the Commission at its forty-sixth session (2013), were adopted by the Commission as the *Guide to Enactment and Interpretation of the UNCITRAL Model Law on Cross-Border Insolvency (GEI)* on 18 July 2013.**

**The meaning of COMI is discussed in detail in the context of articles 16, paragraph 3 and 17. It is also discussed in the JP**

**What constitutes a debtor's COMI has given rise to considerable discussion, particularly with respect to the proof required for the presumption in article 16, paragraph 3, to be rebutted**



*Japan: Think3, case No. (ra) 1757 of 2012 (appeal), Tokyo High Court, ch. 3, 2 (1), CLOUT 1335 noted that diversity of outcomes with respect to the date at which COMI is determined does not promote uniformity of interpretation*

*Morning Mist Holdings Ltd. v Kryz (In re Fairfield Sentry Ltd.), 714 F.3d 127 (2d Cir. Apr. 16, 2013), CLOUT 1339, at 136 referring to GE [paras. 31, 72] on COMI (court concluded that international sources were of limited use in solving the question of whether a United States court should determine a debtor's COMI as of the time of the filing of the petition initiating the ancillary proceeding, or in some other way) and referred to GE [para. 89] on art. 6.*

*United States: Gerova Financial Group, Ltd. 482 B.R. 86, 92 (Bankr. S.D.N.Y. 2012), CLOUT 1275, which refers to amendments to the Guide to Enactment being prepared (at that time) by UNCITRAL Working Group V, citing United Nations document A/CN.9/742 Report of Working Group V (Insolvency) on the Work of its forty-first session (New York, 2012), at [para. 60], wherein "a proposed change to the Model Law to clarify that the COMI determination be made as of the date of the commencement of the foreign insolvency proceeding 'received wide support.*

*The GEI [paras. 157-160] discusses the date by reference to which the debtor's COMI (or establishment) is to be determined, an issue not specifically addressed by the MLCBI.*

*The GEI suggests that the appropriate date is the date of commencement of the foreign proceeding. The GEI [para. 159] notes that, having regard to the evidence required to accompany an application for recognition under article 15 and the relevance accorded to the decision commencing the foreign proceeding and appointing the foreign representative, the date of commencement of that proceeding is the appropriate date for determining COMI. Where the business activity of the debtor ceases after the commencement of the foreign proceeding, all that may exist at the time of the application for recognition to indicate the debtor's COMI is the foreign proceeding and the activity of the foreign representative in administering the insolvency estate.*

*In such a case, determination of the debtor's COMI by reference to the date of the commencement of those proceedings would produce a clear result*

*In considering the debtor's COMI, courts have made reference to several possible dates as being the most relevant to that determination, including:*

*(a) The date of commencement of the foreign proceeding for which recognition is sought;*

*(b) The date of the application for recognition;*

*(c) The date the court is called upon to decide the application;*

*(d) A date determined by reference to the operational history of the debtor.*

**One view is that because the date of application for recognition is an arbitrary or random matter and the proceeding for recognition is secondary to the foreign proceeding, an interpretation by reference to the date in (a) is to be preferred.**

**It has also been suggested that the use of the present tense in article 17, paragraph 2 (i.e., use of the words "is taking place", may be seen as a requirement that the foreign proceeding is to be current at the time of the recognition proceeding,**

**Choosing the date of commencement of the foreign proceeding, will avoid different outcomes in different jurisdictions where applications for recognition are made at different times and the debtor may have moved around between those times (particularly in the case of a natural person debtor).**

**Ref: *Australia: Kapila* [para. 37]. *Japan: Think3*, case Nos. (shou) 3 and 5 of 2011 Tokyo District Court, ch. 3, issue 2-1, (1)-(5) affirmed case No. (ra) 1757 of 2012 (appeal), Tokyo High Court, ch. 3, 2 (3), (5), CLOUT 1335.**

**Another court noted that the date of commencement of the foreign proceeding is fixed and readily verifiable, while in contrast, the date for filing an application for recognition can vary greatly depending on the circumstances and the diligence of the foreign representative.**

**Ref: *United States: Kemsley*, 489 B.R. 346, 354 (Bankr. S.D.N.Y. 2013), CLOUT 1274.**

**Courts supporting the time referred to in (b) have focused on the use of the present tense ("has" its COMI) in paragraph 2 to conclude that a plain meaning interpretation would lead to the conclusion that the COMI is to be determined by reference to the facts as at the date of filing of the recognition application.**

**Ref: *Australia: Gainsford*, in the matter of *Tannenbaum v Tannenbaum* [2012]**

***United States: Betcorp Limited* 400 B.R. 266, 290-291 (Bankr. D. Nev. 2009),**

***Morning Mist Holdings Ltd. v Krys (In re Fairfield Sentry Ltd.)*, 714 F.3d 127, 133 (2d Cir. Apr. 16, 2013),**

***American Insurance Co., Ltd.* 425 B.R. 884, 909-10 (Bankr. S.D. Fla. 2010),**

**It is also suggested that approach allows for the harmonization of transnational insolvency proceedings on the basis that limiting the inquiry to the time of filing avoids a detailed examination of the operational history of the applicant.**

**A further argument in favour of this approach is that it allows the court to account for shifts in the debtor's COMI in the period between the commencement of the foreign**

**insolvency proceeding and the date of the application for recognition. One court has suggested that considering the period between the commencement of the foreign insolvency proceeding and the application for recognition may offset a debtor's ability to manipulate COMI.**

(c) *The date the court is called upon to make a decision on the application*

**The provision in the MLCBI for notifying changes of status under article 18 and for modifying or terminating recognition based on changed circumstances. It has been suggested that those provisions exhibit a policy that the recognition process should be flexible and consider the actual facts relevant to the court's decision rather than setting an arbitrary determination point**

(d) *The operational history of the debtor*

**This approach has been argued in several cases, it has been rejected on the basis that it would increase the likelihood of conflicting COMI determinations and competing main proceedings, undermining uniformity and harmonization.**

**Question 2.2** [maximum 3 marks]

Commented [SL8]: 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

**Principle of equal treatment of creditors, ensuring that foreign creditors will be notified whenever notification is required for creditors in the enacting State.**

Article 14: Notification to foreign creditors of a proceeding under

**[identify laws of the enacting State relating to insolvency]**

**1. Whenever under [identify laws of the enacting State relating to insolvency] notification is to be given to creditors in this State, such notification shall also be given to the known creditors that do not have addresses in this State. The court may order that appropriate steps be taken with a view to notifying any creditor whose address is not yet known.**

**2. Such notification shall be made to the foreign creditors individually, unless the court considers that, under the circumstances, some other form of notification would be more appropriate. No letters rogatory or other, similar formality is required.**

**3. When a notification of commencement of a proceeding is to be given to foreign creditors, the notification shall:**

- 1. (a) Indicate a reasonable time period for filing claims and specify the place for their filing;**
- 2. (b) Indicate whether secured creditors need to file their secured claims; and**
- 3. (c) Contain any other information required to be included in such a notification to creditors pursuant**

**to the law of this State and the orders of the court.**

#### STATEMENT 2

**Safe conduct Rule is aimed at ensuring that the court does not assume jurisdiction over all the assets of the debtor on the sole ground that foreign representative has made an application for recognition. This limitation is not absolute. It proposes to shield foreign representative.**

#### **Article 10**

##### ***Limited jurisdiction***

**The sole fact that an application pursuant to this Law is made to a court in this State by a foreign representative does not subject the foreign representative or the foreign assets and affairs of the debtor to the jurisdiction of the courts of this State for any purpose other than the application.**

**A tort committed by, or misconduct on the part of, the foreign representative may provide grounds for dealing with the consequences of that tort or misconduct.**

#### STATEMENT 3

**Presumption of insolvency based on recognition of Foreign Main Proceeding.**

**Article 31: In the absence of evidence to the contrary, recognition of a foreign main proceeding is, for the purpose of commencing a proceeding under [identify laws of the enacting State relating to insolvency], proof that the debtor is insolvent.**

**Article 16: Presumptions concerning recognition.**

**3. In the absence of proof to the contrary, the debtor's registered office, or habitual residence in the case of an individual, is presumed to be the Centre of the debtor's main interests**

**The concept used in the presumption in paragraph 3, "Centre of main interests", or COMI, is fundamental to the operation of the MLCBI, but is not defined in article 2. What constitutes a debtor's COMI has given rise to considerable discussion, particularly with respect to the proof required for the presumption in article 16, paragraph 3, to be rebutted.**

**As a general statement, when the debtor's COMI is at the same location as its place of registration, no issue concerning rebuttal of the presumption is likely to arise. However, when there appears to be a separation between the debtor's registered office and its alleged COMI, the party alleging the COMI is not located at the place of registration will be required to satisfy the court as to its location.**

Question 2.3 [2 marks]

Commented [SL9]: 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.**

**ANS:**

***IBA* : The OJSC International Bank of Azerbaijan ("*IBA*") was in a voluntary restructuring proceeding in Azerbaijan pursuant to which its debts were to be restructured. Under Azerbaijani law, the restructuring plan became binding on all creditors once approved by the requisite majority. However, the debts included English law-governed debts where the creditors had neither participated in the restructuring nor submitted to the jurisdiction of the Azerbaijani court. As a result, pursuant to the English common law rule in *Gibbs*, the claims of the English creditors could not be discharged or otherwise affected by the Azerbaijani proceedings.**

**The foreign representative of *IBA* had successfully applied to the English court for recognition of the Azerbaijani proceeding as a foreign main proceeding under the Cross-Border Insolvency Regulations 2006 (the "*CBIR 2006*"), (which implemented the UNCITRAL Model Law on Cross-Border Insolvency (the "*Model Law*") in the UK). Recognition resulted in an automatic stay on enforcement action in the UK. Two creditors did not participate in the Azerbaijani proceedings and were instead seeking relief in the English courts. In order to prevent English enforcement proceedings undermining the successful outcome of the Azerbaijani restructuring, *IBA* applied for an indefinite continuation of the stay of enforcement actions, even after the restructuring had come to an end. *IBA* argued that the English court was empowered to grant a permanent stay under the *CBIR 2006* as it was a procedural step taken to**

**assist a foreign insolvency process, which would hamper the creditor's right to enforce their claim but would not discharge the claim itself.**

**At first the court dismissed IBA's application. IBA then appealed to the Court of Appeal.**

### **The Court's Decision**

**Acknowledging that the Court of Appeal was bound by *Gibbs*, the applicant effectively sought to avoid *Gibbs* by seeking a permanent stay of the English law rights. The Court of Appeal dismissed the application, holding that:**

- 1. The permanent stay was not necessary to protect the interests of IBA's creditors (the requirement under the CBIR 2006 for the grant of appropriate relief) - IBA was trading again and the restructuring was at an end;**
- 2. The scope of the Model Law was limited to procedural aspects of cross-border insolvency cases - there was nothing in the CBIR 2006 to suggest that the procedural power to grant a stay could be used to extinguish the rights guaranteed by *Gibbs*.**

**Further, Supreme Court had held in *Rubin v Eurofinance SA [2012] UKSC 46*, the principle of universalism could not be used to justify the disregard of English law.**

- 3. It would be inconsistent with the Model Law's procedural and supporting role for a stay granted under the CBIR 2006 to outlast the foreign proceedings.**

### **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.**

**ANS: The court has the following action available under the given provision below:**

#### **ARTICLE 20.**

**1. Upon recognition of a foreign proceeding that is a foreign main proceeding,**

- a) Commencement, continuation of individual actions or proceedings of the debtor's assets, liabilities is stayed.**
- b) Execution against the debtor's assets is stayed**

**c) The Right to transfer, encumber or dispose of any assets of debtor is suspended.**

**2. The scope, modification or termination of the stay and suspension are subject, any provisions of law of the enacting state, relating to insolvency.**

**3. Para 1(a) does not affect the right to request the commence individual actions or proceedings, necessary to preserve a claim against the debtor.**

**4. Para 1 of this article does not affect the right to request the commencement of proceeding under, laws of the enacting state, or the right to file claims in such a proceeding.**

**As per Article 29 (b) (ii) if the foreign proceeding is a foreign main proceeding the stay and suspension referred to in para 1 of Article 20 shall be modified or terminated in terms of para2 of Article 20 if inconsistent with the proceeding if this state.**

**The duty of foreign representative in the foreign main proceeding towards the court in the enacting State:**

**Foreign Representative may be a person or body as person has not been defined by the MLCBI. Foreign Representative must have the power to administer the reorganisation or liquidation of the debtor's assets (Article 2)**

**Foreign Representative has to fully and frankly disclose the facts to the court. Questions have been raised on the conduct of the Foreign Representative e.g in the matter of United States: Cozumel Caribe, S.A (Bankr.S.D.N.Y 2014).**

**Article 9 provides Right of direct access to the Foreign Representative.**

**Article 10. a Foreign Representative is subject to applicable non-Bankruptcy law and must therefore comply with court orders. (Australia V Britannia Bulkers case2009)**

**Article 12 provides that the Foreign Representative is entitled to participate upon the recognition of the foreign proceeding in the enacting state. Article 18 shall inform any subsequent information from the time of filing the application for recognition. Article 25 and 26 provide for direct communication between this state and the Foreign Representative.**

**Article 19. Relief that may be granted upon application for recognition of a foreign proceeding**

**1. From the time of filing an application for recognition until the application is decided upon, the court may, at the request of the foreign representative, where relief is urgently needed to protect the assets of the debtor or the interests of the creditors, grant relief of a provisional nature, including:**

*(a) Staying execution against the debtor's assets;*

*(b) Entrusting the administration or realization of all or part of the debtor's assets located in this State to the foreign representative or another person designated by the court, in order to protect and preserve the value of assets that, by their nature or because of other circumstances, are perishable, susceptible to devaluation or otherwise in jeopardy;*

*(c) Any relief mentioned in paragraph 1 (c), (d) and (g) of article 21.*

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

Commented [BB11]: SUB TOTAL = 7 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 mark 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.*

**ANS:**

*The Model Law respects the differences among national procedural laws and does not attempt a substantive unification of insolvency law. It offers solutions that help in several modest but significant ways. These include the following:*

*(a) Providing the person administering a foreign insolvency proceeding ("foreign representative") with access to the courts of the enacting State, thereby permitting the foreign representative to seek a temporary "breathing space", and allowing the courts in the enacting State to determine what coordination among the jurisdictions or other relief is warranted for optimal disposition of the insolvency.*

*(b) In addition to the mandatory stay and suspension, the Model Law authorizes the court to grant "discretionary" relief for the benefit of any foreign proceeding, whether it is a "main" proceeding or not (article 21).*



**Such discretionary relief may consist of, for example, staying proceedings or suspending the right to encumber assets (to the extent such stay and suspension have not taken effect automatically under article 20), facilitating access to information concerning the assets of the debtor and its liabilities, appointing a person to administer all or part of those assets, and any other relief that may be available under the laws of the enacting State. Urgently needed relief may be granted already upon filing an application for recognition (article 21).**

**Foreign representative's access to courts of the enacting State. Thus, they can act on behalf of the debtor to protect the interest and value of the assets.[½]**

**The following provisions favour the Foreign Representative to protect the Assets of the debtor:**

**Article 9. Right of direct access [½] the foreign representative has automatic standing before the Court in state A**

**Article 10. Limited jurisdiction : The sole fact that an application pursuant to this Law is made to a court in this State by a foreign representative does not subject the foreign representative or the foreign assets and affairs of the debtor to the jurisdiction of the courts of this State for any purpose other than the application.**

**Article 11. Application by a foreign representative to commence a proceeding under [identify laws of the enacting State relating to insolvency] :**

**A foreign representative is entitled to apply to commence a proceeding under [identify laws of the enacting State relating to insolvency] if the conditions for commencing such a proceeding are otherwise met.**

**Article 12. Participation of a foreign representative in a proceeding under [identify laws of the enacting State relating to insolvency]**

**Upon recognition of a foreign proceeding, the foreign representative is entitled to participate in a proceeding regarding the debtor under [identify laws of the enacting State relating to insolvency].**

**Article 24. Intervention by a foreign representative in proceedings in this State**

**Upon recognition of a foreign proceeding, the foreign representative may, provided the requirements of the law of this State are met, intervene in any proceedings in which the debtor is a party.**

**Your answer should have included 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] [2 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.**

**ANS:**

### **Recognition of a foreign proceeding and relief**

**Chapter III describes in detail the aspects to be considered for recognition.**

#### **Article 15. Application for recognition of a foreign proceeding**

**1. A foreign representative may apply to the court for recognition of the foreign proceeding in which the foreign representative has been appointed. [½]**

**2. An application for recognition shall be accompanied by:**

**(a) A certified copy of the decision commencing the foreign proceeding and appointing the foreign representative; or**

**(b) A certificate from the foreign court affirming the existence of the foreign proceeding and of the appointment of the foreign representative; or**

**(c) In the absence of evidence referred to in subparagraphs (a) and (b), any other evidence acceptable to the court of the existence of the foreign proceeding and of the appointment of the foreign representative. [½]**

**3. An application for recognition shall also be accompanied by a statement identifying all foreign proceedings in respect of the debtor that are known to the foreign representative.**

**4. The court may require a translation of documents supplied in support of the application for recognition into an official language of this State.**

#### **Article 16. Presumptions concerning recognition**

**1. If the decision or certificate referred to in paragraph 2 of article 15 indicates that the foreign proceeding is a proceeding within the meaning of subparagraph (a) of article 2 and that the foreign representative is a person or body within the meaning of subparagraph (d) of article 2, the court is entitled to so presume.**

**2. The court is entitled to presume that documents submitted in support of the application for recognition are authentic, whether or not they have been legalized.**

**3. In the absence of proof to the contrary, the debtor's registered office, or habitual residence in the case of an individual, is presumed to be the centre of the debtor's main interests.**

#### **Article 17. Decision to recognize a foreign proceeding [½]**

**1. Subject to article 6, a foreign proceeding shall be recognized if:**

*(a) The foreign proceeding is a proceeding within the meaning of subparagraph (a) of article 2;*

*(b) The foreign representative applying for recognition is a person or body within the meaning of subparagraph (d) of article 2;*

*(c) The application meets the requirements of paragraph 2 of article 15; and*

*(d) The application has been submitted to the court referred to in article 4. 2. The foreign proceeding shall be recognized:*

*(a) As a foreign main proceeding if it is taking place in the State where the debtor has the Centre of its main interests; or*

*(b) As a foreign non-main proceeding if the debtor has an establishment within the meaning of subparagraph (f) of article 2 in the foreign State. [½]*

**3. An application for recognition of a foreign proceeding shall be decided upon at the earliest possible time.**

**4. The provisions of articles 15, 16, 17 and 18 do not prevent modification or termination of recognition if it is shown that the grounds for granting it were fully or partially lacking or have ceased to exist.**

**Article 18. Subsequent information**

**From the time of filing the application for recognition of the foreign proceeding, the foreign representative shall inform the court promptly of:**

*(a) Any substantial change in the status of the recognized foreign proceeding or the status of the foreign representative's appointment; and*

*(b) Any other foreign proceeding regarding the same debtor that becomes known to the foreign representative.*

**Your answer must include a brief discussion on the following elements of the question:**

- 1. Exclusions:** *If the debtor is an entity that is subject to a special insolvency regime in State B, the foreign representative should first check if the foreign proceedings regarding that type of a debtor are excluded in State A based on Article 1(2) of the implemented Model Law in State A.*
- 2. Restrictions: Existing international obligations of State A:** *Based on Article 3 of the Model Law, the court in State A should also check if there are no existing international obligations of State A (under a treaty or otherwise) that may conflict with granting the recognition application under the implemented Model Law in State A.*

3. **Judicial scrutiny:** While the court in State A is able to rely on the rebuttable presumptions set forth in Article 16 of the Model Law, in the context of Article 17 of the Model Law the court will have to assess whether either the COMI or at least an establishment of the debtor is located in State B where the foreign proceedings were opened. If the COMI of the debtor is in State B the foreign proceedings should be recognised as foreign main proceedings and if only an establishment of the debtor is in State B the foreign proceedings should be recognised as foreign non-main proceedings. Without a COMI or at least an establishment of the debtor in State B, recognition cannot be granted by the court in State A.
4. **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] [3 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.**

**ANS:**

**# In addition to establishing the principle of direct court access for the foreign representative, the Model Law:**

**(a) Establishes simplified proof requirements for seeking recognition and relief for foreign proceedings, which avoid time-consuming "legalization" requirements involving notarial or consular procedures (Article 15);**

**# The Model Law presents to enacting States the possibility of aligning the relief resulting from recognition of a foreign proceeding with the relief available in a comparable proceeding in the national law;**

**# The Model Law establishes criteria for determining whether a foreign proceeding is to be recognized (Articles 15-17) and provides that, in appropriate cases, the court may grant interim relief pending a decision on recognition (Article 19). The decision includes a determination whether the jurisdictional basis on which the foreign proceeding was commenced was such that it should be recognized as a "main" or a "non-main" foreign insolvency proceeding. Procedural matters related to notice of the filing of an application for recognition or of the decision to grant recognition are not dealt with in the Model Law; they remain to be governed by other provisions of law of the enacting State.**

**# The determination that a foreign proceeding is a "main" proceeding may affect the nature of the relief accorded to the foreign representative**

***Effects of recognition and discretionary relief available to a foreign representative***

**# Key elements of the relief accorded upon recognition of the representative of a foreign "main" proceeding include a stay of actions of individual creditors against the debtor or a stay of enforcement proceedings concerning the assets of the debtor, and a suspension of the debtor's right to transfer or encumber its assets (Article 20, paragraph 1). Such stay and suspension are "mandatory" (or "automatic") in the sense that either they flow automatically from the recognition of a foreign main proceeding or, in the States where a court order is needed for the stay or suspension, the court is bound to issue the appropriate order. The stay of actions or of enforcement proceedings is necessary to provide "breathing space" until appropriate measures are taken for reorganization or fair liquidation of the assets of the debtor. The suspension of transfers is necessary because in a modern, globalized economic system it is possible for multinational debtors to move money and property across boundaries quickly. The mandatory moratorium triggered by the recognition of the foreign main proceeding provides a rapid "freeze" essential to prevent fraud and to protect the legitimate interests of the parties involved until the court has an opportunity to notify all concerned and to assess the situation.**

**# Exceptions and limitations to the scope of the stay and suspension (e.g. exceptions for secured claims, payments by the debtor made in the ordinary course of business, set-off, execution of rights *in rem*) and the possibility of modifying or terminating the stay or suspension are determined by provisions governing comparable stays and suspensions in insolvency proceedings under the laws of the enacting State (Article 20, paragraph 2).**

**# In addition to the mandatory stay and suspension, the Model Law authorizes the court to grant "discretionary" relief for the benefit of any foreign proceeding, whether it is a "main" proceeding or not (article 21). Such discretionary relief may consist of, for example, staying proceedings or suspending the right to encumber assets (to the extent such stay and suspension have not taken effect automatically under article 20), facilitating access to information concerning the assets of the debtor and its liabilities, appointing a person to administer all or part of those assets, and any other relief that may be available under the laws of the enacting State. Urgently needed relief may be granted already upon filing an application for recognition (article 21).**

**However, although Article 21 apparently gives the court a wide discretion to grant "any appropriate relief", in practice the courts have found this discretion to be constrained. In particular, the Supreme Court in *Rubin and another v Eurofinance SA and others* and *New Cap Reinsurance Corporation (in liquidation) and another v Grant and others* [2012] UKSC 46 held that although the type of relief available**

**under Article 21 should be widely construed, it was of a procedural nature rather than a substantive one.**

***Protection of creditors and other interested persons***

**# The Model Law contains provisions such as the following to protect the interests of the creditors (in particular local creditors), the debtor and other affected persons: the availability of temporary relief upon application for recognition of a foreign proceeding or upon recognition is subject to the discretion of the court; it is expressly stated that in granting such relief the court must be satisfied that the interests of the creditors and other interested persons, including the debtor, are adequately protected (Article 22, paragraph 1); the court may subject the relief it grants to conditions it considers appropriate; and the court may modify or terminate the relief granted, if so requested by a person affected thereby (Article 22, paragraphs 2 and 3).**

**#When the local proceeding begins subsequent to recognition or application for recognition of the foreign proceeding, the relief that has been granted for the benefit of the foreign proceeding must be reviewed and modified or terminated if inconsistent with the local proceeding. If the foreign proceeding is a main proceeding, the stay and a suspension, as mandated by article 20, must also be modified or terminated if inconsistent with the local proceeding.**

**#The purpose of article 17 is to indicate that, if recognition is not contrary to the public policy of the enacting State and if the application meets the requirements set out in the article, recognition will be granted as a matter of course.**

**# Article 15, paragraph 3, requires that an application for recognition be accompanied by a statement identifying all foreign proceedings in respect of the debtor that are known to the foreign representative. Article 18, subparagraph (b), extends that duty to the time after the application for recognition has been filed. That information will allow the court to consider whether relief already granted should be coordinated with the existence of the insolvency proceedings that have been commenced after the decision on recognition (Article 30).**

**#Relief available to the foreign representative is subject to the protection of local creditors and other interested persons, including the debtor, against undue prejudice; relief is also subject to compliance with the procedural requirements of the enacting State and to applicable notification requirements (article 22 and article 19, paragraph 2).**

***Article 19. Relief that may be granted upon application for recognition of a foreign proceeding***

**Article 19. Relief that may be granted upon application for recognition of a foreign proceeding**

**1. From the time of filing an application for recognition until the application is decided upon, the court may, at the request of the foreign representative, where relief is urgently needed to protect the assets of the debtor or the interests of the creditors, grant relief of a provisional nature, including:**

**(a) Staying execution against the debtor's assets;**

**(b) Entrusting the administration or realization of all or part of the debtor's assets located in this State to the foreign representative or another person designated by the court, in order to protect and preserve the value of assets that, by their nature or because of other circumstances, are perishable, susceptible to devaluation or otherwise in jeopardy;**

**(c) Any relief mentioned in paragraph 1 (c), (d) and (g) of article 21.**

**2. [Insert provisions (or refer to provisions in force in the enacting State) relating to notice.]**

**3. Unless extended under paragraph 1 (f) of article 21, the relief granted under this article terminates when the application for recognition is decided upon.**

**4. The court may refuse to grant relief under this article if such relief would interfere with the administration of a foreign main proceeding.**

**Article 21. Relief that may be granted upon recognition of a foreign proceeding**

**Article 22. Protection of creditors and other interested persons**

**Article 30. Coordination of more than one foreign proceeding**

**Your answer must include 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?**

**ANS:**

**The provisions given below make it clear, 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 Khadzi Murat Derev( 2021) the question was whether under article 21 MLCBI a worldwide freezing order that was granted as provisional relief under Article 19 MLCBI could continue following recognition in the UK of a Russian Bankruptcy as a foreign main proceeding. It was found that there were other forms of regime offers available which meant that relief in the form of freezing order was not warranted.**

**Article 21. Relief that may be granted upon recognition of a foreign proceeding**

**Upon recognition of a foreign proceeding, whether main or non-main, where necessary to protect the assets of the debtor or the interests of the creditors, the court may, at the request of the foreign representative, grant any appropriate relief, ( may be freezing order)**

**(f) Extending relief granted under paragraph 1 of article 19;**

**Article 19. Relief that may be granted upon application for recognition of a foreign proceeding**

**(3) Unless extended under paragraph 1 (f) of article 21, the relief granted under this article terminates when the application for recognition is decided upon.**

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

**Commented [BB12]: SUB TOTAL = 7 MARKS**

**Read the following facts very carefully before answering the questions that follow.**

**(1) Background**

**The Commercial Bank for Business Corporation (the Bank) has operated since 1991. The Bank's registered office is situated in Country A, which has not adopted the MLCBI. As of 13 August 2015, the Bank's majority ultimate beneficial owner was Mr Z, who held approximately 95% of the Bank's shares through various corporate entities (including some registered in England).**

**The Bank entered provisional administration on 17 September 2015 and liquidation on 17 December 2015. Investigations into the Bank have revealed that it appears to have been potentially involved in a multi-million dollar fraud resulting in monies being sent to many overseas companies, including entities incorporated and registered in England.**

**Proceedings were 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] [7 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 [3.5 out of 10]**

**ANS:**

**Article 2. Definitions**

**For the purposes of this Law:**

**(a) "Foreign proceeding" means a collective [element 1] judicial or administrative [element 2] proceeding [element 3] in a foreign State [element 4], including an interim proceeding, pursuant to a law relating to insolvency [element 5] in which proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign court [element 6], for the purpose of reorganization or liquidation [element 7];**

**According to the Article 2 (a) which provides the definition, wherein it says that the proceeding to qualify to be a foreign proceeding it can either be collective judicial or Administrative proceeding in a foreign state**

**This proceeding should be pursuant to a law relating to insolvency. Here in the given facts of the case, the Country A, where the Registered office of the said Bank is situated has its own Insolvency legislation of Country A's specific insolvency procedure for Banks. The procedure involves initial input from the National Bank (the NB) at the time that the Bank entered liquidation, followed by a number of stages. 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 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.**

**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 certain conditions.**

**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.**

**The Deposit Guarantee Fund (DGF) is a governmental body of Country A tasked principally with providing deposit insurance to bank depositors in Country A.**

**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.**

**(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.**

**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.**

***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.***

***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.***

***Article 35(1) of the DGF Law specifies that who could qualify to be an authorised person.***

***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.***

***Article 37 establishes that the DGF or its authorised person, insofar as such powers are delegated) has extensive powers.***

***On 17 September 2015, the NB classified the Bank as insolvent pursuant to article 76 of the LBBA.***

***on 17 December 2015, the NB formally revoked the Bank's banking licence and resolved that it be liquidated. 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, (Resolution 1513). Resolution 1513 expressly excludes from Ms G's authority the power to certain claims. Each of the excluded powers remains vested in the DGF as the Bank's formally appointed liquidator.***

***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 can be the Applicants and apply for recognition.***

***The Bank's liquidation was extended to an indefinite date, keeping in view the satisfaction of the creditors' claims.***

***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.***

***It has been noticed in the facts from the report, 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.***



**English court based on the Cross-Border Insolvency Regulations 2006 (CBIR), the English adopted version of the MLCBI on the same lines approving the Applicants being the rightful applicants in their capacity as Foreign Representative. The proceedings in the Country are to be considered as Foreign Proceedings.**

**In the matter of Agrokar DD (2017) EWHC 2791(Ch) and A similar recent English case is MS Svitlana Vasilyvna Groshova (authorised officer) of the Deposit Guarantee fund of Ukraine in respect of the liquidation of PJSC Bank and DGF of Ukraine (2021) EWHC1100. The English court considered the application for recognition under CBIR in the UK, of the Ukrainian liquidation of the PJSC Bank, considering in a clear and helpful manner whether the various elements of definitions "Foreign Proceeding" and Foreign Representative" were met as well as the requirements of Art 6,15,17 of the MLCBI.**

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. In your response, a lot of facts are mentioned, but they are not really applied to any of the elements so as to conclude that they have been met in this case, and therefore there is a "foreign proceeding". By way of example, for the "collective nature" element, we would be looking for a response 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]. [3.5 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.**

**ANS:**

***Article 2. Definitions***

**For the purposes of this Law:**

- (a) "....."***
- (b) .....***
- (c) .....***
- (d) "Foreign representative" means a person or body, including one appointed on an interim basis, authorized in a foreign proceeding to administer the reorganization or the liquidation of the debtor's assets or affairs or to act as a representative of the foreign proceeding.***

**For a representative to qualify as "foreign representative" within the meaning of the Model Law the representative needs to meet the following elements:**

- 1. Appointed authorised person or body: It needs to be an appointed person or body authorised in a foreign proceeding ; and**
- 2. Administer debtor's assets or affairs or act as representative: the authorisation of the representative is either to administer the reorganisation or liquidation of the debtor's assets or affairs or to act as representative of the foreign proceeding.**

**An English court can give effect, in its jurisdiction, to a foreign law/court order or the legal status of a foreign representative. If a person is deemed a "foreign representative," they are entitled to commence and participate in proceedings under the insolvency laws of the enacting state. This means the proceedings will be supervised and controlled by the foreign court.**

**MLCBI does not specify that the foreign representative must be authorised by the foreign court. The definition is thus sufficiently broad to include appointment that might be made by special agency other than the court. New Zealand: William Vs Simpson(2010) NZHC1786(2011)NZLR.**

**United States; Vitro S.A.B. de C.V. 701F.3d1031,1047(5<sup>th</sup> Circuit 2013). The court went on to say that it was compatible with being appointed "in the context of" or "during" or "in the course of" a foreign proceeding.**

*There have been various instances where different position holders have been held to be the Foreign Representatives:*

*The trustee in proceedings in Japan who assumes control over the relevant debtor and can administer over the assets of the debtor: Australia: Katayama V Japan Airlines corporation(2010)*

*An administrator in a sauvegarde proceeding in France: United States: SNP Boat Service S.A VS Hotel Le St. James 483 B.R.776,(2012)*

*An "Oversight Commissioner" appointed by supervising Court in Spain to represent and protect the interest of creditors and assure the debtor's compliance.*

*Such have been the instances where the Foreign Representatives have been acting.*

*The English Court has recently considered who can be recognised as ,1047(5<sup>th</sup> "foreign representatives" under the Cross-Border Insolvency Regulations 2006 (CBIR) in the case of *Re 19 Entertainment Limited*, about a US company in Chapter 11. The *Re 19 Entertainment* judgment appears to be the first English case where directors of a company in Chapter 11 proceedings were recognised as "foreign representatives."*

*The court also had to decide whether the applicants (i.e., the directors of the company) were 'foreign representatives.' A foreign representative is deemed to be a person authorised in foreign proceedings to administer the reorganisation/liquidation of the company or to act as a representative of the foreign proceedings. In US proceedings, the continuation of a debtor in possession to operate and manage the business during the bankruptcy proceeding under Chapter 11 is the norm. Therefore, the court accepted the directors were indeed foreign representatives.*

#### **Article 16:**

##### **Recognition Presumptions**

***This article sets forth the following presumptions:***

***If the decision or certificate referred to in Article 15 paragraph 2 indicates that the foreign proceeding is a proceeding within article 2(a) of the Model Law and the foreign representative is a person or body within the meaning of article 2(d) the court is entitled to presume so.***

***In the facts of the present case the Applicants satisfy the description of "foreign representatives" as defined by article 2(d) of the MLCBI.***

***For full marks your response should also apply the guidance and source references you used to explain the elements of the definition of "foreign representative" to the facts. In that context, we are looking for something along the following lines:***

- 1. This application is brought jointly by the DGF and Ms G. The DGF's role as liquidator arises under statute and article 77 of the LBBA provides that the DGF***

*is automatically appointed as liquidator on the day it receives the NB's decision pursuant to article 77 revoking a bank's licence and commencing its liquidation.*

- 2. 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".*
- 3. 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.*
- 4. 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.*
- 5. As a result of the sharing of some, but not all of the liquidator's powers and the division of responsibility between Ms G and the DGF, it seems likely that depending on the nature and timing of relief sought from this Court pursuant to the CBIR (if any), the appropriate applicant may, in the future, be either or both of Ms G and the DGF. I am satisfied that subject to the express limitations on Ms G's powers, they are both authorised to administer the liquidation and as such both meet the definition of "foreign representative". In our judgment they both had the necessary standing to apply in that capacity, for recognition of the Bank's liquidation.*

*\* End of Assessment \**

