



SUMMATIVE (FORMAL) ASSESSMENT: MODULE 2A

THE UNCITRAL MODEL LAWS RELATING TO INSOLVENCY

Commented [BB1]: TOTAL = 44 MARKS

88% - Very well done!

*This is the summative (formal) re-sit assessment for Module 2A of this course and is compulsory for all candidates who selected this module as one of their compulsory modules from Module 2. Please read instruction 6.1 on the next page very carefully.*

*If you selected this module as one of your elective modules, please read instruction 6.2 on the next page very carefully.*

The mark awarded for this assessment will determine your final mark for Module 2A. *In order to pass this module, you need to obtain a mark of 50% or more for this assessment.*

## INSTRUCTIONS FOR COMPLETION AND SUBMISSION OF ASSESSMENT

Please read the following instructions very carefully before submitting / uploading your assessment on the Foundation Certificate web pages.

1. **You must use this document for the answering of the assessment for this module. The answers to each question must be completed using this document with the answers populated under each question.**
2. **All assessments must be submitted electronically in MS Word format, using a standard A4 size page and a 11-point Arial font. This document has been set up with these parameters - please do not change the document settings in any way. DO NOT submit your assessment in PDF format as it will be returned to you unmarked.**
3. **No limit has been set for the length of your answers to the questions. However, please be guided by the mark allocation for each question. More often than not, one fact / statement will earn one mark (unless it is obvious from the question that this is not the case).**
4. **You must save this document using the following format: [student ID.assessment2A]. An example would be something along the following lines: 202223-336.assessment2A. Please also include the filename as a footer to each page of the assessment (this has been pre-populated for you, merely replace the words "studentID" with the student number allocated to you). Do not include your name or any other identifying words in your file name. Assessments that do not comply with this instruction will be returned to candidates unmarked.**
5. **Before you will be allowed to upload / submit your assessment via the portal on the Foundation Certificate web pages, you will be required to confirm / certify that you are the person who completed the assessment and that the work submitted is your own, original work. Please see the part of the Course Handbook that deals with plagiarism and dishonesty in the submission of assessments. Please note that copying and pasting from the Guidance Text into your answer is prohibited and constitutes plagiarism. You must write the answers to the questions in your own words.**
- 6.1 **If you selected Module 2A as one of your compulsory modules (see the e-mail that was sent to you when your place on the course was confirmed), the final time and date for the submission of this assessment is 23:00 (11 pm) GMT on 1 March 2023. The assessment submission portal will close at 23:00 (11 pm) GMT on 1 March 2023. No submissions can be made after the portal has closed and no further uploading of documents will be allowed, no matter the circumstances.**
- 6.2 **If you selected Module 2A as one of your elective modules (see the e-mail that was sent to you when your place on the course was confirmed), you have a choice as to when you may submit this assessment. You may either submit the assessment by 23:00 (11 pm) GMT on 1 March 2023 or by 23:00 (11 pm) BST (GMT +1) on 31 July 2023. If you elect to submit by 1 March 2023, you may not**

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

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

**ANSWER ALL THE QUESTIONS**

Please note that all references to the "MLCBI" or "Model Law" in this assessment are references to the Model Law on Cross-Border Insolvency.

**QUESTION 1 (multiple-choice questions) [10 marks in total]**

Commented [SL2]: SUBTOTAL = 10 MARKS

Questions 1.1 - 1.10. are multiple-choice questions designed to assess your ability to think critically about the subject. Please read each question carefully before reading the answer options. Be aware that some questions may seem to have more than one right answer, but you are to look for the one that makes the most sense and is the most correct. When you have a clear idea of the question, find your answer and **mark your selection on the answer sheet by highlighting the relevant paragraph in yellow**. Select only ONE answer. Candidates who select more than one answer will receive no mark for that specific question.

Question 1.1

Which of the following statements does not reflect the purpose of the Model Law?

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

Question 1.2

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

- (a) The increased risk of fraud due to the interconnected world.
- (b) The difficulty of agreeing multilateral treaties dealing with insolvency law.
- (c) The practical problems caused by the disharmony among national laws governing cross-border insolvencies, despite the success of protocols in practice.

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

Question 1.3

**Which of the following challenges to a recognition application under the Model Law is most likely to be successful?**

- (a) The registered office of the debtor is not in the jurisdiction where the foreign proceedings were opened, but the debtor has an establishment in the jurisdiction of the enacting State.**
- (b) The registered office of the debtor is in the jurisdiction of the enacting State, but the debtor has an establishment in the jurisdiction where the foreign proceedings were opened.**

**(c) The debtor has neither its COMI nor an establishment in the jurisdiction where the foreign proceedings were opened.**

**(d) The debtor has neither its COMI nor an establishment in the jurisdiction of the enacting State.**

Question 1.4

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

**(a) The *locus standi*/access rules.**

**(b) The public policy exception.**

**(c) The safe conduct rule.**

**(d) The "hotchpot" rule.**

Question 1.5

**For a debtor with its COMI in South Africa and an establishment in Argentina, foreign main proceedings are opened in South Africa and foreign non-main proceedings are opened in Argentina. Both the South African foreign representative and the Argentinian foreign representative have applied for recognition before the relevant court in the UK. Please note that South Africa has implemented the Model Law subject to the so-called principle of reciprocity (based on country designation), Argentina has not implemented the Model Law and the UK has implemented the Model Law without any so-called principle of reciprocity. In this scenario, which of the following statements is the most correct one?**

*(a) The foreign main proceedings in South Africa will not be recognised in the UK because the UK is not a designated country under South Africa's principle of reciprocity, but the foreign non-main proceedings in Argentina will be recognised in the UK despite Argentina not having implemented the Model Law.*

*(b) Both the foreign main proceedings in South Africa and the foreign non-main proceedings in Argentina will not be recognised in the UK because the UK has no principle of reciprocity and Argentina has not implemented the Model Law.*

*(c) Both the foreign main proceedings in South Africa and the foreign non-main proceedings in Argentina will be recognised in the UK.*

*(d) None of the statements in (a), (b) or (c) are correct.*

Question 1.6

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

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

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

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

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

Question 1.7

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

*(a) The court must be satisfied that the interests of the creditors and other interested parties, excluding the debtor, are adequately protected.*

**(b) The court should consider whether the relief requested is necessary for the protection of the assets of the debtor or the interests of the creditors and strike an appropriate balance between the relief that may be granted and the persons that may be affected.**

**(c) The court should be satisfied that the foreign proceeding is a main proceeding.**

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

Question 1.8

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

**(a) COMI is not a defined term in the Model Law.**

**(b) For a corporate debtor, the Model Law does contain a rebuttable presumption that the debtor's registered office is its COMI.**

**(c) For an individual debtor, the Model Law does contain a rebuttable presumption that the debtor's habitual residence is its COMI.**

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

Question 1.9

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

**(a) Court proceedings.**

**(b) Arbitral Tribunals.**

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

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

Question 1.10

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

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

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

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

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

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

**Commented [SL3]:** SUBTOTAL = 8.5 MARKS

**Question 2.1** [maximum 3 marks]

**Commented [SL4]:** 2 marks

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

*The appropriate date for determining the COMI of a debtor is the date of commencement of the foreign proceeding (see paragraph 159 of the UNCITRAL Guide to Enactment). There is however, case law in the US and the UK which have taken a different approach to the date for determination of the debtor's COMI because of the ability for a debtor to move its 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 or establishment is that foreign proceeding and the activity of the foreign representative in administering the insolvency estate. In such a case, determination of the COMI or an establishment by reference to the date of the commencement of those proceedings would produce a clear result. The same reasoning may also apply in the case of reorganisation where, under some laws, it is not the debtor that continues to have a COMI, but rather the reorganised entity. In such a case, the requirement for a foreign proceeding that is taking place in accordance with article 17(2)(a) is clearly satisfied and the foreign proceeding should be entitled to recognition. Moreover, taking the date of commencement to determine COMI provides a test that can be applied with certainty to all insolvency proceedings.

*In Morning Mist Holdings Ltd v Kryz (Matter of Fairfield Sentry Ltd) (2<sup>nd</sup> Cir Appeals Apr. 16, 2013), the US Court held that the debtor's COMI should be determined based on its activities at or around the time the application for recognition of foreign proceedings is filed, but that a Court may consider the period between the commencement of the foreign insolvency proceeding and the filing of the recognition application to ensure that the debtor has not manipulated its COMI in bad faith.*

*In the UK, the US "commencement" approach was followed by Re Toisa Limited (unreported, Judge Catherine Burton, 29 March 2019). The judgment of the Trustees in bankruptcy of Li Shu Chung v Li Shu Chung [2021] EWHC 3346 (Ch) has also followed the "commencement" approach.*

**Question 2.2** [maximum 3 marks]

**Commented [SL5]:** 2.5 marks

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

Statement 3 = Art 16(3)

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

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

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



Statement 1 relates to the concept/principle of equal treatment of creditors, and of timely notice, and is found in Article 14 (Notification to foreign creditors of a proceeding)

Statement 2 relates to Article 10 (Limited Jurisdiction) and is aimed at ensuring that the court in the enacting state does not assume jurisdiction over all the assets of the debtor on the sole ground that the foreign representative has made an application for recognition of a foreign proceeding.

Statement 3 relates to Article 16 (Presumptions concerning recognition) and contains a rebuttable presumption as to a debtor's COMI (centre of main interests).

**Question 2.3 [2 marks]**

Commented [SL6]: 2 marks

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

The English Court of Appeal in the IBA case considered the issue to be whether the court should not exercise its power to grant the indefinite Moratorium Continuation where to do so would: (a) in substance, prevent the challenging creditors from enforcing their English law rights in accordance with the Gibbs Rule (being the proposition that a debt governed by English law cannot be discharged or compromised by a foreign insolvency proceeding); and/or (b) prolong the stay after the Azeri reconstruction had come to an end. The Court of Appeal found that an indefinite Moratorium Continuation could only properly be granted if the court were satisfied that: (a) the stay was necessary to protect the interests of IBA's creditors; and (b) the stay was an appropriate way of achieving such protection.

**Question 2.4 [2 marks]**

Commented [SL7]: 2 marks

**In terms of relief, what should the court in an enacting State, where a domestic proceeding has already been opened in respect of the debtor, do after recognition of a foreign main proceeding? In your answer you should mention the most relevant article of the MLCBI. What (ongoing) duty of information does the foreign representative in the foreign main proceeding have towards the court in the enacting State? Here too you are required to mention the most relevant article of the MLCBI.**

In terms of relief, a court in an enacting State, where a domestic proceeding has already been opened in respect of the debtor, should, after recognition of a foreign main proceeding, ensure that: (a) any relief granted under article 19 (interim relief) or 21 (post-recognition relief) of the MLCBI is consistent with the proceeding of the enacting State; and (b) the automatic relief of Article 20 does not apply This is required by article 29(a) of the MLCBI.

*The foreign representative in the foreign main proceeding has an ongoing duty to promptly inform the court in the enacting State of any substantial change in the status of the foreign proceeding or the status of the foreign representative's appointment and any other foreign proceeding that becomes known to the foreign representative - this is an obligation under article 18 of the MLCBI.*

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

Commented [BB8]: SUB TOTAL = 11 MARKS

***A foreign representative of a foreign proceeding opened in State B in respect of a corporate debtor (the Debtor) is considering whether or not to make a recognition application under the implemented Model Law of State A (which does not contain any reciprocity provision). In addition, the foreign representative is also considering what (if any) relief may be appropriate to request from the court in State A.***

***Write a brief essay in which you address the three questions below.***

Question 3.1 [maximum 4 marks] [4 out of 4 marks]

***The foreign representative is considering his options to secure the value of the debtor's assets located in State A. With reference to the Model Law's provisions on access and co-operation, explain how these rights in State A can benefit the foreign representative.***

***The following Model Law provisions on access and co-operation may benefit the foreign representative in securing the value of the debtor's assets located in State A:***

- (a) ***Article 9 provides the foreign representative with standing to directly apply to the court in State A. This means that the foreign representative would not need to go through the time and expense of having to meet formal requirements such as licenses or consular action before being recognised as having standing to access the courts. [1]***
- (b) ***In addition to Article 9, Article 11 provides standing to the foreign representative to request the commencement of a domestic insolvency proceeding [1] - no prior recognition of the foreign proceeding is required, so the foreign representative could, by requesting the commencement of a domestic insolvency proceeding, help secure the value of the debtor's assets. [1]***
- (c) ***Article 12 also provides a foreign representative with standing to make petitions, requests or submissions concerning the protection, realisation or distribution of assets in respect of a domestic insolvency proceeding in the enacting State. Article 12 requires the foreign proceeding to be recognised for standing to be available, but provides an avenue to securing the value of the debtor's assets.***
- (d) ***Article 25 provides that the court shall cooperate to the maximum extent possible for foreign representatives and that there can be direct communication between the court and the foreign representative. Article 27(c) specifies that***

*cooperation can be implemented by any appropriate means including coordination of the administration and supervision of the debtor's assets and affairs. The requirement to cooperate is not dependent upon recognition and so cooperation can occur before the foreign representative applies for recognition of the foreign proceedings. [1]*

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

***For a recognition application in State A to be successful, the foreign proceeding opened in State B must qualify as a "foreign proceeding" within the meaning of article 2(a) of the MLCBI and the "foreign representative" must qualify as a foreign representative within the meaning of article 2(d) of the MLCBI. Assuming that both qualify as such, list and briefly explain (with reference to the relevant MLCBI articles) any other evidence, restrictions, exclusions and limitations that must be considered, as well as the judicial scrutiny that must be overcome for a recognition application to be successful.***

*The following evidence, restrictions, exclusions and limitations, and judicial scrutiny must be overcome for a recognition application to be successful:*

*Pursuant to Article 15 (and as required by Article 17(1)(c)), the application for recognition will need to be accompanied by: [½]*

- (a) the following (i) a certified copy of the decision commencing the foreign proceeding and appointing the foreign representative; or (ii) a certificate from the foreign court affirming the existence of the foreign proceeding and of the appointment of the foreign representative; or (iii) in the absence of the preceding evidence, any other evidence acceptable to the court of the existence of the foreign proceeding and the appointment of the foreign representative;*
- (b) a statement identifying all foreign proceedings in respect of the debtor that are known to the foreign representative;*
- (c) a translation (if necessary) of documents supplied in support of the application for recognition into an official language of the enacting State. [½]*

*The application will need to be submitted to a competent court or authority pursuant to Article 4 (and as required by Article 17(1)(d)).*

*The foreign representative, in making his or her application for recognition, also has an obligation to provide full and frank disclosure to the Court and, pursuant to Article 18, has an ongoing obligation to promptly inform the court of any substantial change to the status of the recognised foreign proceeding or the status of the foreign representative's appointment, and any other foreign proceeding regarding the debtor that becomes known to the foreign representative.*

*Article 6 permits the court to refuse to take action if the action would be manifestly contrary to the public policy of the State. The court will therefore consider whether*

there are any grounds to invoke the public policy exception in considering an application for recognition. [1]

Pursuant to Article 17(2), in deciding whether to recognise the foreign proceeding, the Court will recognise the proceeding: (a) as a foreign main proceeding if the proceeding is taking place in the State where the debtor has the centre of its main interests (COMI); or (b) as a foreign non-main proceeding if the debtor has an establishment within the meaning of Article 2(f) in the foreign State, that is, any place of operations where the debtor carries out a non-transitory economic activity with human means and good or services. If the debtor does not have its COMI or an establishment in the foreign State where the foreign proceedings were opened, then the Court will deny the recognition application. [1]

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

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

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.**

Where there is need for urgent relief, Article 19 provides that the following pre-recognition relief can be granted on a provisional basis from the time of filing the recognition application until the application is decided upon:

- a stay of execution against the debtor's assets (article 19(1)(a));
- entrusting the administration or realisation of all or part of the debtor's assets located in the 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 (article 19(1)(b));
- any relief mentioned in article 21(1)(c), (d) and (g), being:
  - suspending the right to transfer, encumber or otherwise dispose of any assets of the debtor;

- b. providing for the examination of witnesses, the taking of evidence or the delivery of information concerning the debtor's assets, affairs, rights, obligations or liabilities; and*
- c. granting any additional relief that may be available to a domestic liquidator / office holder under the laws of the enacting state. (article 19(1)(c)).*

*The above interim relief is subject to:*

- (a) Article 19(3) which provides that the relief granted above terminates when the application for recognition is decided upon, unless extended under article 21(1)(f); and*
- (b) Article 19(4) which provides that the court may refuse to grant interim relief where the interim relief would interfere with the administration of a foreign main proceeding.*

*Article 21(1) provides broad powers to the grant of post-recognition relief in that it provides that the court may, at the request of the foreign representative, grant any appropriate relief, including:*

- (a) staying the commencement or continuation of individual actions or individual proceedings concerning the debtor's assets, rights, obligations or liabilities, to the extent they have not been stayed under article 20(1)(a);*
- (b) staying execution against the debtor's assets to the extent it has not been stayed under article 20(1)(b)*
- (c) suspending the right to transfer, encumber or otherwise dispose of any assets of the debtor to the extent this right has not been suspended under article 20(1)(c);*
- (d) providing for the examination of witnesses, the taking of evidence or the delivery of information concerning the debtor's assets, affairs, rights, obligations or liabilities;*
- (e) entrusting the administration or realisation of all or part of the debtor's assets located in the state to the foreign representative or another person designated by the court;*
- (f) extending the relief granted under article 19(1);*
- (g) granting any additional relief that may be available to the court under the laws of the state.*

*Article 21(2) provides that upon recognition, the court may at the request of the foreign representative, entrust the distribution of all or part of the debtor's assets located in the state to the foreign representative or another person designated by the court provided that the court is satisfied that the interests of creditors in the state are adequately protected.*

*Article 21(3) provides that in granting relief, the court must be satisfied that the relief relates to assets that should be administered in the foreign non-main proceeding or concerns information required in that proceeding.*

*The relief that can be provided under article 21 is subject to observations by the courts, in that, the courts have observed that the relief that can be granted under article 21(1):*

- (a) must be necessary to protect the interests of creditors or to protect the assets of the debtor;*
- (b) is subject to the public policy exception under article 6;*
- (c) must have regard to article 22(1) which emphasises the need to tailor relief and conditions so as to balance the relief granted to the foreign representative and the interests of those affected by the relief, without unduly favouring one group of creditors over another;*
- (d) is subject to article 22(2) which provides that the court may impose conditions on discretionary relief, such as the posting of a security or bond.*

*In England, the courts have considered limits as to the appropriate relief it is able to grant, including that:*

- (a) default judgment is not covered by the Model Law*
- (b) applying foreign insolvency law to an English law governed contract is outside the scope of appropriate relief that the English court can grant;*
- (c) it did not have jurisdiction to grant a foreign representative of a foreign main proceeding an indefinite continuation of the automatic moratorium that resulted from an earlier recognition order;*
- (d) absent some exceptional reason, a freezing order or other similar order, will not be continued following recognition of a foreign main proceeding.*

**Your answer should have also included a brief discussion on the following elements:**

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

Question 3.4 [maximum 1 mark] [1 mark]

**Briefly explain - with reference to case law - why a worldwide freezing order granted as pre-recognition interim relief ex article 19 MLCBI, is unlikely to continue post-recognition ex article 21 MLCBI?**

*In the English case of Igor Vitalievich Protasov and Khadzhi-Murat Derev [2021] EWHC 392 (CH), the Court did not consider that a freezing order would be required or justified, absent some exceptional reason, post-recognition. The Court found that while the court did have jurisdiction to grant a worldwide freezing order post recognition, there were restrictions and limitations which existed to inhibit the exercise of that jurisdiction. In particular, the English bankruptcy regime offered other forms of protection which meant that relief in the form of a freezing order was simply*

*not warranted in circumstances where the Model Law is intended to put the foreign representative in the same position as far as practicable, as a representative appointed under domestic law.*

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

Commented [BB9]: SUB TOTAL = 14.5 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] [14.5 out of 15]

**Prior to any determination made in the English Proceedings, Ms G, in her capacity as authorised officer of the Deposit Guarantee Fund (or DGF) of Country A in respect of the liquidation of the Commercial Bank for Business Corporation (the Bank), together with the DGF (the Applicants), applied for recognition of the liquidation of the Bank before the English court based on the Cross-Border Insolvency Regulations 2006 (CBIR), the English adopted version of the MLCBI.**

**Assuming you are the judge in the English court considering this recognition application, you are required to discuss:**

**4.1.1 whether the Bank's liquidation comprises a "foreign proceeding" within the meaning of article 2(a) of the MLCBI [maximum 10 marks]; and [10 out of 10]**

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

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

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

*Whether the Bank's liquidation comprises a “foreign proceeding” within the meaning of article 2(a) of the MLCBI depends on whether the liquidation meets all the elements of the definition of “foreign proceeding”. Article 2(a) defines “foreign proceeding” to mean “a collective judicial or administrative proceeding in a foreign State, including an interim proceeding, pursuant to a law relating to insolvency in which proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganisation or liquidation”. On the basis of this definition, the questions are whether the Bank's liquidation:*

- (a) is a proceeding (including an interim proceeding) - on the facts, the liquidation appears to be a proceeding because the provided facts state that “the DGF is obliged to commence liquidation proceedings against a bank...”. Further, paragraph 4 of the Case Law on Article 2 (under the UNCITRAL Digest of Caselaw) explains that it has been suggested that “the hallmark of a “proceeding” was “a statutory framework that constrains a company's actions and that regulates the final distribution of a company's assets”. Based on the description of what happens when the bank enter liquidations, it appears that the bank's actions are constrained and the distribution of its assets will be regulated.*
- (b) that is either judicial or administrative - on the facts, the proceedings appear to be administrative in that it is conducted by the National Bank and the Deposit Guarantee Fund (a governmental body) under the Law of Country A on Banks and Banking Activity.*
- (c) that is collective in nature - the proceedings appear to be collective in nature in that it is based on the desirability of achieving a coordinated, global solution for all stakeholders of an insolvency proceeding” (per paragraph 5 of the Case Law on Article 2 (under the UNCITRAL Digest of Caselaw)). As the DGF resolved to approve an amended list of creditors totalling approximately USD1.113 billion, it appears that the proceeding is for the benefit of all stakeholders/creditors, as opposed to a particular creditor group.*
- (d) that is in a foreign State - the proceedings are in a foreign state, Country A, as opposed to England.*
- (e) that is authorised or conducted under a law relating to insolvency - the Bank was classified as insolvent pursuant to article 76 of the Law of Country A on Banks and Banking Activity, after being first classified as troubled. The Bank was classified as troubled because the Bank was engaged in risky operations,*

*which included a breach of minimum capital requirements, 10 months of loss making activities and a critically low balance of funds held with the National Bank. It appears that the Bank then also suffered increased losses and a further reduction in regulatory capital. It therefore appears that the proceeding is an insolvency proceeding.*

- (f) in which the assets and affairs of the debtor are subject to control or supervision by a foreign court - foreign court is defined in Article 2(e) as "a judicial or other authority competent to control or supervise a foreign proceeding". Paragraph 41 of the Case Law on Article 2 (under the UNCITRAL Digest of Caselaw) notes that no distinction is drawn between proceedings controlled or supervised by a judicial or administrative body. Paragraph 42 notes that administrative agencies and banking commissions have been found by courts to satisfy the definition. Here, it looks like the insolvency is subject to the control or supervision by the Deposit Guarantee Fund, a governmental body, which meets the definition of foreign court; and*
- (g) which proceeding is for the purpose of reorganisation or liquidation - here the proceeding is for the purpose of liquidation. The facts explain that the liquidation has been extended to an indefinite date, arising when circumstances rendered the sale of the Bank's assets and satisfaction of creditor's claims no longer possible.*

*Based on the above, the Bank's liquidation comprises a "foreign proceeding" within the meaning of article 2(a) of the MLCBI.*

**Excellent response!**

*Article 2(d) defines "foreign representative" to mean "a person or body, including one appointed on an interim basis, authorised in a foreign proceeding to administer the reorganisation or the liquidation of the debtor's assets or affairs or to act as a representative of the foreign proceeding". On the basis of this definition, the questions are whether the Applicants are:*

- (a) a person or body, including one appointed on an interim basis - here, the applicants are Ms G in her capacity as authorised officer of the Deposit Guarantee Fund and the Deposit Guarantee Fund. The applicants meet this definition. Paragraph 39 of the Case Law on Article 2 (under the UNCITRAL Digest of Caselaw) provides that courts have interpreted "body" as meaning "an artificial person created by a legal authority" and so the Deposit Guarantee Fund meets this definition..*
- (b) authorised in a foreign proceeding - the definition does not specify that the representative must be authorised by the foreign court. Paragraph 37 of the Case Law on Article 2 (under the UNCITRAL Digest of Caselaw) notes that the definition is sufficiently broad to include appointments that may be made by a special agency other than the court. Here, Ms G was appointed by the Deposit Guarantee Fund and so meets the definition. The Deposit Guarantee Fund is*

*empowered by the LBBA - the definition appears to be wide enough for the Deposit Guarantee Fund to meet the definition.*

*(c) to administer the reorganisation or liquidation of the debtor's assets or affairs or to act as representative of the foreign proceeding Here, Ms G and the Deposit Guarantee Fund are to administer the liquidation of the Bank's assets or affairs and so the definition is met.*

*Based on the above, the Applicants fall within the description of "foreign representatives" as defined by article 2(d) of the MLCBI.*

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

**\* End of Assessment \***