



SUMMATIVE (FORMAL) ASSESSMENT: MODULE 2A

THE UNCITRAL MODEL LAWS RELATING TO INSOLVENCY

Commented [BB1]: TOTAL = 39 MARKS

78% - well done!

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 = 9 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

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

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 [SL4]: SUBTOTAL = 9 MARKS

Question 2.1 [maximum 3 marks]

Commented [SL5]: 3 marks

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

The Model Law does not lay down a decisive and conclusive recommendation in relation to the date for determining the COMI of a debtor. However, reference can be made to Article 17 (2)(a) of the Model Law, which states that a 'foreign proceeding shall be recognised as a foreign main proceeding if it is taking place in the State where the debtor has its centre of main interest'. The use of the present tense in the aforesaid, gives us the primary understanding that the foreign insolvency/liquidation proceedings should be pending and sub-judice at the time when a recognition application is referenced before the relevant court in the enacting state. Hence broadly it has been understood that the appropriate date for determining the COMI should be the same as the one on which the foreign proceedings were admitted or commenced. However, it is pertinent to note that the judicial interpretation and applicability of the same has been varied. For instance, in a United States recognition proceedings, the judge considered that the date of determination of COMI should be the same as on which the application for recognition was made¹, which approach was followed in an array of American cases. To the contrary, in the United Kingdom, the judges have opined that the date of determination should be the same as the commencement of the foreign proceedings. Interestingly, in two cited cases (one from the United States and one from the United Kingdom), the judges have considered a finer, detailed approach for the same, where they closely lensed the activities of the debtor in the period between the commencement of the foreign proceedings and the date of filing of the recognition application, to rule out any fraudulent element in relation to the manipulation of COMI².

Question 2.2 [maximum 3 marks]

Commented [SL6]: 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.

¹ *Betcorp Ltd (in re) (in liquidation)* 400 B.R. 266 (Bankr. D. Nev.2009), CLOUT 927.

² *Morning Mist Holdings Ltd v Krys (In re Fairfield Sentry Ltd)* 714 F.3d 127 (2d Cir. Apr. 16, 2013), CLOUT 1339 affirming 458 B.R. 665 (S.D.N.Y. 2011), CLOUT 1316 (second instance) affirming 440 B.R. 60 (Bankr. S.D.N.Y. 2010) (first instance). The consideration of the COMI was only considered in the appellate court. The United Kingdom followed the the interpretation of *Morning Mist* in *Re Toisa Limited* (unpublished)

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: *The Model Law lays down the requirement to provide notice to the foreign creditors as when any notification is ought to be given to the creditors in the enacting state under Article 14. Article 14 substantiates that the court of the enacting state may decide on the most appropriate mode or channel for the said communication which does not involve any formal, official or diplomatic procedures. The article also lays down certain mandatory requirements of any notice given hereunder, which includes: the timelines for filing of the claims; indication to the secured lenders qua their security interest and any special requirements stemming from it and any other pertinent information in relation to any law or order of the court which ought to be communicated to such a foreign creditor.*

Statement 2: *The "Safe Conduct Rule" is enshrined in Article 10, the limited text of which states "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". The rule tries to protect the foreign creditors and representative from an over-arching assumption of jurisdiction of the courts of the enacting state merely on the basis of reference of the recognition application thereto.*

Statement 3: *An undefined key concept under the Model Law is that of Centre of Main Interest or 'COMI'. The Model Law contains a rebuttal presumption in Article 16(3), which states that "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 center of the debtor's main interests". The concept and interpretation of COMI has been widely and variedly opined upon in the cross-border law space by different judgements, however the unsurpassed way to summarise the interpretation and interplay thereof as a key concept of the Model Law, which highlights the objectivity of this concept is to say that "The 'centre of main interests' should correspond to the place where the debtor conducts the administration of his interests on a regular basis and is therefore ascertainable by third parties."³*

Question 2.3 [2 marks]

³ M.Virgos and E. Schmit, Report on the Convention on Insolvency Proceedings, Brussels 3 May 1996 <<[Report on the Convention on Insolvency Proceedings - Archive of European Integration \(pitt.edu\)](#)>>, accessed on February 2, 2023. The aforesaid report is in relation to the to the European Convention , but the same is comparable to the Model Law and hence can relied upon for interpretation.

Commented [SL7]: 1 mark

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

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

The English Court of Appeal ("Court of Appeal"), in upholding the decision of Justice Hildyard ("Court of First Instance"), approached the IBA Case⁴ ("IBA Case"), from the perspective of what would effectuate if the English court were to grant the request under the Moratorium Continuation Application ("Moratorium Application"). The Court of Appeal, essentially concluded that in granting the requests under the Moratorium Application, they would essentially be denying the rights of the English creditors to seek repayment of the bonds under the Gibbs Rule (in relation to which there was nothing to say that, in the application of the principles of modified universalism or the Model Law, a foreign law could override a domestic law). And also, that in doing so, they would also be artificially prolonging the lifespan of the restructuring proceedings which were essentially terminated in Azerbaijan (in relation to which, the essentials of Model Law were adopted and interpreted to state that the Model Law requires the foreign proceedings to be in effect and continuing at the time of the filing of the recognition application). So, while the Court of First Instance dwelled and touched upon the jurisprudential aspect of the applicable provisions and laws including the Gibbs Rule, the Court of Appeal, approached the problem statement head-on by directly corresponding the issues to the relevant articles of the Model Law.

Question 2.4 [2 marks]

Commented [SL8]: 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.

The above question is answered in in two parts:

PART A: The most relevant article the Model Law qua the given situation is Article 29(a). The said article establishes the supremacy of the domestic insolvency proceedings if in the event the foreign main proceedings have been recognised after the commencement of the domestic insolvency proceedings. It further requires the reliefs⁵ to be granted to the foreign proceeding to be consistent with the local

⁴ OJSC International Bank of Azerbaijan and the CBIR 2006- (Bakhshiyeva v Sberbank of Russia [2018] EWCA Civ 2802)

⁵ Under Article 19 or Article 21 of the Model Law

proceeding⁶ and in the present scenario, where the foreign proceedings are foreign main proceedings, they will not enjoy any automatic effects of Article 20⁷.

PART B: *The most relevant article of the Model Law which establishes and highlights the on-going responsibility of the foreign representative qua the domestic insolvency proceedings is Article 18, 'Subsequent Information'. The said article rests a responsibility on the foreign representative of a foreign main/non-main proceedings after the recognition of the same in the enacting state, to regularly keep its courts informed of any substantial change in the foreign proceedings or in the terms of his/her appointment or/and of any other foreign proceedings that the representative may come to know of. The premise of the same is that the court in the enacting state should always have the most updated information about the status of all the relevant proceedings so as to be able to review, modify and/or terminate any recognition order granted and also that the foreign representative will always be privy to such facts.*

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

Commented [BB9]: SUB TOTAL = 10 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.

*Firstly, the foreign representative should be considerate of the fact that a recognition of the foreign proceedings will have tremendous upsides compared to having no recognition, as under Article 9 of the Model Law, the foreign representative may only have a direct access or *locus standi* in the courts in State A, [1] but the same will not dictate that reliefs that must be given to the foreign representative, as reliefs are specifically addressed under other articles of the Model Law⁸. Considering that the foreign representative interests lie in securing the value of the debtor's assets located in State A, and in the event he/she decides to move a recognition application under the Model Law provisions of State A, the following will be the likely benefits of the same:*

⁶ Digest of Case Law on the UNCITRAL Model Law on Cross-Border Insolvency, Page 85

⁷ *Ibid*

⁸ *United States: Cozumel Caribe, S.A., de C.V. 482 B.R. 96, 109–110 (Bankr. S.D.N.Y. 2012), CLOUT 1311.*

- a. *The foreign representative will be entitled to interim reliefs even when the said recognition application is sub-judice before the courts of State A. Under Article 19, the courts are empowered to grant reliefs such as; staying the execution as against the debtor's assets in the state ⁹, entrusting the administration/realisation and preservation of the assets of the debtor to a court appointed administrator or to the foreign representative ¹⁰, declaring a moratorium as against disposal/transfer of the assets¹¹. The interim reliefs can be extended if the recognition application is allowed¹²;*
- b. *Further, once the foreign proceedings have been recognised, the courts in State A, have the discretionary power¹³ to grant various reliefs under Article 21, such as a moratorium in favour of the debtor's assets, rights and obligations¹⁴, staying of execution against the debtor's assets¹⁵, suspending the rights to dispose of or rather deal in any manner with the assets of the debtor¹⁶, providing access to evidence and information in relation to the debtor's assets¹⁷, entrusting the administration/realisation and preservation of the assets of the debtor to a court appointed administrator or to the foreign representative¹⁸, extending any interim reliefs granted under Article 19¹⁹ and/or granting any other reliefs that the foreign representative may apply for. The court can also, under Article 21(2), entrust the responsibility to the court representative or the foreign creditor for distribution of the debtor's domestic assets provided the court is satisfied that the interests of all the other stakeholders is protected;*
- c. *The foreign presentative will also have right to initiate proceedings [1] to set aside any voidable transactions detrimental to the value of the assets under Article 21(1);*
- d. *The foreign representative will also be entitled to intervene in any proceedings locally to which the debtor is a party, in order to safeguard the assets and to voice his/her interest and claim qua it under Article 24;*
- e. *In addition to the aforesaid benefits, the foreign representative will also benefit from the general provisions of cooperation between the court of State A and the insolvency administrator of the debtor in State A (if applicable) with the foreign representative and the foreign court under Article 25 and Article 26, which shall include coordination of the administration and supervision of the debtors' assets and affairs²⁰.*

⁹ Article 19(1)(a)

¹⁰ Article 19(1)(b)

¹¹ Article 19(1)(c)

¹² Article 19(3)

¹³ Article 21(1): the power is discretionary rather than automatic as under Article 20

¹⁴ Article 21(1)(a)

¹⁵ Article 21(1)(b)

¹⁶ Article 21(1)(c)

¹⁷ Article 21(1)(d)

¹⁸ Article 21(1)(e)

¹⁹ Article 21(1)(f)

²⁰ Article 27(c)

Question 3.2 [maximum 5 marks] [4 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.

Assuming that the recognition application has passed the qualifications of being a “foreign proceeding” and the foreign representative has been recognised as such, then the following are the various considerations which have to be overcome for the application to be successful:

- 1. The International obligations of State A: In accordance to Article 3 of the Model Law, the concerned court in State A has to be mindful that recognition application and/or any relief sought thereunder is not in violation or contrary to the obligations of State A under any treaty or any other form of agreement qua one or more other states. If the answer to the aforesaid is in the affirmative then, such a treaty or agreement will prevail over the Model Law. This is a sort of a standard and a fundamental principle which has been adopted in the other texts prepared by UNCITRAL²¹. Having said that, the foreign representative must note that there is a general expectation that the courts will deal with this scrutiny in the context of international law, and further a nexus should be established between what the concerned treaty deals with and the Model Law. Additionally, given the executing and non-executing nature of international treaties, it would be pertinent to note the way in which State A has adopted Article 3. [1]*
- 2. Public Policy Exception: Article 6 of the Model Law states that “Nothing in this Law prevents the court from refusing to take an action governed by this Law if the action would be manifestly contrary to the public policy of this State”. [½] The notions of public policy depend state to state and hence any uniform of applicability of this article has to be ruled out. This article requires a court to consider whether the action in question would be contrary to the public policy of the enacting State²². To the comfort of the foreign representative, there have been a plethora of judgements and case laws on the applicability of this article, but have been ruled applicable only in a few cases such as, when the recognition was sought on the basis of an ex-parte order²³ which was not permissible in the enacting state, where the recognition application would insufficiently protect the interests of the creditors in the enacting State under*

²¹ Digest of Case Law on the UNCITRAL Model Law on Cross-Border Insolvency, Page 29, Introduction -1

²² Digest of Case Law on the UNCITRAL Model Law on Cross-Border Insolvency, Page 20, Paragraph 4

²³ United States: Gold & Honey, Ltd. 410 B.R. 357, 371 (Bankr. E.D.N.Y. 2009), CLOUT 1008.

Article 22²⁴, where a party was denied jury trial in the original state and would have been entitled to one in the enacting state²⁵, or where there was a conflict of interest, when various elements of the foreign insolvency law were argued to be manifestly contrary to public policy²⁶ etc. Application of the public policy exception has been argued in several cases involving bad faith or failure on the part of the foreign representative to fully and frankly disclose pertinent facts to the receiving court²⁷. [½]

3. Application for recognition: Article 15 of the Model Law [½] lays down the mandatory contents of the recognition application. It states that the recognition application should be accompanied by:

- i. A certified copy of the commencement/admission order of a foreign court appointing the foreign representative;*
- ii. A certificate from the foreign court certifying the existence of the foreign proceedings and the appointment of the foreign representative;*
- iii. In the absence of the aforesaid, any other evidence that is acceptable to the court to that effect. This provides flexibility to the court but could also prove to be a hinderance in the event the court in State A is not accepting of the available evidence on record. The same could include, verified copies of minutes, court order, reports to creditors, company and court registry services, registration details of the foreign representative, etc²⁸;*
- iv. A statement recognising all the foreign proceedings in respect of the debtor that are known to the foreign representative. While this statement is not required qua the recognition itself, but more so for the reliefs that accompany the recognition application so as to make sure that the reliefs granted is not inconsistent the on-going proceedings.*
- v. A copy of the documents supplied in the official language of the state. [½]*

In the event the documents mentioned in (i) and (ii) above are not available or are not in order, the foreign representative may also be asked to submit satisfactory submissions justifying the absence thereof²⁹. Hence it should be remembered that while the court has flexibility, the court the powers to demand the presentation of certain documents which can derail and delay the process of recognition.

4. When does a court allow a recognition application: Under Article 17, the court in State A can allow the recognition application (assuming that the proceedings have been recognised as foreign proceedings and the foreign representative is deemed a foreign representative under Article 2 of the Model Law), if all the

²⁴ United States: Toft 453 B.R. 186, 196 (Bankr. S.D.N.Y 2011), CLOUT 1209

²⁵ United States: Jaffé v Samsung Electronics Co., Ltd., 737 F.3d 14 (4th Cir. 2013), CLOUT 1337.

²⁶ United States: ABC Learning Centres Limited 728 F.3d 301, 310–311 (3d Cir. 2013), CLOUT 1338.

²⁷ *Idem*, Page 21, Paragraph 9.

²⁸ *Idem*, Page 31, Paragraph 5; Australia: Raithatha v Ariel Industries PLC [2012] FCA 1526 [paras. 47–48].

²⁹ Canada: Probe Resources Ltd. (2011), 2011 CarswellBC 1043, 79 C.B.R. (5th) 148 (B.C. S.C.) [paras. 14–16].

requirements according to the court under Article 15 are met, the application is submitted to a competent court, and the same will be recognised and main or non-main in correlation to the centre of main interest/establishment assessment of the corporate debtor. [1]

5. The post recognition reliefs which are common for main and non-main proceedings are that the courts in State A, have the discretionary power³⁰ to grant various reliefs under Article 21, such as a moratorium in favour of the debtor's assets, rights and obligations³¹, staying of execution against the debtor's assets³², suspending the rights to dispose of or rather deal in any manner with the assets of the debtor³³, providing access to evidence and information in relation to the debtor's assets³⁴, entrusting the administration/realisation and preservation of the assets of the debtor to a court appointed administrator or to the foreign representative³⁵, extending any interim reliefs granted under Article 19³⁶ and/or granting any other reliefs that the foreign representative may apply for. The court can also, under Article 21(2), entrust the responsibility to the court representative or the foreign creditor for distribution of the debtor's domestic assets provided the court is satisfied that the interests of all the other stakeholders is protected. The foreign representative will also have right to initiate proceedings to set aside any voidable transactions detrimental to the value of the assets under Article 21(1). In granting the reliefs under this Article, the courts in State A have to impose a limitation qua proceedings that are non-main in nature, since its scope out to be much limited compared to foreign main proceedings.

For full marks, and with reference to the question, your answer must include a brief discussion on the following element:

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.

Question 3.3 [maximum 5 marks] [3 marks out of 5]

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.

³⁰ Article 21(1): the power is discretionary rather than automatic as under Article 20

³¹ Article 21(1)(a)

³² Article 21(1)(b)

³³ Article 21(1)(c)

³⁴ Article 21(1)(d)

³⁵ Article 21(1)(e)

³⁶ Article 21(1)(f)

On filing of the recognition application, when the same is pending adjudication³⁷, the foreign representative is entitled to the following reliefs in State A:

- a. The foreign representative will be entitled to interim reliefs even when the said recognition application is sub-judice before the courts of State A. Under Article 19, the courts are empowered to grant reliefs such as; staying the execution as against the debtor's assets in the state³⁸, entrusting the administration/realisation and preservation of the assets of the debtor to a court appointed administrator or to the foreign representative in order to protect and preserve the value of the assets which are perishable, susceptible to devaluation³⁹, declaring a moratorium as against disposal/transfer of the assets⁴⁰. The interim reliefs can be extended if the recognition application is allowed⁴¹;*
- b. The reliefs which can be granted by the courts of State A have to be qua the requests which show case 'urgency' and needless to add, the grant thereof is discretionary in nature. Additionally, these are in the nature of 'collective reliefs' as they may be required, before a decision on the recognition can be taken to protect the assets of the Debtor and the interests of the creditors in State A⁴². Resultantly, this restriction for the relief to be 'collective' as stated in Article 19(3), are conditional or interim in nature and can terminate once the recognition application is allowed. Also, in relation to Article 19(4), it should be noted that (if applicable), if the reliefs that are being asked for in a foreign non-main proceeding, then the court in State A has to make sure that the same are consistent with the foreign main proceedings. The 'assets in jeopardy' concept that has been referred to under Article 19(1)(a) and Article 19(1)(b), has been held to include circumstances by creditors to possess and control the assets of the debtor, actions qua ipso facto clauses, tightening of credit terms, or any other actions that are deemed to be detrimental to the health of the corporate debtor⁴³. It has also been suggested time and again that the nature of interim and pre-recognition reliefs under Article 19 are not exhaustive and can be tailored and dependant on the fact so the case. In addition to addressing the possibility that interim relief might be subjected to conditions the court thinks appropriate⁴⁴.*

The details in relation the reliefs post recognition are as follows:

³⁷ Yu v STX Pan Ocean Co Ltd (South Korea) [2013] FCA 680 [para. 17]

³⁸ Article 19(1)(a)

³⁹ Article 19(1)(b)

⁴⁰ Article 19(1)(c)

⁴¹ Article 19(3)

⁴² UNCITRAL Model Law on Cross-Border Insolvency with Guide to Enactment and Interpretation, Page 88, Paragraph 172.

⁴³ United States: Japan Airlines Corp. (Bankr. S.D.N.Y. Jan. 28, 2010), pp.1-2.

⁴⁴ UNCITRAL Model Law on Cross-Border Insolvency: The Judicial Perspective, Page 52, Paragraph 156

a. *Assuming that the Debtor has its center of main interest in State B, and the foreign proceedings are recognised as foreign main proceedings in State A pursuant to the recognition application, there are certain reliefs under Article 20 of the Model Law, such as stay on the commencement or continuation of individual actions against the debtor's assets, rights obligations or liabilities⁴⁵, stay qua execution against the debtor's assets⁴⁶, suspension of the debtors right to transfer, encumber or dispose off its assets⁴⁷. Article 20(2), makes the scope of the aforementioned reliefs subject to the insolvency law of State A, the enacting state at its discretion. The reliefs that are granted under this Article are not discretionary but automatic, giving due respect to the fact that proceedings in State A are only ancillary to the ones which are going on in State B, and this is approach reflects a basic principle underlying the Model Law according to which recognition of foreign proceedings by the court of the enacting State produces effects that are considered necessary for an orderly and fair conduct of a cross-border insolvency⁴⁸. In relation to the limitations and modifications which can be exercised by the court in State A, the same has been imported in the Model Law, to principally give an opportunity to those who are being affected by the reliefs which are granted under this Article or have some protection which they would be entitled to under the insolvency law of State A. An instance of the such an exception or limitation can be the one which is included in UK insolvency framework (the relevant part which adopts the Model Law), the same is as follows:*

"the same in scope and effect as if the debtor, in the case of an individual, had been adjudged bankrupt under the Insolvency Act 1986 (a) or had his estate sequestrated under the Bankruptcy (Scotland) Act 1985 (b), or, in the case of a debtor other than an individual, had been made the subject of a winding-up order under the Insolvency Act 1986; and (b) subject to the same powers of the court and the same prohibitions, limitations, exceptions and conditions as would apply under the law of Great Britain in such a case, and the provisions of para. 1 of this article shall be interpreted accordingly."

b. *Article 20(3) is a limitation to the scope of reliefs granted itself, which states that the nothing in this article shall affect the right to commence individual actions or proceedings to the extent necessary to preserve a claim against the debtor or to protect the a creditor from losing its claim. Further Article 20(4) also envisaged a limitation which states that the automatic stay and suspension pursuant to Article 20 does not prevent anyone, including the foreign representative or foreign creditors, from requesting the commencement of a local insolvency proceeding and from participating in that proceeding⁴⁹.*

c. *Reliefs under Article 14, 23 and 24: Article 14 gives the right to foreign creditors to receive notices, Article 23, gives the power to the foreign representative to take actions against voidable transactions and Article 24,*

⁴⁵ Article 20(1)(a)

⁴⁶ Article 20(1)(b)

⁴⁷ Article 20(1)(c)

⁴⁸ *Idem*, Point 35, Paragraph 178

⁴⁹ *Ibid*, Paragraph 188

gives the foreign representative the right to intervene in local proceedings where the Debtor would have been a party.

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

- 1. Adequate protection:** Pursuant to Article 22 of the Model Law any interim relief under Article 19 of the Model Law or any post-recognition relief under Article 21 of the Model Law require the court in State A to be satisfied that the interests of the creditors and the other interested persons, including the debtor, are adequately protected and any relief may be subject to conditions as the court considers appropriate.
- 2. 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.
- 3. 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 the case of Igor Vitalievich Protasov Vs Khadzhi-Murat Derev- In The High Court of Justice Business & Property Courts Of England & Wales, dated February 24, 2021⁵⁰, the court England had the opportunity to determine if a worldwide freezing order granted under Article 19 of the Model Law can continue after the foreign proceedings had been recognised.

Facts: *Mr. Devrev was declared bankrupt in Russia, and shortly before that he had moved to London. On declaration of the bankruptcy, the administrator who was appointed by the Russian court moved a recognition application and also successfully got an interim worldwide freezing order in his favour under Article 19. Thereafter, the recognition application was allowed as foreign main proceedings.*

Held: *In deciding whether the worldwide freezing order should continue under Article 21, the court observed in the negative, as the court held that, when the recognition order was made, the provisional suspension under the freezing order was superseded by a permanent suspension of the bankrupt's*

⁵⁰ [2021] EWHC 392 (Ch); << <https://www.bailii.org/ew/cases/EWHC/Ch/2021/392.html> >>, accessed on February 23, 2023

rights by way of Article 20(1) and Article 20(2) of the Model Law. Hence, there was no reason for the freezing order to be extended⁵¹.

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

Commented [BB10]: SUB TOTAL = 11 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

⁵¹ Protasov v Derev [2021] EWHC 392 (Ch) << <https://www.ashfords.co.uk/news-and-media/general/protasov-v-derev-2021-ewhc-392-ch> >>, accessed on February 23, 2023

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 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 [7.5 out of 10]

In reference to Article 2(1) of the Model Law, to qualify as "foreign proceedings", there are certain requirements to be met. The said requirements are listed hereinbelow with the respective specific instances from the above fact set.

Assumption: For the purpose of analysis of the above fact set in light of the provisions of the Model Law and to arrive at an answer as set out in question 4.1.1, it is assumed that in the UK, a financial services institution like a bank, qualifies as a 'debtor' under its insolvency law framework.

- 1. The 'foreign proceedings' must be judicial or administrative [separate element] proceedings [separate element] in nature:** According to the jurisprudence on the subject, a foreign proceeding can be either. In the case of Commercial Bank for Business Corporation (the "Bank"), the liquidation proceedings thereof would be more administrative in nature as its being done under the supervision of the National Bank ("NB") under the law of Country A on Banks and Banking Activity, hence essentially by a central bank under a special legislation coupled with the Deposit Guarantee Fund Law ("DGF Law"). This case has to be distinguished from the case of an ordinary company. Further, these should also be 'proceedings' in so far as being under a statutory framework that has the power to constrain the Bank's actions. Hence these "foreign proceedings" are ADMINISTRATIVE PROCEEDINGS.
- 2. The 'foreign proceedings' must be collective:** This requirement lays down that these proceedings should "affect" all creditors if the realised assets are for the general benefit of all creditors⁵². Essentially, this means that no creditor or class of creditor should be excluded from the process. From the fact set, it clear that the Deposit Guarantee Fund ("DGF"), as the liquidator is empowered to "the power to compile a register of creditor claims and to seek to satisfy those claims" which suggests no discrimination between different creditors. Hence these "foreign proceedings" are COLLECTIVE.
- 3. The "foreign proceedings" should be pursuant to the law related to insolvency:** As highlighted hereinabove, the liquidation proceeding of the Bank are being conducted under the law of Country A on Banks and Banking Activity along with the DGF Law. For the purposes of determination, it is to be noted that the scope of the Model Law is quite wide qua this, and the description is sufficiently broad to encompass a range of insolvency rules irrespective of the type of statute or law in which they might be contained⁵³. Further, a liquidation commenced in the originating State on just and equitable grounds against an insolvent debtor

⁵² United States: Betcorp Limited 400 B.R. 266, 281

⁵³ England: Stanford International Bank Limited [2010] EWCA Civ 137

based upon regulatory misbehavior was found to be pursuant to a law relating to insolvency⁵⁴, which is exactly as in the case of the Bank.

4. The “foreign proceedings” should be for the purpose of reorganisation or liquidation: In relation to the present proceedings in State A under its law of insolvency and liquidation for banks or financial services organisations, more than enough determination has been made by NB, to firstly declare the Bank ‘insolvent’ and then to withdraw its banking license and then to finally remove it from the market and liquidate. In relation to this, the DGF, as a liquidator, has enough powers to conclude that these are liquidation proceedings. Hence these are LIQUIDATION PROCEEDINGS.
5. The control or supervision of the affairs and assets of the debtor by a court or another official body: The present proceedings are being administered by the central bank of State A being, the National Bank and a statutorily appointed body being the DGF.

For full marks, your response in respect of this element should be more extensive and also include something along the following lines:

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. The Guide to Enactment states: “74) 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 under subparagraph (a) should be formal in nature, it may be potential rather than actual. As noted in paragraph 71, 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 but 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.”

⁵⁴ *Ibid*

5. *In this case the DGF has control of all of the Bank's assets and overall control of the liquidation.*
6. *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.*
7. *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.*
8. *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".*

As all the above 5 pointers have been answered in the affirmative, hence its concluded that these should be adjudicated as "foreign proceedings" under Article 2(a) of the Model Law.

*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 the "of a foreign State" element is not specifically addressed.***

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]

In accordance to Article 2(d), a "foreign representative", is "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"

Breaking down the relevant requirements in the aforementioned definition:

1. **Should be a person or a body of persons:** *In this case, DGF is the body which is the recognised body to act as the official liquidator of the Bank under the DGF Law. It should be noted that Mr. C and Ms. G are only delegates and the powers of a liquidator remain with the DGF;*
2. **It is authorised in a foreign proceeding to administer the liquidation of the debtor's assets or affairs:** *As has been clarified hereinabove, the law of Country A on Banks and Banking Activity read along with the DGF Law, officially recognise DGF as the authorised body to conduct the liquidation and has various powers of a liquidator under Articles 34, 35(5), 36(1), 37, 47-52, 521, 53 etc of the DGF Law.*

It is to be noted that it is DGF that should be recognised as the “foreign representative” and not Ms. G, who has been only delegated certain powers of the DGF as the official liquidator. Hence the main applicant in the recognition application should be DGF.

Basis the jurisprudence on the subject, an order of the foreign court affirming that the foreign representative did have the power to dispose of property once held by the debtor was considered by the receiving court to clarify the grant of powers to the foreign representative and to delineate the starting point for recognition⁵⁵, and its as per this understanding that it should be concluded that Ms. G will not be adjudged as the “foreign proceedings” because the power to **and the power to arrange for the sale of the Bank’s assets, has specifically not been delegated to her, but DGF would.**

Please also consider the following reasoning why also Ms G could be considered to qualify as “foreign representative”

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.

⁵⁵ *Ibid*

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.

In addition, for full marks your response should also address the assumption of article 16(1) MLCBI.

While not all facts provided in the fact pattern given for this Question 4 are immediately relevant for your answer, please do use, where appropriate, those relevant facts that directly support your answer.

For the purpose of this question, you may further assume that the Bank is not excluded from the scope of the MLCBI by article 1(2) of the MLCBI.

* End of Assessment *