



SUMMATIVE (FORMAL) ASSESSMENT: MODULE 2A

THE UNCITRAL MODEL LAWS RELATING TO INSOLVENCY

Commented [BB1]: TOTAL = 41 MARKS

82% = great effort!

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

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

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

INSTRUCTIONS FOR COMPLETION AND SUBMISSION OF ASSESSMENT

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

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

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

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

ANSWER ALL THE QUESTIONS

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

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

Commented [SL2]: SUBTOTAL = 10 MARKS

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

Question 1.1

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

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

Question 1.2

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

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

(d) All of the above.

Question 1.3

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

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

(b) The registered office of the debtor is in the jurisdiction of the enacting State, but the debtor has an establishment in the jurisdiction where the foreign proceedings were opened.

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

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

Question 1.4

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

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

(b) The public policy exception.

(c) The safe conduct rule.

(d) The "hotchpot" rule.

Question 1.5

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

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

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

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

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

Question 1.6

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

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

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

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

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

Question 1.7

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

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

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

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

(d) All of the above.

Question 1.8

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

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

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

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

(d) All of the above.

Question 1.9

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

(a) Court proceedings.

(b) Arbitral Tribunals.

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

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

Question 1.10

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

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

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

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

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

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

Commented [SL3]: SUBTOTAL = 10 MARKS

Question 2.1 [maximum 3 marks]

Commented [SL4]: 3 marks

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

The appropriate date for determining the COMI of a debtor is the date of commencement of the foreign proceeding.

It is important to note that difficulties have been noted in respect of a change of the COMI in close proximity, as a matter of time, to the commencement of the foreign proceeding. This is due to the special requirement that the center of main interests must be 'ascertainable' by third parties, and in particular creditors.

*In substance, the *Morning Mist Holdings Ltd v Krys* case (*Matter of Fairfield Sentry Ltd*) (2nd Cir Appeals Apr. 16, 2013) followed a somewhat distinctive approach in respect of the date for the determination of the COMI of the debtor. It based that determination on the assessment of the debtor's activities around or during the filing of the recognition application. In the same judgment the court noted that it may also observe the period between the commencement of the foreign proceeding and the filing of the application with a view to ascertaining that the COMI has not been manipulated by a bad faith debtor. In the context of that assessment, other elements may be taken into account, such as, for instance, the "liquidation activities and administrative functions". Courts in the United Kingdom have adopted the aforementioned approach in the *Re Toisa Limited* case (29 March 2019).*

*In any event, in the *Trustees in bankruptcy of Li Shu Chung v Li Shu Chung* [2021] EWHC 3346 (Ch), the court adopted the 'commencement of the proceedings' approach and not the 'filing of the application' approach.*

The Guide to Enactment in paras. 157-160 analyzes the reasons why the appropriate date for the determination of the COMI should be the date of initiation of the foreign proceedings. It primarily focuses on the fact that, after the business activity of the debtor has been ceased, the foreign proceedings and the administration of the debtor's assets undertaken by the foreign representative constitute the only coherent elements as to the assessment of the COMI. At the same time, the date of commencement of the foreign proceedings provides with a clearer answer also in terms of a reorganization proceeding where, in accordance with some domestic insolvency laws, it is not the debtor but the entity under reorganization that has a

COMI. For all insolvency proceedings, the 'commencement approach' gives a straightforward answer as to the determination of COMI.

Question 2.2 [maximum 3 marks]

Commented [SL5]: 3 marks

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

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

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

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

With respect to statement one (1), it is Article 14 of the Model law on Cross-Border Insolvency that refers to the concept of timely and individual notice of foreign creditors ('timely notice'). This relates to the commencement of local insolvency proceedings and, more specifically, the statutory limits to file claims in these proceedings. Article 14 recognizes the time-consuming procedures involved and ensures timely notice via expeditious methods. It states that neither letters rogatory nor similar formalities are needed. Paragraph 3 of the said article identifies what a notification should comprise and what clarifications should be included in terms of secured creditors and treaty obligations.

Concerning statement two (2), Article 10 of the MLCBI specifies that the court should not assume jurisdiction over all assets of the debtor on the single basis of an application for recognition of a foreign proceeding by a foreign representative ('safe conduct rule').

With reference to statement three (3), paragraph 3 of Article 16 of the MLCBI includes a rebuttable presumption that the debtor's centre of main interests (COMI) is presumed to be either its registered office, in the case of a corporate debtor, or its habitual residence, in the case of an individual.

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.

Contrary to the *BTA* case, where an order for a permanent automatic stay in accordance with Article 20 of the Model Law was granted, in the *IBA* case Mr. Justice Hildyard

refused to grant a permanent stay regarding a Moratorium Continuation Application. It was refused on the grounds that such a stay could not be granted with a view to circumventing the Gibbs Rule. In the BTA case the relief was granted under the condition that the relief would remain unopposed.

The IBA appeal case upheld the decision of the court of first instance and centered specifically on the jurisdictional perspectives. Applying the stay would, first of all, deny the creditors the possibility of enforcing their English law rights in line with the Gibbs Rule. In this context, the Court of Appeal affirmed that an indefinite stay could be granted only if it were satisfied of the necessity of the measure in order to safeguard the interests of the IBA creditors and the appropriateness of the stay as a means to reach such a protection. As these two conditions were not fulfilled, the court held that the IBA creditors needed no additional protection.

Secondly, applying such measure would extend the stay after the termination of the reconstruction plan, and, therefore, after the termination of the insolvency representative's appointment and the foreign proceeding. Any additional orders in the light of the foreign proceeding as well as any relief previously granted should be discontinued.

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.

Article 29 of the Model Law is the most relevant in the context of the recognition of a foreign main proceeding by a court where a local proceeding has been also opened in respect of the same debtor. The commencement of a local proceeding does not prevent the recognition of any foreign proceeding. Thus, in accordance with paragraph (a) of Article 29, the court shall ensure that any interim (Article 19) or post-recognition (Article 21) relief granted is consistent with the local proceeding. In addition, the automatic relief of Article 20 as regards the automatic stay is not applicable.

With respect to the continuous duty of information that the foreign representative has, this is reflected in Article 18 of the Model Law. The foreign representative is required from the time of filing of the application to inform the court of any changes in respect of the status of the foreign proceeding or the foreign representative. It is obligated to also inform of the existence of any additional proceeding concerning the debtor as that becomes known to the foreign representative.

QUESTION 3 (essay-type questions) [15 marks in total] [3.5 out of 4 marks]

Commented [BB8]: 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]

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.

With respect to the access principle, chapter II of the Model law provides important rights for the foreign representative.

Direct access of the foreign representative to the courts of the State having implemented the Model Law is reflected in Article 9 of the MLCBI. This means that no formalities are required such as licenses or consular action. [1] For the standing of the foreign representative to take effect in the courts of the enacting State, there is no requirement for any a priori recognition in that State of the foreign proceedings opened in the foreign State.

Requesting the commencement of a local proceeding is possible via Article 11 of the Model Law.[1] It should be, however, considered that such a right may not act as a 'modifier' of the conditions that would otherwise be applicable to open an insolvency proceeding in the enacting State.

*Although not giving specific rights or powers to the foreign representative, Article 12 vests the foreign representative with the right to make petitions, requests or submissions "concerning issues such as protection, realization or distribution of assets of the debtor or cooperation with the foreign proceeding." (para. 115, *UNCITRAL Model Law on Cross-Border Insolvency with Guide to Enactment and Interpretation*, p. 58).*

In addition, Article 10 establishes that a recognition application would not automatically give the right to any court in an enacting State to assume jurisdiction over all assets of the debtor. This is otherwise known as the 'safe conduct rule'.

Of course, the foreign insolvency representative is authorized to recognize the foreign insolvency proceeding in the enacting State via an application procedure in accordance with Article 15 MLCBI. In addition, upon recognition, the foreign representative is given the right to "avoid or otherwise render ineffective" acts detrimental to creditors (Article 23) and to also intervene in local proceedings in which the debtor is a party (as specified in Article 24).

The aforementioned rights aim at formulating a streamlined, transparent and less costly framework. [½] - the key benefits of both the access and cooperation provisions

are that they save time and therefore also costs, as a result of which value destruction can be avoided and value enhancement is promoted.

In its Chapter IV, the Model Law includes provisions on cooperation. These, among others, promote consistency with respect to the treatment of actors around the globe and further cooperation mechanisms even before the recognition application, independently from the recognition decision. As relevant to enacting States that support the principle of comity in their jurisdictions, the MLCBI further contributes to a more consistent incorporation of that principle in the context of cross-border insolvency.

Article 25 introduces a crucial element for cross-border insolvency which aims at the mandatory cooperation of courts with foreign representatives and/or foreign courts to the maximum extent possible. The same Article enables the court to communicate or be provided with information from the foreign court and/or the foreign representative. Viewed from the perspective of the insolvency office-holder, the latter is obligated to cooperate as well to the maximum extent possible and to communicate directly with the foreign court and/or the foreign representative (Article 26).

Furthermore, Article 27 comprises a non-exhaustive list of types of cooperation, thus permitting flexibility to the courts in the exercise of their powers. This list includes, for instance, the "appointment of a person or body to act at the direction of the court" (Article 27(a)), the utilization of any appropriate means for the communication of information, the implementation of measures that concern the proper coordination of the administration and supervision of the affairs and assets of the debtor, the fostering of agreements regarding coordination of proceedings as well as the appropriate coordination of concurrent proceedings. [1]

*At the same time, the *Judicial Perspective* additionally emphasizes some important elements with respect to cross-border communication. It underscores the consideration of the respect of parties' procedural and substantive rights, the timely notice addressed to the parties involved, the importance of the presence of those parties except for exceptional circumstances, the diverse technical means of communication, the open character of that communication and the multiple types of information that can be exchanged, including transcripts, court orders, judgments, informal documents as well as questions and observations.*

*It is accentuated that appropriateness and necessity when combined in the context of communication and cooperation can result in noticeable outcomes for the parties involved (*UNCITRAL Model Law on Cross-Border Insolvency: The Judicial Perspective (Updated 2022)*, E. Cooperation and coordination, p. 71-80).*

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.

Assuming that the court is satisfied from the prerequisites that the foreign representative and the foreign proceeding qualify as such, it will subsequently embark on the consideration of the application requirements set out in article 15 MLCBI. More specifically, the application for recognition should be deposited at the recognizing court by the foreign representative. It comprises a certified copy of the decision initiating the foreign proceeding by which, at the same time, the foreign representative is appointed (article 15(2)(a)). [1] Alternatively, the court may accept a certificate issued by the foreign court appointing the foreign representative and declaring the existence of the foreign proceeding (article 15(2)(b)). In the event all the aforementioned evidential documents are not reproduced, the court could be satisfied by any other evidence acceptable to that court regarding the existence of the proceeding and the designation of the foreign representative (article 15(2)(c)). A statement enumerating all known to the foreign representative foreign proceedings concerning the debtor shall be submitted to the recognizing court (article 15(3)). In addition, a formal translation into an official language of the State to which the recognition application is deposited may be also requested by the recognizing court (article 15(4)).

Article 16 identifies certain presumptions regarding recognition, namely, the presumptions concerning subparagraphs (a) and (d) of article 2 ('foreign proceeding', 'foreign representative') as well as that the authenticity of the documents submitted at the court is presumed, regardless of their legalization. Overall, article 16 establishes a duty of continuous disclosure by the foreign representative in respect of his appointment, the status of the foreign proceeding as well as any information on additional proceedings except for the one under recognition. The same article in its paragraph 3 states that "[i]n the absence of proof to the contrary, the debtor's registered office, or habitual residence in the case of an individual, is presumed to be the centre of the debtor's main interests."

The following article clarifies that the recognition of a foreign main proceeding takes place in the context of a proceeding commenced in the State where the debtor has the center of its main interests. Recognition of a foreign non-main proceeding occurs in the context of an establishment that the debtor has in the State of the foreign proceeding. For that matter, the definition provided in subparagraph (f) of article 2 should be examined by the court. In terms of evidential requirements, expert evidence may be relevant for the assessment of COMI or establishment. In any case, judicial scrutiny should be pursued with regard to the identification of the debtor's COMI or establishment for the granting of the recognition. Vast caselaw emanating from several courts worldwide together with the Virgos-Schmit Report and the EIR recast, useful for the interpretation of the main insolvency proceeding and COMI concepts, could be of assistance to the judge. [1]

In addition, the MLCBI characterizes a foreign proceeding only as a foreign main or non-main proceeding. In the Judicial Perspective (*UNCITRAL Model Law on Cross-Border Insolvency: The Judicial Perspective (Updated 2022)*, paragraph 59, p. 23), it

is noted that the main differentiation between the two proceedings is related to the effects as regards the relief granted. More specifically, the main proceeding refers to an automatic stay and an automatic freeze of the debtor's assets. Furthermore, in the event the debtor's COMI does not correspond to its place of registration, the GEI suggests the assessment of two elements, i.e. the location of the debtor's central administration and the 'ascertainability' by its creditors. Those guiding factors should be considered by the court in finding whether the location of the foreign proceeding coincides with the COMI of the debtor. These factors do not preclude the consideration of additional factors as relevant to that assessment.

It is also important to underscore that the recognition decision should be made "at the earliest possible time" (Article 17, paragraph 3). Depending on the jurisdiction, this can translate into days or even months.

In the event of partial or total lack of the grounds for granting the recognition or even if those have ceased to exist, modification or termination of recognition is provided in paragraph 4 of article 17.

Another consideration to be taken into account stems from the public policy exception of article 6 that gives the opportunity to courts to deny recognition (or to take any MLCBI-related action) on the basis of the manifestly contrary to public policy character of the action pursued via recognition. Some jurisdictions view the meaning of public policy as broad while others interpret it more restrictively. [1]

An eventual move of the debtor's COMI in close proximity to the commencement of the foreign proceeding may generate additional scrutiny by the judiciary in examining the application for recognition.

With respect to the consideration pertaining to timing and date, it is merely acknowledged by article 17, subparagraph 2(a), that the foreign proceeding should be current at the time of the recognition application. Nevertheless, notable caselaw has given rise to different concepts as to the timing at which consideration of the COMI concept should be ascertained. Determination of the COMI could thus concern either the time of application or the date on which the foreign proceeding commenced or the date on which the court should make a decision upon the recognition application. In the GEI it is solely suggested that the proper date for determining the COMI as well as the establishment of the debtor is the date on which the proceeding has commenced. Moreover, the foreign representative when applying at the court of the enacting State for recognition should also consider the existing procedural (or other) rules in accordance with domestic law, especially those relating to circumstances of abuse of process. It is envisaged that the foreign representative also has an obligation of full and frank disclosure to the recognizing court in the enacting State.

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. Public policy exception: Finally, the court in State A should also ensure based on Article 6 of the Model Law that the recognition application is not manifestly contrary to public policy of State A.**

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

As far as relief is concerned, briefly explain (with reference to the relevant MLCBI articles) what pre- and post-recognition relief can be considered in the context of the MLCBI. Also address which restrictions, limitations or conditions should be considered in this context. For the purposes of this question, it can be assumed that there is no concurrence of proceedings.

In cases of urgency, the MLCBI provides in its article 19 for interim relief upon application for recognition. It is ordered on a discretionary basis by the court. Interim relief should in principle concern urgent and provisional measures. The recognizing court considers the appropriateness of the relief while it may identify specific conditions for the granting of such relief (see article 22, paragraph 2). Although the contents of article 19 very much resemble those of article 21, considerable differences occur. Subparagraph (a) of article 19 merely states a stay of execution, while subparagraph (b) brings forward the practice of entrusting the administration or realization of the debtor's assets to the foreign representative or another authorized person in the event of possible devaluation, perishable assets or assets in jeopardy. Such relief is discontinued upon decision of the recognition application (see paragraph 3, article 19).

As specified in paragraph 4 of the same article, an important requirement lies in the consistency between relief granted to the foreign main proceeding and the relief to be granted in the foreign non-main proceeding.

Another restriction relates to the fact that the interim relief should be 'collective' in character and thus in line with relief generally available in collective insolvency proceedings.

In addition, the granting, denying, modifying or terminating relief under articles 19 or 21 is conditioned upon appropriate protection of the rights of creditors and other persons, including the debtor (see article 22, paragraph 1).

In particular, the following measures are envisaged as interim relief: a stay of execution regarding the debtor's assets, entrusting the administration or the realization of the debtor's assets to the foreign representative or another entity designated by the court as well as granting any relief available under subparagraphs (c), (d) and (g) of article 21.

Article 20 is dedicated to the automatic relief available upon recognition of the foreign main proceeding. It gives the opportunity for an 'automatic' stay to be applied. It provides for a stay of proceedings and actions against the assets and liabilities of the debtor, a stay against execution of the debtor's assets as well as suspension of the right

to transfer, encumber or otherwise dispose of those assets. Once again, limitations or restrictions present in the law of the enacting State may be applied in the event legitimate interests of parties are affected by the automatic stay and suspension.

It is important to clarify that such relief, albeit automatic, is linked to available exceptions, conditions or specificities as those exist in the domestic law of the enacting State. For instance, the law may include particular exceptions such as the enforcement of claims on behalf of secured creditors, the commencement of court actions regarding claims generated after the insolvency proceeding or after the recognition and the finalization of transactions in the open financial market.

At the same time, an important element refers to the existing arduousness of applying the stay to an arbitral proceeding when that neither takes place at the enacting State nor the State of the foreign proceeding.

It is specified that the court may modify or terminate the automatic relief if contrary to legitimate interests of parties in interest (see paragraph 2). In some jurisdictions such individual requests are also an option. In this context, the court may assess the domestic laws relating to insolvency.

From a caselaw perspective, the court may also examine the question regarding the duration of the automatic stay.

Paragraph 3 of article 20 acknowledges the possibility to initiate proceedings or actions with a view to preserving a claim against the debtor.

As per post-recognition relief, article 21 MLCBI envisages the opportunity for the court to grant discretionary relief upon recognition of the foreign proceeding. Noting the non-exhaustive character of the list, article 21 provides for a stay of the commencement of individual actions and proceedings against debtor's assets and liabilities, a stay regarding the execution of debtor's assets, suspension of the right to dispose in any way the debtor's assets, the examination of witnesses, the taking of evidence, the provision of information, the entrusting of the administration of the assets of the debtor either to the foreign representative or another entity designated by the court and the prolonging of the interim relief of article 19. It is important to bear in mind that the court (or the competent authority) is authorized to provide additional assistance to the foreign representative in accordance with the domestic laws of the enacting State.

The court may apply specific conditions for the granting of such relief, assess the appropriateness of the relief, 'tailor' such relief and refuse, modify or terminate the relief so to ensure that the rights of creditors and interested persons are protected. It is accepted by the judiciary that when granting discretionary relief different perspectives may be applicable as to the possibility of granting the relief and its extent.

As reflected in paragraph 2, there is possibility for the court to order the 'turnover' of assets to the foreign representative. The Model Law provides for a number of measures in order to protect local interests.

Paragraph 3 states that any relief pertaining to a foreign non-main proceeding should concern assets that are in the process of being administered in that non-main proceeding and that in the case of a foreign representative seeking information the relief to be granted should be linked to that non-main proceeding.

Generally speaking, article 21 does not promote any framework by which the foreign representative would be vested with more extensive powers than those necessary. From a caselaw perspective, the limited extent of article 21 has been identified, namely, in the non-enforcement of an *in personam* insolvency bankruptcy judgment under the MLCBI, the non-applicability of foreign insolvency law to an English law contract as being outside the purpose of article 21 in some jurisdictions and the non-applicability in certain circumstances of an indefinite stay in the context of a recognition decision.

Concerning the consequences of recognition, it is further acknowledged by article 23 that the foreign representative is authorized to commence avoidance of antecedent actions in order to render ineffective acts detrimental to creditors. Powers are not broader than those conferred to the local insolvency representative. Once again, the restrictive framework of the relief available in the context of a non-main proceeding is emphasized in paragraph 2 stating that such relief should only relate to assets concerning the non-main proceeding.

Article 24 authorizes the foreign representative to intervene in any local proceeding of which the debtor is a party on the condition that domestic laws are followed.

Your answer should have also included a brief discussion of 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?

Recent caselaw gave an interesting answer to that question. In *Igor Vitalievich Protasov and Khadzhi-Murat Derev* (order of 24 February 2021 by Mr. Justice Adam Johnson, [2021] EWHC 392 (CH) (the *Protasov v Derev* case)), the issue was whether a worldwide freezing order could continue after the recognition of a Russian main proceeding in the United Kingdom. The court denied the continuation of the order after the recognition decision due to the fact that the main effects of the recognition decision are intended to bring the foreign representative to a similar position with the domestic insolvency representative. The latter is vested with sufficient powers to further the purpose of the cross-border insolvency procedure as a whole, in accordance with English domestic insolvency law.

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

Commented [BB9]: SUB TOTAL = 10.5 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] [10.5 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 [6 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.

Answer to question 4.1.1:

It is important to examine whether the proceeding in question is a 'foreign proceeding' in the meaning of article 2(a) MLCBI. That assessment is inextricably connected to the subsequent determination of that proceeding as main or non-main.

At this stage, the elements forming the aforementioned definition should be wholistically surveyed.

- I. **'Collective [element 1] judicial or administrative [element 2] proceeding [element 3] of a foreign State [element 4]'**

First of all, it should be examined whether the proceeding is a 'collective judicial or administrative' proceeding. It is agreed that the Model Law was intended to apply to insolvency proceedings specifically bearing the meaning of 'collective' proceedings. It is thus important for the proceeding to englobe the interests of all stakeholders. The MLCBI mechanism should not be used in a way that would preclude the treatment of creditor's claims. It is also not intended to merely favour a specific group of creditors. In addition, it is important for the proceeding to treat all assets and liabilities of the bank.

Exploring the nature of the proceeding might also be of assistance, i.e. whether it is a voluntary or non-voluntary procedure.

From the facts of the case, reference is made to a liquidation proceeding. In accordance with the law of Country A, upon liquidation, money liabilities towards the bank become due and the offsetting of counterclaims is forbidden. Public encumbrances and limitations regarding disposal of bank property are also brought to an end. The DGF (Deposit Guarantee Fund) is an independent entity tasked with the processing of the withdrawal of insolvent banks from the market and their winding up via liquidation. As the formal liquidator of the bank, the DGF has the power, inter alia, to compile a list comprising creditor claims and seek the settlement of the said claims. It is also responsible for taking steps so to identify and recover property and for exercising appropriate powers for the finalization of the liquidation. On 7 September 2020, the DGF indeed approved an amended list of creditors' claims. Moreover, article 76 of the LBBA (Law of Country A on Banks and Banking Activity) states that the NB (the National Bank) is obligated to characterize a bank as 'insolvent' if specific criteria are satisfied. Article 34 of the DGF Law states that subsequent to the classification of the bank entity as insolvent, the DGF commences the process of withdrawing the bank from the market and initiating its liquidation. There is often a provisional administration period prior to the liquidation proceeding. More specifically, the DGF

is obligated to initiate liquidation proceedings on or immediately before the next working day following the National Bank's decision to rescind the bank's licence.

In conclusion, nothing in the LBBA, the DGF Law and the facts of the case indicates that the Country A proceeding is not collective. [Why? - see comment below] The proceeding intends to treat wholistically creditors' claims and deal with all assets and liabilities of the insolvent bank. The insolvency process involves an unvoluntary procedure triggered by the NB and DGF as primary actors in the proceedings.

Based on the following line of argument we believe it can be argued that the "collective nature" element is met:

- 1. UNCITRAL's guide for judiciary, "The Model Law on Insolvency: The Judicial Perspective" (2013) explains the requirement for proceedings to be "collective":***

"The UNCITRAL Model Law was intended to apply only to particular types of insolvency proceedings. The Guide to Enactment and Interpretation indicates that the notion of a "collective" insolvency proceeding is based on the desirability of achieving a coordinated, global solution for all stakeholders of an insolvency proceeding. It is not intended that the Model Law be used merely as a collection device for a particular creditor or group of creditors who might have initiated a collection proceeding in another State, or as a tool for gathering up assets in a winding up or conservation proceeding that does not also include provision for addressing the claims of creditors. The Model Law may be an appropriate tool for certain kinds of actions that serve a regulatory purpose, such as receiverships for such publicly regulated entities as insurance companies or brokerage firms, provided the proceeding is collective as that term is used in the Model Law."

- 2. The Guide to Enactment and Interpretation of the UNCITRAL Model Law (2014) explains that when:***

"evaluating whether a given proceeding is collective for the purpose of the Model Law, a key consideration is whether substantially all of the assets and liabilities of the debtor are dealt with in the proceeding, subject to local priorities and statutory exceptions, and to local exclusions relating to the rights of secured creditors. A proceeding should not be considered to fail the test of collectivity purely because a class of creditors' rights is unaffected by it."

- 3. Based on the facts provided the understanding is that all of the Bank's creditors are entitled to claim in the liquidation and that their claims are met from available assets, according to the statutory order of priorities. Consequently, the conclusion can be reached that the Bank's liquidation is a "collective proceeding".***

Please also specifically address the "judicial or administrative" element, the "proceeding" element and the "of a foreign State" element.

II. 'Pursuant to a law relating to insolvency' [element 5]

The following requirement set out by the MLCBI is linked to the understanding that a law related to insolvency might not be explicitly entitled 'insolvency law'. It thus captures instances where domestic law treats insolvency or financial distress regardless of the statute or law in which those regulations are included.

Indeed, Country A comprises a specific insolvency procedure for banks that involves several phases. From the detailed summary of the Affidavit the following elements can

be extracted. First of all, a bank can be declared 'troubled' if it meets specific criteria set out in the Law of the Country A on Banks and Banking Activity (LBBA). Secondly, the National Bank (NB) is obliged to declare the bank insolvent if certain criteria are met in accordance with the same Act. Thirdly, the DGF takes over the liquidation procedure once the NB has decided to revoke the bank's licence. The DGF, as previously mentioned, is an independent entity principally tasked with the provision of deposit insurance to bank depositors in Country A. At the same time, the same entity can also undertake the procedure of withdrawal of insolvent banks from the market terminating their activity through liquidation proceedings. Pursuant to DGF law, upon characterization of the bank as insolvent a provisional period is initiated. During that period, DGF Law specifies the process of direct administration and management of the insolvent bank and the modalities of the moratorium. Indeed, "[i]ts 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". The DGF acts as formal liquidator vested with extensive powers starting from the date of the decision to rescind the bank's licence. The DGF has also powers related to the appointment of an 'authorized officer/person', the bringing of claims for compensation against persons for damages on the insolvent bank and the investigation of the insolvent entity's assets, liabilities and management history. From all of the above, it is apparent that the applicable law concerning the bank's liquidation proceeding concerns a 'law relating to insolvency' notwithstanding the fact that it is not clearly labelled 'insolvency law'.

For full marks, please also provide supporting guidance and source references.

III. 'Subject to control or supervision by a foreign court' **[element 6]**

The way the Model law is drafted does not preclude any non-judicial authority from the meaning of 'foreign proceeding'. In addition, the level of supervision or control by the judicial or non-judicial entity as well as the time at which such supervisory acts should take place are equally not specified in the Model Law. The respective entity's control on the proceeding can be achieved directly by that entity or through an appointed professional, i.e. an 'insolvency representative', supervised by that entity. At the same time, explicit reference is made to the control over the debtor's assets and affairs, as per article 2(a).

In the case at hand, the Deposit Guarantee Fund is the main entity responsible for withdrawal of an insolvent bank from the market and its liquidation. As a non-judicial authority, the DGF can be considered a 'foreign court' and the proceeding an 'administrative' one in accordance with the MLCBI. This is because the DGF exercises its powers independently from any other public institution or authority, as clarified in articles 3(3) and 3(7) of the DGF Law. It has appointed Ms. C and subsequently Ms. G, as authorized officer, to whom the DGF has delegated powers of liquidator in accordance with article 48(3) of the DGF Law. Moreover, it appears that pursuant to Article 35(1) the authorized officer remains accountable to the DGF entity regarding their actions. For those actions that remain vested in the DGF (the powers to claim damages from a related party of the Bank, to make a claim against a non-banking

financial institution having raised money as loans or deposits from individuals and to manage the sale of the Bank's assets), control is deemed to be exercised directly by that entity, as the formal liquidator. The MLCBI remains silent as to the level of control or supervision by the DGF in our case. What is important to underscore is that DGF Law does not contemplate mere supervision of the authorized officer by a 'licensing' authority, something that the Model Law describes in its Guide to Enactment and Interpretation as 'not sufficient'. It is also evident that both the assets and the affairs of the debtor entity are under the supervision of the DGF (or the appointed officer). The DGF alienates the bank's property and funds upon liquidation and is vested with extensive powers in that regard. Among others, it acquires management and supervision powers and undertakes the management of the bank's property, including the disposal, sale and distribution of those assets.

Therefore, for the aforementioned reasons, the liquidation proceeding is 'subject to control or supervision' by the non-judicial entity, the DGF.

IV. 'For the purpose of liquidation or reorganization' [element 7]

The next requirement laid out in the Model law concerns a proceeding initiated for the scope of reorganization or liquidation.

In this case, the Applicants seek recognition of the liquidation proceedings. The DGF is required to initiate liquidation proceedings upon decision of the NB regarding the withdrawal of the bank's licence. The DGF at that point becomes the formal liquidator of the bank acquiring extensive powers. Among those powers, we should particularly refer to the disposal, sale and distribution of the bank's assets and other necessary powers for the completion of the liquidation process.

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. As follows from the comments already made above, your response does not specifically address each of the 7 elements, and it at time a bit light on providing supporting guidance and source references. Also, your response does not contain a clear overall conclusion.

Answer to question 4.1.2:

Pursuant to article 2(d) MLCBI, a foreign representative is defined as "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".

The 'foreign representative' must be an officer appointed either to administer a foreign proceeding or to act as a representative of that proceeding. As we can understand, the interconnection of the terms 'foreign representative' and 'foreign proceeding' is

evident. The term 'foreign proceeding' was previously analyzed in the meaning of art. 2(a) MLCBI and a conclusion was reached that the liquidation proceeding meets the requirements set out in the Model Law. [Please therefore also address in this context the assumption set forth in article 16(1) MLCBI] It is thus important to determine whether the applicant has been *authorized* in the 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" (Article 2(d) MLCBI). The applicable law of the foreign State in which the proceeding commenced determines whether the foreign representative is authorized to act as a representative of the proceeding.

In the case at issue, the Applicants filed a recognition application under the Cross-Border Insolvency Regulations of 2006 (CBIR). The term 'applicants' comprises the authorized officer of the Deposit Guarantee Fund of Country A, Ms. G, and the DGF, acting as formal liquidator. The latter is an independent authority whose duties and responsibilities remain unaffected by any external interference from public authorities and/or the National Bank (articles 3(3) and 3(7) of the DGF Law). As previously mentioned, the DGF acquires substantial powers in the context of liquidation, *inter alia*, the power to investigate the bank, its history, its management and property. The DGF can also file claims against persons having contributed to the insolvency of the bank. In addition, the DGF can exercise managerial and supervisory duties concerning the bank's property, compile a register of creditor claims, facilitate the recovery of bank property via asset identification and the filing of claims, discharge employment contracts and bring to an end non-employment contracts, and other powers as necessary. It is also responsible for the sale, distribution and disposal of the bank's property. At the same time, article 48(3) of the DGF Law stipulates that it is possible for the DGF to delegate its powers to an authorized officer or person. It is stated that the authorized officer is appointed to 'ensure' the bank's withdrawal from the market in the course of liquidation (article 2(1)(17) of the DGF Law). Article 35(1) sets forth the requirements to be met with respect to high professional and moral qualities of the authorized officer. As mentioned in the DGF Law, "[o]nce 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."

According to the facts of the case, the DGF commenced liquidation proceedings on 18 December 2015, after notification of the NB's decision to revoke the bank's license. The DGF appointed Ms. C as authorized officer and she was subsequently substituted by Ms. G. That appointment took effect on 17 August 2020. The Decision of the Executive Board of the Directors of the DGF ('Resolution 1513') clarifies that all liquidation powers are delegated to Ms. G. That decision makes explicit reference to specific duties and articles of the DGF Law. Resolution 1513 goes on excluding "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."

It follows from the above analysis that the Applicants maintain quite distinct duties in the liquidation procedure. Of course, that should not limit the court's consideration that the applicants fall within the description of 'foreign representative' as defined in article 2(d) MLCBI. The question of whether the foreign representative is authorized to administer the proceeding is a question to be answered in accordance with applicable law of the State in which the proceeding commenced. It is thus apparent from the previous assessment that both Applicants are authorized to administer the Bank's liquidation proceeding. The Applicants have direct access to the courts of this State and thus have standing to file a recognition application.

*This conclusion can be supported by recent caselaw emanating from the High Court of England and Wales. In the 'PJSC Bank Case' (*Ms Svitlana Vasylivna Groshova (in her capacity as authorised officer of the Deposit Guarantee Fund of Ukraine in respect of the liquidation of PJSC Bank Finance and Credit) and Deposit Guarantee Fund of Ukraine* [2021] EWHC 1100 (Ch)), the court accepted that an authorized officer appointed by an independent entity (which was responsible, among others, for the withdrawal of insolvent banks from the market and the winding down of their operations via liquidation) and the independent entity per se (which assumed responsibilities of a formal liquidator) were authorized to administer the insolvency proceeding. The court held that both fell within the definition of 'foreign representative' notwithstanding their different roles in the procedure.*

*** End of Assessment ***