



SUMMATIVE (FORMAL) ASSESSMENT: MODULE 2A

THE UNCITRAL MODEL LAWS RELATING TO INSOLVENCY

Commented [BB1]: TOTAL = 37 MARKS

74%

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

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

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

INSTRUCTIONS FOR COMPLETION AND SUBMISSION OF ASSESSMENT

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

1. **You must use this document for the answering of the assessment for this module. The answers to each question must be completed using this document with the answers populated under each question.**
2. **All assessments must be submitted electronically in MS Word format, using a standard A4 size page and a 11-point Arial font. This document has been set up with these parameters - please do not change the document settings in any way. DO NOT submit your assessment in PDF format as it will be returned to you unmarked.**
3. **No limit has been set for the length of your answers to the questions. However, please be guided by the mark allocation for each question. More often than not, one fact / statement will earn one mark (unless it is obvious from the question that this is not the case).**
4. **You must save this document using the following format: [student ID.assessment2A]. An example would be something along the following lines: 202223-336.assessment2A. Please also include the filename as a footer to each page of the assessment (this has been pre-populated for you, merely replace the words "studentID" with the student number allocated to you). Do not include your name or any other identifying words in your file name. Assessments that do not comply with this instruction will be returned to candidates unmarked.**
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- 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 = 6 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

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

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

any so-called principle of reciprocity. In this scenario, which of the following statements is the most correct one?

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

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

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

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

Question 1.6

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

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

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

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

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

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

Question 1.7

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

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

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

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

(d) *All of the above.*

Question 1.8

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

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

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

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

(d) *All of the above.*

Question 1.9

Commented [SL6]: Correct answer is (c).

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

(a) *Court proceedings.*

(b) *Arbitral Tribunals.*

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

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

Question 1.10

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

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

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

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

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

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

Question 2.1 [maximum 3 marks]

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

[Type your answer here]

The definition of COMI is not contained in the Model Law itself although the concept of COMI is fundamental to its operation. The key elements to determine COMI under the Model Law are:

- the location where the central administration of the debtor takes place; and
- which is readily ascertainable as such by creditors of the debtor.

Based on the circumstances of each matter the courts may base the determination of COMI, the court may need to give greater or less weight to certain facts. The determination of COMI in all cases is a holistic approach and is designed to determine that the location of the foreign proceeding in fact corresponds to the actual location of the debtor's COMI, and be ascertainable by its creditors.

The appropriate date for determining the COMI, or whether an establishment exists, is the date of commencement of the foreign proceeding. The Second Circuit of Appeals in the matter of Morning Mist Holdings Ltd had taken a different approach towards the date for determination of the debtor's COMI. The US court held that: "(...) a debtor's COMI should be determined based on its activities at or around the time the Chapter 15 petition [i.e. the US implementation of the Model Law] is filed, as the statutory text suggests."¹

The EIR and other international interpretations, which focus on the regularity and ascertainability of the debtor's COMI, a court may consider the period between the commencement of the foreign insolvency proceeding and the filing of the Chapter 15 petition to ensure that a debtor has not manipulated its COMI

¹ Morning Mist Holdings Ltd v Krys (Matter of Fairfield Sentry Ltd) (2nd Cir Appeals Apr. 16, 2013)

Commented [SL7]: SUBTOTAL = 8.5 MARKS

Commented [SL8]: 3 marks

*in bad faith.*²

*“As far as COMI factors are concerned, the US court further held that: “(...) any relevant activities, including liquidation activities and administrative functions, may be considered in the COMI analysis. (...)”.*³

While the COMI of a debtor can move in terms of the foreign proceedings as close to date if such date is close to the date of foreign proceedings, this may more difficult and the appropriate evidence must be available to establish COMI by creditors.

Question 2.2 [maximum 3 marks]

Commented [SL9]: 3 marks

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

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

Statement 2 *“This Article is referred to as the ‘Safe Conduct Rule’.”*

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

[Type your answer here]

Statement 1

“This Article lays down the requirements of notification of creditors.”

Article 14 and the equal treatment principle requiring that foreign creditors should be notified as notification is required for local creditors in the enacting State. The Model Law leaves a discretion to the court to decide based on the case, foreign creditors are also entitled to:

- *individual* notification of,
 - the commencement of the local proceedings regarding the debtor under the insolvency law of the enacting State, and;
 - of the time-limit to file claims in those proceedings.

To ensure timely notice by expeditious means, Article 14 states:

- “no letters rogatory or other, similar formality required”
- And that the traditional are too cumbersome and time- consuming in the

² *Morning Mist Holdings Ltd v Krys (Matter of Fairfield Sentry Ltd)* (2nd CirAppeals Apr. 16, 2013) (...)” [Slip Op. at 23/34].

³ *Morning Mist Holdings Ltd v Krys (Matter of Fairfield Sentry Ltd)* (2nd CirAppeals Apr. 16, 2013) (...)” [Slip Op at 24]

context of insolvency proceedings and therefore not adequate.

Paragraph 3 of Article 14 advised on exactly what the notification to a foreign creditor of commencement of a proceeding in the enacting State should include.

This should address any conflict with treaty obligations of the enacting State, further for secured creditors in particular, provide clarification as to what they need to do. As in some jurisdictions the filing of a claim by a secured creditor is deemed to be a waiver of their security interest.

Statements 2

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

The "safe conduct" rule is provided for in **Article 10**.

The safe conduct rule of article 10 and the access rights of the Model Law, should give foreign investors comfort. Due to the fact that these rights ensure that local tools are available to the foreign representative. There is no need for any separate proceedings in the enacting State to obtain such standing. This allows for time and cost saving, as both are of utmost importance in cross-border insolvencies.

The result being that foreign creditors could be comfortable that recoveries are being maximized without unnecessary domestic proceedings and further no standing creating any adverse jurisdictional consequences in the enacting State.

This ensures that the court in the enacting State does not assume jurisdiction over all the assets of the debtor solely based on the grounds because the foreign representative has made an application for the recognition of a foreign proceeding.

Response to the Concerns of foreign representatives and creditors are contained in this article.

The immunity afforded by article 10 has been reiterated in the orders issued by some courts as contained in the Digest of Case Law.⁴

"United States: In re Lloyd (Les Mutuelles du Mans Assurances IARD, United Kingdom Branch) case No. 05-60100 (Bankr. S.D.N.Y. Dec. 7, 2005), CLOUT 788 – upon granting recognition, the court included in its order the following language: "that no action taken by the Petitioner, the Scheme Advisers, the Scheme, MMA, or each of their successors, agents, representatives, advisers or counsel, in preparing, disseminating, applying for, implementing or otherwise acting in furtherance of or in connection with the Foreign Proceeding, the scheme of arrangement, this Order, or this Ch. 15 case, or any adversary proceeding herein, or further proceeding commenced hereunder, shall be deemed to constitute a waiver of the immunity afforded to

⁴ UNCITRAL Model Laws relating to Insolvency, Guidance text, page 22

such persons under 11 U.S.C. sects. 306 and 1510.” See also CSL Australia v Britannia Bulkcarriers A/S, case No. 08-15187 (S.D.N.Y. Sept. 8, 2009) – United States Bankruptcy Code, 11 U.S.C. sect. 1509 (e), provides that subject to art. 10, a foreign representative is subject to applicable non-bankruptcy law and must therefore comply with court orders; SNP Boat Service SA, 453 B.R. 446 (Bankr. S.D. Fla. 2011), CLOUT 1314 – court threatened to revoke recognition of a foreign main proceeding because the foreign representative was not complying with the discovery process.”

Statement 3

“This Article contains a rebuttable presumption in respect of an undefined key concept in the MLCBI.”

The concept of COMI is fundamental to the operation of the Model Law albeit there is no definition of COMI in the Model Law itself but, the UNCITRAL Guide to Enactment provides some guidance. Further to the above the COMI concept under the European Insolvency Regulation which is followed for purposes of the Model Law and in article 16(3) of the Model Law – if it is contrary to Section 16.1 and Section 16.2 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 wherein there is a rebuttable presumption that the place of the registered office of the debtor is the place of its COMI.

In jurisdictions where insolvency is a condition for commencing insolvency proceedings, article 31 establishes, upon recognition of a foreign main proceeding, a rebuttable presumption of insolvency of the debtor for the purposes of commencing an insolvency proceeding in the enacting State. This presumption is not applicable if the foreign proceeding is a non-main proceeding. Reason being is that an insolvency proceeding commenced in a State in another State where the debtor has the center of its main interests does and does not necessarily mean that the debtor is to be subject to laws relating to insolvency in other States.

Question 2.3 [2 marks]

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

[Type your answer here]

In the *IBA* case appeal, the English Court of Appeal upheld the decision in the court of first instance :

According to the Court of Appeal, the case did not involve an issue of jurisdiction as the court had no power to deal with the dispute.

Commented [SL10]: 1.5 marks

Gibbs rule

The real issue was the court should not exercise its power to grant the indefinite Moratorium Continuation where to do so would.

There were two questions to be answered, and the Court of Appeal considered:

- that the information obligation on the foreign representative contained in article 18 of the Model Law, regarding a substantial change in the status of the foreign proceeding, and;
- the status of the foreign representative's own appointment, requires the foreign proceeding to still be in existence and the foreign representative to still be in office.

Considering the above, according to the Court of Appeal, once the foreign proceeding has come to an end and the foreign representative no longer holds office, there is no scope for further orders in support of the foreign proceeding to be made and any relief previously granted under the Model Law should terminate.

The court held that had the Model Law if it had ever contemplated the continuance of relief after the end of the relevant foreign proceeding, it would surely have addressed the question and provided appropriate machinery for that purpose.⁵

Question 2.4 [2 marks]

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

[Type your answer here]

Article 18 (a) ensures that the foreign representative informs the court immediately after the time of filing the application for recognition of the foreign proceeding, of "any substantial change in the status of the recognized foreign proceeding or the status of the foreign representative's appointment" because the obligation is to allow the court to modify or terminate the consequences of recognition therefore only calls for information regarding substantial changes.

Upon recognition of a foreign proceeding, albeit main or not, Article 21(1) of the Model Law provides the court in the enacting State with the discretionary power⁶, where necessary to protect the assets of the debtor or the interest of

⁵ UNCITRAL Model Laws relating to Insolvency, Guidance text, page 41

⁶ *Armada Shipping SA* [2011] EWHC 216 (Ch) at paras 35, 38, 45, 46 and 49- *Re Pan Ocean Co Ltd ; Seawolf Tankers Inc and another v Pan Ocean Co Ltd and another* [2015], EWHC 1500 (Ch) at 23, 24, 28, 37, 38, 49, 50, 59 and 60.

Commented [SL11]: 1 mark

Art 29(a) and art 18 (discussed)

creditors and at the request of the foreign representative to grant appropriate relief.⁷

Article 21(2) provides the court in the enacting State with discretionary power at the request of the foreign representative – to hand over all or a part of the debtor’s assets located in the enacting State to the foreign representative or a person appointed by the court provided that the court is satisfied that the interests of the local creditors in the enacting State are adequately protected.

The court must in terms of Article 21(1) (e) – be satisfied that the relief relates to assets that – under the law of the enacting State. Such relief should not interfere with the administration of another insolvency proceeding, in particular the main proceeding.

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

Commented [BB12]: SUB TOTAL = 10.5 MARKS

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

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

Question 3.1 [maximum 4 marks] [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.

[Type your answer here]

There is limitation on cooperation and coordination between judges from different jurisdictions in cases, of cross-border insolvency, which due to the lack of a legislative framework, and or from uncertainty regarding the scope of the existing legislative authority, to be able to pursue cooperation with foreign courts. The Model Law is intended to operate as an integral part of the existing insolvency law in the enacting State.

Inbound and outbound aspects of cross-border insolvency are addressed in the provisions for access.

Article 5 gives authority in terms of the outbound aspects to the person and or body administrating, under the law of the enacting state to act in the foreign state on behalf of the local proceedings.

⁷ UNCITRAL Guide to Enactment, pp 87-88, para 189 clarifies that

In terms of inbound requests, Article 9 gives authority to a foreign representative applying in the enacting State has the following rights: of direct access to courts in the enacting State. [1]

In terms of Article 11, a foreign representative is entitled to apply to commence a proceeding if the conditions for commencing such a proceeding are met. [1]
In terms of Article 12, upon recognition, a foreign representative is entitled to participate in insolvency-related proceedings conducted in the enacting State under the law of that State .

Cooperation is the only realistic way, for example, to prevent dissipation of assets, to maximize the value of assets, [1] eg. if it can be considered, when items of production equipment located indifferent states are worth more if sold together and if sold separately, value is decreased. Therefore, benefits the foreign representative in maximizing the value of the assets and the prevention of dissipation of assets.

Cooperation is not dependent upon recognition [1] and may occur at an early stage and before an application for recognition. The articles of chapter 4 apply to the matters referred to in article 1, cooperation is available for assistance made in the enacting State.

Articles 25 and 26 authorize cross-border cooperation, further also mandate it by providing that the court and the insolvency representative “shall cooperate to the maximum extent possible”.

These articles are designed to overcome the problem of national laws lacking rules providing a legal basis for cooperation by local courts with foreign courts in dealing with cross-border insolvencies.

Enactment of such a legal basis would be helpful in legal systems in which the discretion given to judges to operate outside areas of express statutory authorization is limited as in State A.

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.

[Type your answer here]

For the recognition application to be successful the following must be considered:

In terms of Article 4 it allows the enacting state relating to recognition and co-operation to clarify functions under the Model Law are performed by an authority other than a court. This would be to increase the transparency and ease of use of the insolvency legislation for the benefit of, foreign representatives and foreign courts.⁸

In terms of Article 6 - Public policy exception. 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.⁹ [1]

This exception provides comfort as the ultimate safeguard to its sovereignty, which the Model Law respects. But, the use of the expression “manifestly” in this exception emphasizes that public policy exceptions should be interpreted restrictively only apply in exceptional circumstances concerning matters of fundamental importance for the enacting State. It gives the courts in the enacting State the necessary discretion to deny applications that are manifestly contrary to the public policy of the enacting State.

Further the success of the Model Law to a great extent depends on consistent application wherein the outcomes be more predictable. This predictability of outcome is important for investors and debtors to be comfortable on a State's ability to appropriately deal with cross-border insolvencies. A restrictive interpretation and application of the “public policy exception” therefor is equally important and ensured by the requirement that for the “public policy exception” to apply an application must be manifestly contrary to the public policy of the enacting State.

In terms of Article 7 - Additional assistance under other laws
Nothing in this Law limits the power of a court or an additional person to provide additional assistance to a foreign representative under other laws of this State.¹⁰
It clear that the Model Law does not aim to displace any existing cross-border assistance provisions in the law of the enacting State provided that it consistent with the principles of comity¹¹

Article 8. Interpretation In the interpretation of this Law, regard is to be had to its international origin and to the need to promote uniformity in its application and the observance of good faith.¹²

A foreign representative will make an application under the UNCITRAL Model Law in order to seek recognition of the foreign proceeding.

⁸ Part one. UNCITRAL Model Law on Cross-Border Insolvency page 5 and page 19

⁹ UNCITRAL Model Law on Cross-Border Insolvency Law with Guide to Enactment and Interpretation – page 52

¹⁰ UNCITRAL Model Law on Cross-Border Insolvency Law with Guide to Enactment and Interpretation – page 5

¹¹ UNCITRAL Model Laws relating to Insolvency, Guidance text, page 20

¹² UNCITRAL Model Law on Cross-Border Insolvency Law with Guide to Enactment and Interpretation – page 5

In terms of Article 15 which establishes the requirements to be met by such application being: [½]

- A certified copy of the decision commencing the foreign proceeding and the appointing the foreign representative; or
- A certificate from the foreign court affirming that there is an exiting foreign proceeding and that the foreign representative is appointed.
- In the absence of the above then in that event any other evidence acceptable to the court of the existence of the foreign proceeding and the confirmation of appointment of the foreign representative.¹³
- The application itself should contain a statement of the following;
 - identifying all foreign proceedings that are known to the foreign representative in respect of the Debtor;
 - A translation of documents supplied in support of the application for recognition into an official language of this State, should same be required.[¼]

In terms of Article 16 should it be presumed by the court that the 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), then in that event that documents submitted in support of the application for recognition are authentic, even if they have been legalized or not. Further in the absence of proof to the contrary, the debtor’s registered office, or habitual residence depending on an individual or company, is presumed to be the center of the debtor’s main interests. [1] - refer to Article 17

In order for the Court to decide on whether a foreign proceeding should be recognized, the receiving court is limited to the jurisdictional pre-conditions set out in the definition.

The Model Law makes no provision for the receiving court to embark on a consideration of whether the foreign proceeding was correctly commenced under applicable law as long as it the proceeding satisfies the requirements of article 15, recognition should follow in accordance with article 17.¹⁴

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.***
- 3. Judicial scrutiny: While the court in State A is able to rely on the rebuttable presumptions set forth in Article 16 of the Model Law, in the context of Article 17***

¹³ UNCITRAL Model Law on Cross-Border Insolvency Law with Guide to Enactment and Interpretation – page 8

¹⁴ UNCITRAL Model Law on Cross-Border Insolvency: The Judicial Perspective page 15

of the Model Law the court will have to assess whether either the COMI or at least an establishment of the debtor is located in State B where the foreign proceedings were opened. If the COMI of the debtor is in State B the foreign proceedings should be recognised as foreign main proceedings and if only an establishment of the debtor is in State B the foreign proceedings should be recognised as foreign non-main proceedings. Without a COMI or at least an establishment of the debtor in State B, recognition cannot be granted by the court in State A.

Question 3.3 [maximum 5 marks] [2.5 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.

[Type your answer here]

The Model law procedures for recognition of qualify foreign procedures is designed to establish its key objective so that it would avoid time consuming legalisation or other processes and provide certainty with regards to the decision to recognise.¹⁵

The Model Law is not intended to accord recognition to all foreign insolvency proceedings.

The Pre-recognition relief to be considered is :-

The court in the enacting State is limited to the jurisdictional pre-conditions set out in the definition of “foreign proceeding” as set forth in Article 2(a) of the Model Law when deciding whether the foreign proceeding should be recognized.

*Article 2 (a) of the Model Law defines “Foreign proceeding” which means 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 reorganization or liquidation.*¹⁶

A key definition is that of “foreign proceeding” as contained in Article 2 (a) which definition has the following elements:¹⁷

- a proceeding , interim or not; that is either judicial or administrative; that is collective in nature; that is in a foreign State; that is authorized or conducted

¹⁵ UNCITRAL Model Law on Cross-Border Insolvency Law with Guide to Enactment and Interpretation-page 28

¹⁶ UNCITRAL Model Law on Cross-Border Insolvency Law with Guide to Enactment and Interpretation – page 4

¹⁷ UNCITRAL Model Laws relating to Insolvency, Guidance text, page 14

under a law relating to insolvency; in which the assets and affairs of the debtor are subject to control or supervision by a foreign court; and which proceeding is for the purpose of re-organization or liquidation.

The court of the enacting state is not to embark on a consideration of whether the foreign proceeding for which recognition is requested was correctly commenced under the applicable law of the foreign state. In the matter of *The Trustees in bankruptcy of Li Shu Chung v. Li Shu Chung*, “*The English court accepted that it should not go behind the judgment despite Mr Li’s challenges to the Hong Kong court’s findings. The receiving court would not embark on a consideration of whether the foreign proceeding was correctly commenced under the applicable law because “it would deprive the Model Law of much of its force if a debtor could challenge the findings of fact or law made by the foreign court before the receiving court would recognise the foreign proceeding.”*¹⁸

The main purpose of notifying foreign creditors as provided in Article 14 is to inform them of the commencement of the insolvency proceeding and of the time-limit to file their claims. Furthermore, and considering the principle of equal treatment established by article 13, article 14 requires that foreign creditors should be notified whenever notification is required for creditors in the enacting State.

Article 15 provides the primary procedural requirements for an application by a foreign representative for recognition. With article 15, in conjunction with article 16, the Model Law provides a simple, expeditious structure to be used by a foreign representative to obtain recognition.¹⁹

The process of application and recognition is aided by the presumptions provided in article 16 that enable the court in the enacting State to presume the authenticity and validity of the certificates and documents, originating in the foreign State, that are required by article 15. Article 15 (3), requires an application for recognition to be accompanied by a statement identifying all foreign proceedings in respect of the debtor that are known to the foreign representative.²⁰

In terms of Article 16 (2) and in respect of the provision relaxing any requirement of legalization, the question may arise whether that is in conflict with the international obligations of the enacting State.

The treaties on legalization of documents, like letters rogatory and similar formalities, leave in effect laws and regulations that have abolished or simplified legalization procedures; therefore a conflict is unlikely to arise. According to article 3 of the Model Law, if there is still a conflict between the Model Law and a treaty, the treaty will prevail.²¹

Article 17 provides that, subject to article 6, which allows recognition to be refused, when the specified requirements of article 2 concerning the nature of the foreign

¹⁸ *The Trustees in bankruptcy of Li Shu Chung v. Li Shu Chung* [2021] EWHC 3346 (Ch)

¹⁹ UNCITRAL Model Law on Cross-Border Insolvency Law with Guide to Enactment and Interpretation-page 64

²⁰ UNCITRAL Model Law on Cross-Border Insolvency Law with Guide to Enactment and Interpretation-page 66

²¹ UNCITRAL Model Law on Cross-Border Insolvency Law with Guide to Enactment and Interpretation-page 66

proceeding (i.e. that the foreign proceeding is, as a matter of course, a collective proceeding for the purposes of liquidation or reorganization under the control or supervision of the court and the foreign representative are met and the evidence required by article 15 has been provided, the court should recognize the foreign proceeding without further requirement.²²

Relief available under article 19 is provisional in that, as provided in paragraph 3, it terminates when the application for recognition is decided upon; however, the court is given the opportunity to extend the measure, as provided in article 21, subparagraph 1 (f).

The court might wish to do so, for example, to avoid a hiatus between the provisional measure issued before recognition and the measure issued after recognition.²³

In terms of Article 19 (4), pursues the same objective as in article 30 (a), that if a foreign main proceeding is pending, any relief granted in favour of a foreign non-main proceeding must be consistent with the foreign main proceeding and without interference. The foreign representative who is applying for recognition is required, in terms of article 15 (3), to attach to the application for recognition a statement identifying all known foreign proceedings with respect to the debtor by the foreign representative so that the foreign representative foster such coordination of pre-recognition relief with any foreign main proceeding.

Post recognition relief:

In terms of Article 15 (3) which requires an application for recognition to be accompanied by a statement identifying all foreign proceedings in respect of the debtor that are known to the foreign representative.

Article 18 obligates the foreign representative to inform the court immediately of any substantial change in the status of the recognized foreign proceeding or the status of the foreign representative's appointment after the time of filing the application for recognition of the foreign proceeding. The reason for this is to allow the Court to make the correct decision in this regard. The provision only calls for information of "substantial" changes.

It is important that the court be informed of such modifications when its decision on recognition concerns a foreign "interim proceeding" or a foreign representative has been "appointed on an interim basis".

Article 18 (b), extends that duty to the time after the application for recognition has been filed.

This updated information will allow the court to consider whether relief already granted should be coordinated with insolvency proceedings commenced after the decision on recognitions as contain in article 30 and to facilitate cooperation under chapter IV.

²² UNCITRAL Model Law on Cross-Border Insolvency Law with Guide to Enactment and Interpretation-page 28

²³ UNCITRAL Model Law on Cross-Border Insolvency Law with Guide to Enactment and Interpretation

The post recognition relief under article 21 is discretionary, as is pre-recognition relief as contained in Article 19.

In terms of Article 21 the relief that may be granted upon recognition of a foreign proceeding:

- Upon recognition of a foreign proceeding, either main or non-main, the foreign representative may request to protect the assets or the interests of the creditors if necessary, the court may grant any appropriate relief, including:

Article 21(1):

“(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 paragraph 1 (a) of article 20;

(b) Staying execution against the debtor’s assets to the extent it has not been stayed under paragraph 1 (b) of article 20;

(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 paragraph 1 (c) of article 20;

(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 realization of all or part of the debtor’s assets located in this State to the foreign representative or another person designated by the court;

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

(g) Granting any additional relief that may be available to [insert the title of a person or body administering a reorganization or liquidation under the law of the enacting State] under the laws of this State.

Article 21(2)

2. Upon recognition of a foreign proceeding, whether main or non-main, the court may, at the request of the foreign representative, entrust the distribution of all or part of the debtor’s assets located in this State to the foreign representative or another person designated by the court, provided that the court is satisfied that the interests of creditors in this State are adequately protected.

Article 21(3)

3. In granting relief under this article to a representative of a foreign nonmain proceeding, the court must be satisfied that the relief relates to assets that, under the law of this State, should be administered in the foreign nonmain proceeding or concerns information required in that proceeding.”²⁴

The relief listed in Article 21 (1), which is not exhaustive, are typical relief as granted in insolvency proceedings. The Court is not restricted in granting any type of relief that may be available under the law of the enacting state and it considers the circumstances of the enacting state. This idea is reinforced by Article 22 (2). Article 20(1)(a) is also applicable to Article 21 (1) (a).

²⁴ UNCITRAL Model Law on Cross-Border Insolvency: The Judicial Perspective, page 57

In terms of Article 21(2) the turnover of assets to the foreign representative is discretionary as the Model law contains safe guards which are designed to ensure protection of interests before assets are turnover to the foreign representative. In terms of Article 21 (3) there is one salient factor to be taken into account in tailoring the relief is whether it is for a foreign main or non-main proceeding. Paragraph 3 reflects that idea by providing:

- (a) that relief granted to a foreign non-main proceeding should be limited to assets that are to be administered in that non-main proceeding, and
- (b) that, if the foreign representative seeks information concerning the debtor's assets or affairs, the relief must concern information required in that non-main proceeding.

The reason to advise the court that relief in favour of a foreign non-main proceeding and should not give unnecessarily broad powers to the foreign representative. That relief should not interfere with the administration in particular of the main proceeding. The proviso "under the law of this State" means that recognition of a foreign proceeding entails attaching to the foreign proceeding consequences envisaged by the law of the enacting State.

The idea underlying article 21(3), is also reflected in article 19(4) the (pre-recognition relief), article 29 (c) coordination of a foreign proceeding with a local proceeding and article 30 coordination of more than one foreign proceeding.²⁵

Article 23 upon recognition allows for a foreign representative, , to initiate certain proceedings aimed at illegitimate antecedent transactions. These proceedings to which are specific to article 23 refer are likely to be identified in the adopting legislation of the enacting State.²⁶

It can be gleaned from the above that the model law is drafted in a way that it considers all scenarios in respect of the facts of each case.

Your answer has addressed pre-recognition and post-recognition relief. Your answer should have also included a brief discussion along the following lines:

- 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.**

²⁵ UNCITRAL Model Law on Cross-Border Insolvency: The Judicial Perspective, page 58 - 59

²⁶ UNCITRAL Model Law on Cross-Border Insolvency: The Judicial Perspective, page 63

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?

[Type your answer here]

*In the matter of Igor Vitalievich Protasov and Khadzhi-Murat Derev*²⁷, an English case, the question was whether under article 21 MLCBI a worldwide freezing order that was granted as provisional relief under article 19 MLCBI could continue following recognition in the UK, of a Russian bankruptcy, as a foreign main proceeding.

The court held to have jurisdiction in the strict sense to grant such post-recognition discretionary relief, the court found that relevant restrictions and limitations existed which served to inhibit the proper exercise of that jurisdiction. The court further found that the English bankruptcy regime offers other forms of protection which mean that relief in the form of a freezing order or similar injunction is simply not warranted.

According to the court, "(...) *the scheme of the Model Law is intended to put the foreign trustee or bankruptcy manager in the same position, as far as practicable, as an officeholder appointed under domestic law, and consistent with that, the effect of recognition of a foreign main proceeding is to bring into play the same wide infrastructure of the insolvency legislation.*" There were no exceptional circumstance therefore the court held that a freezing order or any similar order will not be required or justified. In this case, the judge was not persuaded that any special or exceptional circumstances exist."²⁸

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

Commented [BB13]: SUB TOTAL - 12 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).

²⁷ Order of 24 February 2021 by Mr Justice Adam Johnson, [2021] EWHC 392 (CH) (the *Protasov v Derev* Case).

²⁸ Paragraphs 45 and 47 of the *Protasov v Derev* Case judgment, Paragraph 48 of the *Protasov v Derev* Case judgment, Paragraph 52 of the *Protasov v Derev* Case judgment.

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 counterclaims 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] [12 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]

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.

Upon assumption that the Bank is not excluded from the scope of the MLCB by article 1(2) of the MLCBI then: -

In order to define a "foreign proceeding" under article 2, there are various characteristics required. These characteristics are cumulative and article 2 (a) should be considered as a whole, albeit discussed separately. Whether a foreign proceeding possesses or possessed those characteristics would be considered at the time the application for recognition is considered by reference to the date of commencement of the foreign proceeding.²⁹

The attributes required for a foreign proceeding to fall within the scope of the Model Law includes the following:³⁰

- a) "Collective [separate element] judicial or administrative separate element] proceeding [separate element]"

The notion of a "collective" insolvency proceeding, as the guide to enactment and interpretation indicates is based on the desired effect of achieving a coordinated, global solution for all stakeholders of an insolvency proceeding. This Model Law cannot be used merely as or as a tool for gathering up assets in a winding up or a collection device for a particular creditor and or group of creditors who might have initiated a collection proceeding in another State.

The UNCITRAL Model Law was intended to apply only to particular types of insolvency proceedings.

When evaluating whether a given proceeding is collective for the purpose of the Model Law, a key consideration is whether substantially all of the assets and liabilities of the debtor are dealt with in the proceeding, subject to local priorities and statutory exceptions, and to local exclusions relating to the rights of secured

²⁹ UNCITRAL Model Law on Cross-Border Insolvency: The Judicial Perspective – page 25

³⁰ UNCITRAL Model Law on Cross-Border Insolvency: The Judicial Perspective – page 25

creditors. In Country A, Ms G's appointment was pursuant to a decision of the Executive Board of Directors of the DGF, the resolution contains the Ms G is a leading bank liquidation professional and it delegates her to all the liquidation powers which was effected from the time of administration by Ms C and as set out in the DGF Law. The resolution excludes certain authority but each of the excluded power remain vested in the DGF as the Bank's formally appointed liquidator (statutory exceptions).

In as much as Article 36(5) establishes a moratorium under the Provisional administration, Article 77 of the LBBA provides that the DGF automatically becomes the liquidator of the bank on the date it receives confirmation of the NB's decision to revoke the bank's license. At that point the DGF acquires the full powers of a liquidator under the law of Country A.

In *Betcorp*³¹, a voluntary liquidation which had commenced under Australian law, United States of America in the was held by a court to be an administrative proceeding falling within the scope of the Model Law. Due to the voluntary liquidation realized assets for the benefit of all creditors, the requisite aspect of a "collective" proceeding was held to be present.

In the matter of *Gold & Honey*³² it was held by a United States court not to be an insolvency or collective proceeding, because the receivership commenced under Israeli law and that it did not require the receivers to consider the rights and obligations of all creditors. It was designed primarily to allow a certain party to collect its debts.

In the matter of *British American Insurance*³³, the had court concurred with the courts in both *Betcorp* and *Gold & Honey* as to the meaning of "collective", noting that such proceedings contemplated both the consideration and the eventual treatment of claims of various types of creditors, as well as the possibility that creditors might take part in the foreign action.

It can be seen from the cases herein above that Country A, consideration given to "collective judicial and administrative proceedings" in terms of the definition of foreign proceedings, may be deemed to comply. [You have primarily focused on the "collective nature" element]

b) "Pursuant to a law relating to insolvency"

The foreign proceeding as defined in the Model includes the requirement "pursuant to a law relating to insolvency" to ensure that acknowledgement is given to the fact that liquidations as in Country A might be conducted under law that is not labelled as insolvency law, which in this case the laws relating to Banking and the relevant articles being used as listed below, which deals with or addresses insolvency. The reason and purpose was to find a broad description that was encompass a range of insolvency rules. This is irrespective of:

- o the type of statute or law in which they might be contained,

³¹ UNCITRAL Model Law on Cross-Border Insolvency: The Judicial Perspective page 26 para 75

³² UNCITRAL Model Law on Cross-Border Insolvency: The Judicial Perspective page 26 para 77

³³ UNCITRAL Model Law on Cross-Border Insolvency: The Judicial Perspective page 26 para 78

- o of whether the law that contained the rules related exclusively to insolvency.³⁴

Basis in insolvency-related law of the originating State;

- o In Country A – the MLCBI was not adopted but the relevant laws of the country was used to declare the Bank as insolvent. The question to be asked was the laws of Country in terms of Insolvency followed. [this in effect addresses the separate element “of a foreign State” in the definition of “foreign proceeding”]
- o The first point to note was the classification of the bank as troubled- It had to meet at least one criteria set down in its laws being Article 75 of the law of Country A on Banks and Banking Activity (LBBA) or for any reasons specified in its regulations. Once declared “troubled” the bank had 180 days within which to bring its activities in line with the NB requirements, and at the end of that period, the NB must either recognize the bank as compliant or classify it as insolvent. The Bank was formally classified as “troubled” on 19 January 2015. At that stage the NB did not classify it as insolvent albeit the NB resolution recorded that the Bank had engaged in risky operations (which included regulatory misbehavior.)
- o In terms of Article 76 of the LBBA, NB is obliged to classify a Bank as insolvent if it meets the criteria go through the criteria as set out in Article 76. The NB has the ability to classify a bank as insolvent without necessarily needing to go through the troubled stage first.
- o Article 77 allows that a Bank can be liquidated by the NB directly , revoking its License.
- o In terms of the Deposit Guarantee Fund (DGF) a governmental body of Country A and pursuant to Article 34 of the said law , once a bank has been classified insolvent the DGF will began the process of removing it from the Market. This was achieved with an initial period of provisional administration.
- o The liquidation followed the provisional administration.

In the Stanford International Bank case, ordered by the Antiguan court on the basis that it was just and equitable to do so, the English court of first instance deemed that the liquidation of an Antiguan company, „was “pursuant to a law relating to insolvency”. Albeit the ground for liquidation was confined to regulatory misbehavior under the applicable legislation, the Antiguan court at its discretion made the order confirming the liquidation. The English appellate court observing that since the Antiguan law provided for liquidation of corporations on just and equitable grounds, which included insolvency, as well as infringements of regulatory requirements, this could be characterized as “pursuant to a law relating to insolvency” . This decision was upheld on appeal.

Country A did follow the laws of insolvency of its country albeit it that the Bank did have other risky elements.

So is your conclusion that this element is met? For full marks, we are looking for this element to be addressed in your response along the following lines:

1. The Guide to Enactment provides at paragraph 48:

“Acknowledging that different jurisdictions might have different notions of what falls within the term “insolvency proceedings”, the Model Law does not define the term “insolvency”. However, as used in

³⁴ UNCITRAL Model Law on Cross-Border Insolvency: The Judicial Perspective – page 28

the Model Law, the word “insolvency” refers to various types of collective proceedings commenced with respect to debtors that are in severe financial distress or insolvent.”

Further explanation is provided at paragraph 73:

“This formulation is used in the Model Law to acknowledge the fact that liquidation and reorganization might be conducted under law that is not labelled as insolvency law (e.g. company law), but which nevertheless deals with or addresses insolvency or severe financial distress. The purpose was to find a description that was sufficiently broad to encompass a range of insolvency rules irrespective of the type of statute or law in which they might be contained and irrespective of whether the law that contained the rules related exclusively to insolvency.”

2. Article 76 of the LBBA clearly set out Country A’s specific insolvency procedures for insolvent banks. The Bank’s liquidation was commenced pursuant to those provisions and in our judgment should be considered by this Court as being “*pursuant to a law relating to insolvency*”.

c) “Subject to control or supervision by a foreign court”

Albeit it is intended that the control required under 2 (a) should be formal in nature³⁵, it may be potential rather than actual.

A supervision of an insolvency representative by a licensing authority would not be sufficient.³⁶ An example of where control may be exercised not only directly by the court, but also by an insolvency representative where the insolvency representative is subject to control or supervision by the court.

Article 2 (a) makes it clear that both assets and affairs of the debtor should be subject to control or supervision; it would not be sufficient if only one or the other were covered by the foreign proceeding.³⁷

The concept of “control or supervision” has received limited judicial attention to date. The court in *Betcorp*³⁸ held that the voluntary liquidation proceeding in Australia was subject to supervision by a judicial authority: the Australian courts.

In the matter this view was based on three factors:

- o *the ability of liquidators and creditors in a voluntary liquidation to seek court determination of any question arising in the liquidation;*
- o *the general supervisory jurisdiction of Australian courts over actions of liquidators; and*
- o *the ability of any person “aggrieved by any act, omission or decision” of a liquidator to appeal to an Australian court, which could “confirm, reverse or modify the act or decision or remedy the omission, as the case may be”.*³⁹

In the later case of *ABC Learning Centers*, the application for recognition of foreign proceedings commenced in Australia was opposed on several grounds, including

³⁵ The Guide to Enactment and Interpretation of the Model Law

³⁶ Guide to Enactment and Interpretation, para. 74.

³⁷ *Gold & Honey*

³⁸ *Betcorp*, pp. 283-284

³⁹ 30 UNCITRAL Model Law on Cross-Border Insolvency: The Judicial Perspective – page 30 - para - 89

that the foreign insolvency proceeding was not controlled or supervised by a foreign court. However, the United States court found, based upon the factors outlined in *Betcorp* that, notwithstanding that Australian courts do not direct the day-to-day operations of the debtor and that most liquidators proceed with their duties largely without court involvement, the relevant law gave the Australian court various control and supervisory roles with respect to liquidation proceedings that satisfied the requirements of article 2 (a).⁴⁰

In Country A the governmental body, the DGF who is responsible for the process of withdrawing insolvent banks from the market and winding down their operations via liquidation. Article 77 of the LBBA provides that the DGF automatically becomes liquidator of the bank as soon as the NB decides to revoke the banks license. At that point the DGF acquires full powers of a liquidator under the law of the country. Article 48(3) of the DGF Law empowers the to delegate its powers to an authorized officer, or authorized person which is defined by Article 2 (1) (17) of the law and Article 35(1) of the said law specifies the required qualification and standard of authorized person. The DGF's independence is addressed in articles 3 (3) and 3(7) and no 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 authorized person has extensive powers, which includes powers to exercise managerial and supervisory powers, to enter into contracts, to restrict or terminate bank's transactions, and to file property and non- property claims with court.

Upon confirmation of the final liquidation, the interim administrator was replaced and delegates her all liquidation powers as set out in the DGF Law , articles 37,38,47 – 52, and 53 including authority to sign all agreements related to the sale of the Banks assets in a manner prescribed by the DGF Law. A resolution taken by the Board to exclude certain powers and authority which remain vested in the DGF as the Banks formally appointed Liquidator.

If one has to consider the above the Model Law in terms of Article 4 requires an enacting State to specify the court or other competent authority that has the power to deal with issues arising under the Model Law.

There is no distinction drawn, in the definition of "foreign court", in a liquidation proceeding controlled or supervised by a judicial body or by an administrative body reason being was to ensure that those legal systems in which control or supervision was under taken by non-judicial authorities would still fall within the definition of "foreign proceeding". The Model Law does not specify the level of control required to satisfy this aspect of the definition. It can be seen the requirement is satisfied.

(e) "For the purpose of liquidation or reorganization"

If a proceeding satisfy only certain elements of the definition of a foreign proceeding may be ineligible for recognition because they are not for the of either reorganization or liquidation. It could be a proceeding to prevent dissipation and waste, rather than a liquidation or re-organization, or designed to prevent detriment to investors rather than to all creditors, (which is likely not to be a collective proceeding, or perhaps the duties imposed on a Foreign Representative be limited. There are types of procedures that may not be eligible for recognition, especially those that may not satisfy neither the requirement for collectivity not control or supervision by court.

⁴⁰ ABC Learning, pp. 331-332

In Country A's affidavit where the proceedings commenced in the High Court of England and Wales against various defendants, after the investigations 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. The Banks assets and the satisfaction of creditors' claims was no longer possible, the banks deficit exceeded USD 833 million, the liquidation was extended to an indefinite date. A judicial officer's obligation is to impartially determine questions submitted by a party based on evidence placed before the Court. These proceeding possesses those elements wherein the application for recognition is considered.

So is your conclusion that this element has been met as well?

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.

4.1.2) *"Foreign representative" means a person or body, including one appointed on an interim basis, authorized in a foreign proceeding to administer the reorganization or the liquidation of the debtor's assets or affairs or to act as a representative of the foreign proceeding*⁴¹

In terms of Article 2 and consideration being given to the definition of foreign proceeding the foreign representative must administer the proceeding in terms of the very definition of the foreign proceeding being:

must be administering a:-

- "collective judicial or administrative 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;⁴²
 - for the purpose of reorganization or liquidation" or be acting as a representative of the foreign proceeding

The definitions of "foreign representative" and "foreign proceeding" are linked.

To administer a qualifying liquidation of the debtor's assets or affairs, or to act as a representative of the foreign proceeding. Under that approach, a judge would need to be satisfied by the fulfillment of the definition of the foreign proceeding.

A "foreign representative" is entitled, as of right, to apply directly to the receiving court.⁴³

⁴¹ UNCITRAL Model Law on Cross-Border Insolvency: The Judicial Perspective page 12

⁴² Article 4

⁴³ Article 9

Whether the “foreign representative” is authorized to act as a representative of a debtor’s liquidation is determined by the applicable law of the State in which the insolvency proceedings began.⁴⁴

Where the decision appointing the foreign representative indicates that that person satisfies the definition in article 2, subparagraph (d), the court may rely on the presumption established by article 16, paragraph 1 of the Model Law. [correct]

In order to determine whether a particular proceeding falls within the scope of the definition requires, expert evidence of applicable law may be required, to enable a decision on whether the particular proceeding falls within the scope of the definitions.⁴⁵

In Country A, the Bank being governed by the laws of LBBA, DGF automatically becomes the liquidator and the DGF however in Article 48(3) of the DGF law empowers the DGF to delegate its powers to an authorized officer or person, which is defined by article 2(1) (17). the affidavit which contains the Article 35(1) of the DGF Law specifies the qualification requirements for the authorized person. What is not clear in the affidavit is the reason for the change, that the interim administrator, Ms C as authorized person by the DGF was appointed on 17 September 2015 by the DGF, some three months later the NB formally revoked the banks license and resolved it be liquidated on the 17 December 2015, when the bank enters liquidation, all the powers of the bank’s management and control bodies are terminated as are the provisional administrators powers if the bank is in provisional administration.

In as much as the affidavit explains the role of the various bodies and especially the DGF’s laws pertaining to the administration it is not clear who administrated the liquidation during this period. Perhaps a further affidavit or explanation may clarify this aspect.

The DGF replaced Ms C by Ms G with effect from 17 August 2020, this decision was done pursuant to a decision of the Board of Executives of the Directors of the DGF by resolution which has noted certain powers as a liquidator and excluded her from certain authority which remain vested in the DGF as the banks formally appointed liquidator, 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.

The applicant has been authorized in the foreign proceeding “to administer the liquidation of the debtor’s assets or affairs or to act as a representative of the foreign proceeding”.

The foreign representative’s ability to seek early recognition and ability to seek relief is often essential for the effective protection of the assets of the debtor from dissipation or concealment. Therefore, the receiving court is obliged to decide the application “at the earliest possible time”. Some cases may be so straightforward that the recognition process can be completed within a matter of days and in some case if opposed, “the

⁴⁴ UNCITRAL Model Law, art. 5

⁴⁵ UNCITRAL Model Law on Cross-Border Insolvency: The Judicial Perspective page 13 – para 34

earliest possible time” might be measured in months. Interim relief will be available in the event that some order is necessary while the recognition application is pending.
So what is your conclusion? Do both the DGF and Ms G qualify as “foreign representative”?
*** End of Assessment ***