



SUMMATIVE (FORMAL) ASSESSMENT: MODULE 2A

THE UNCITRAL MODEL LAWS RELATING TO INSOLVENCY

Commented [BB1]: TOTAL = 27.5 MARKS

55%

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 = 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

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

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

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

Question 1.2

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

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.**

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

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

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

(d) All of the above.

Question 1.8

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

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

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

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

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

(d) All of the above.

Question 1.9

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

(a) Court proceedings.

(b) Arbitral Tribunals.

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

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

Question 1.10

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

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

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

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

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

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

Question 2.1 [maximum 3 marks]

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

Foreign proceedings can only be recognised as foreign main proceedings if they take place in the jurisdiction where the entity has its centre of main interest, and therefore requires consideration of the COMI at a particular point in time.

There is a difference then on how the COMI should be assessed based on approached which were taken traditionally across a number of jurisdictions. Difference approaches of timing might lead to contradictory outcomes regarding the COMI, which might cause confusion against the objectives of the Model Law

Under article 15, there is a list of evidence that is required to for an application to commence a foreign proceeding and appointing the foreign representative. Therefore, having a regard for this evidence, it is appropriate to determine the COMI of a debt is the date of commencement of the foreign proceeding.

Question 2.2 [maximum 3 marks]

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

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

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

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

Statement 1: Article 14 - Notification to foreign creditors of a proceeding under [identify laws of the enacting state relating to insolvency]

Statement 2: Article 10 - Limited Jurisdiction

Commented [SL7]: SUBTOTAL = 6.5 MARKS

Commented [SL8]: 1.5 marks

Where the business activity of the debtor ceases after the commencement of the foreign proceeding, all that may exist at the time of the application for recognition to indicate the debtor's COMI or establishment is that foreign proceeding and the activity of the foreign representative in administering the insolvency estate. In such a case, determination of the COMI or an establishment by reference to the date of the commencement of those proceedings would produce a clear result. The same reasoning may also apply in the case of reorganisation where, under some laws, it is not the debtor that continues to have a COMI, but rather the reorganised entity. In such a case, the requirement for a foreign proceeding that is taking place in accordance with article 17(2)(a) is clearly satisfied and the foreign proceeding should be entitled to recognition. Moreover, taking the date of commencement to determine COMI provides a test that can be applied with certainty to all insolvency proceedings. [see also pages 28/29 of the Guidance Text] However, US courts may take a slightly different approach based on the *Morning Mist Holdings Ltd v. Krys (Matter of Fairfield Sentry Ltd)* (2nd Cir Appeals April 16, 2013) (which was recently followed in the UK in *Re Toisa Limited* – see footnote 94 on page 28 of the Guidance Text). The US court will most likely consider the date of the recognition application pursuant to the US Chapter 15 as the appropriate date for determining the COMI or the existence of an establishment

Commented [SL9]: 2 marks

Statement 3 - Art 16(3)

Statement 3: Article 31 - Presumption of insolvency based on recognition of a foreign main proceedings

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.

The English Court of Appeal upheld the decision that the court should not exercise its power to grant the indefinite Moratorium Continuation based on the questions whether the English court lacked jurisdiction to grant the indefinite Moratorium Continuation requested by foreign representatives.

The Court of Appeal held that an English Court could only properly grant the indefinite Moratorium Continuation if it were satisfied of two things. (1) stay would have been necessary to protect the interest of IBA creditors and (2) the stay would have been appropriate way of achieving such protection. The court of appeal held that neither of these conditions were satisfied

The Court of Appeal also considered the information obligations on the foreign representative contained in article 18 of the Model Law. The Court of Appeal held that once the foreign proceeding has come to an end and the foreign representative no longer holds office then there is no scope of further orders in support of the foreign proceeding to be made and any relief previously granted under the Model Law should terminate.

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.

Concurrent domestic insolvency proceedings and foreign proceedings can exist either at the time of the application of the recognition of the foreign proceeding in the enacting State or after recognition or the filing of the application for recognition of the foreign proceeding. With respect to second situation, any relief that is granted should be made either under article 19 or article 21 and shall be modified or terminated if inconsistent with the domestic insolvency proceeding.

Commented [SL10]: 1.5 marks

Gibbs rule

Commented [SL11]: 1.5 marks

Art 29(a) and art 18 (as discussed)

With respect to the duty of information the foreign representative in the foreign main proceedings has towards the court in the enacting State. Article 18 requires the foreign representative from the time of filing the recognition application for the foreign proceeding to promptly inform the court in the enacting state of any substantial changes in the status of the recognised foreign proceeding or the status of the foreign representative's appointment and any other foreign proceeding regarding the same debtor that becomes known to the foreign representative

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

Commented [BB12]: SUB TOTAL = 8 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] [3 out of 4 marks]

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

Firstly, the model law is intended to simplify the process required to recognise foreign proceedings and to provide a clear framework for obtaining recognition. The purpose of the Model Law is to not attempt a substantive unification of insolvency law but co-operation between jurisdictions, especially with cooperation between the courts and other competent authorities of the state.

Access is defined as providing access of foreign representatives and creditors to courts and co-operation is facilitating with foreign courts and foreign representatives. With respect to access the foreign representative of a foreign proceeding in State B can access the courts of the State A and seek temporary breathing spaced and allow the courts in the enacting state to determine what co-ordination among jurisdictions, whilst co-operation is permitting the courts in the enacting state to cooperate more effectively with foreign courts and foreign representatives involved in an insolvency matter.

Access is dealt in chapter II of the Model law between articles 9-14. Access rights in articles 9 provided to the foreign representative standing before the courts of the enacting state without the need for a foreign proceeding to be opened in the foreign state to be recognised in the enacting state [1]. Together with the safe conduct rule of article 10, this should give foreign investors comfort that

local tools are available to the foreign representative which saves time and costs.[1] Also foreign creditors will benefit given that recoveries are being maximised without being burdened with unnecessary domestic proceedings. With standing before the local courts the foreign representative would be able to raise breaches if foreign creditors are being discriminated.

With respect to cooperation, a uniform approach is facilitated by the permitting courts in the enacting State to co-operate more effectively with foreign courts and foreign representatives involved in an insolvency matter. Cross Border co-operation is dealt with in articles 25-27 [1] of the Model law, and looks to fill a gap by empowering courts to extend co-operation in certain specific areas. The objective of co-operation is to be efficient and achieve optimal results as well as help to promote consistency of treatment of stakeholders. Access rights in the Model law enable the foreign representative standing before the courts in the enacting state facilitate co-operation as they allow the foreign representative to communicate with the court.

To obtain full marks, your answer should include a discussion on Article 11 of the MLCBI:

- **Opening domestic insolvency proceedings (Article 11 MLCBI): The foreign representative is further specifically entitled to apply for the opening of domestic insolvency proceedings in State A, as reflected in Article 11 of the MLCBI. Whether or not the foreign representative would wish to do this will depend on what the requirements are for opening such domestic proceedings. Can these requirements be met? On the other hand, it will depend on what the foreign representative believes he/she can get in terms of (interim) relief for the foreign proceedings in State B. In other words, are domestic insolvency proceedings really needed, or just additional time and costs that should be avoided?**

Question 3.2 [maximum 5 marks] [1 out of 5 marks]

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

The definition of a foreign proceeding under 2(a) 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 the affairs of the debt are subject to control or supervision by a foreign court, for

the purpose of re-organisation or liquidation, where as the definition of a foreign representative under 2(d) of the MLCBI is a person or a body including one appointed in an interim basis authorised in a foreign proceeding to administer the re-organisation or the liquidation of the debtors assets or affairs or to act as a representative of the foreign proceeding.

Given that the foreign proceeding opened in State B qualifies as a foreign proceeding under article 2(A) of the MLCBI and qualifies as a foreign representative under 2(d) of the MLCBI then this raises a number of points for the recognition application to be successful.

Article 15(2) states that such a request for recognition shall be granted as a matter of course if the requirements for 15(2) of the Model Law are met, if the foreign representative qualifies in accordance with 2(a) and 2(b) of the model law. Article 16(1) states that if the decision or certificate referred to in paragraph 2 of article 15 indicates that the qualification is under 2(a) and 2(d) of the Model law then the court is entitled to presume. 15(2) states that an application shall be accompanied by [½]

- a) A certified copy of the decision commencing the foreign proceeding and appointing the foreign representative*
- b) A certificate from the foreign court affirming the existence of the foreign proceeding and of the appointment of the foreign representative; or*
- c) In the absence of evidence referred to in sub paragraphs (a) and (b) any other evidence acceptable to the court of the existence of the foreign proceeding and of the appointment of the foreign representative. [½]*

In addition the application for foreign proceedings must be accompanied by a statement identify all foreign proceedings in respect to the debtor that are known to the foreign representative. Article 18 states that from the time of filing an application for recognition of the foreign proceeding then the foreign representative shall inform the court (a) any change to the recognised foreign proceedings and (b) any other foreign proceeding regarding the same debtor that becomes known to the foreign representative.

Article 20 (1) Upon recognition of a foreign main proceeding that is a foreign main proceeding (a) commencement or continuation of the individual actions or individual proceedings concerning the debtors' assets, rights obligations or liabilities is stayed; (b) execution against the debtors' assets its stayed; and (c) the right to transfer, encumber or other wise dispose of any assets of the debtor is stayed. However, part of (a) of this does not affect the rights to commence individual actions or proceedings to the extent necessary to preserve a claim against the debtor and additionally paragraph 1 of Article 20 does not affect the right to request the commencement of a proceeding under the laws of the enacting state relating to insolvency or the right to file claims in such proceedings.

Read the question carefully when formulating your answer. Your answer should have also included a short discussion on the following elements:

1. **Exclusions:** *If the debtor is an entity that is subject to a special insolvency regime in State B, the foreign representative should first check if the foreign proceedings regarding that type of a debtor are excluded in State A based on Article 1(2) of the implemented Model Law in State A.*
2. **Restrictions: Existing international obligations of State A:** *Based on Article 3 of the Model Law, the court in State A should also check if there are no existing international obligations of State A (under a treaty or otherwise) that may conflict with granting the recognition application under the implemented Model Law in State A.*
3. **Judicial scrutiny:** *While the court in State A is able to rely on the rebuttable presumptions set forth in Article 16 of the Model Law, in the context of Article 17 of the Model Law the court will have to assess whether either the COMI or at least an establishment of the debtor is located in State B where the foreign proceedings were opened. If the COMI of the debtor is in State B the foreign proceedings should be recognised as foreign main proceedings and if only an establishment of the debtor is in State B the foreign proceedings should be recognised as foreign non-main proceedings. Without a COMI or at least an establishment of the debtor in State B, recognition cannot be granted by the court in State A.*
4. **Public policy exception:** *Finally, the court in State A should also ensure based on Article 6 of the Model Law that the recognition application is not manifestly contrary to public policy of State A.*

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

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

With respect to relief, in the context of MLCBI the pre-recognition relief is detailed in Article 19. Pre-recognition relief, or "relief that may be granted upon an application for recognition of a foreign proceeding" the court may at the request of the foreign representative, where is urgently needed to protect the assets of the debtor or the interest of the creditors, grant relief of a provisional nature, including:

- a) *Staying execution against the debtors' assets*
- b) *Entrusting the administration or realisation of all or part of the debtors' assets located in the state to the foreign representative or another person designated by the court.*

Unless this relief is extended under paragraph 1(f) of Article 21, the relief granted under Article 19 is terminated when the application for recognition is decided on. The court may also refuse to grant relief under article 19 is such relief would interfere with the administration of a foreign main proceeding.

With respect to relief, in the context of MLCBI the post recognition relief can be explained through Article 21, where main or not and where necessary to protect the assets of the debtor or the interest of the creditors, the court may at the request of the foreign representative grant any appropriate relief. This includes staying execution against the debtors' assets to the extent it has not been stayed under paragraph 1 (b) of article 20, extending relief granted under paragraph 1 or article 19, granting an additional relief that may be available. In granting relief under this article (21) then the court must be satisfied that the relief relates to assets that, under the law of the State, should be administered in the foreign main proceeding or concerns information required in that proceeding.

The court, however, in the enacting state must strike a balance between the relief that may be granted to the foreign representative and the interest of the persons that may be affected by the relief. Article 22 states that in granting or denying relief under article 21 and 19 then they court must be satisfied that the interests of the creditors and other interest persons including the debtor are adequately protected, that the court considers it to be appropriate and the court may, as per paragraph 3 of this article, at the request of a person affected by this article modify or terminate such relief.

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

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

Question 3.4 [maximum 1 mark] [1 mark]

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

The worldwide freezing order granted as pre-recognition relief as per article 19 MLCBI is unlikely to continue post recognition as per article 21 MLCBI following recent English Case Law between Igor Vitalevich Protasov and Khadzhi Murat Derev. The court rules that there are terms in English bankruptcy regime which offers other forms of protection which means that relief sought in the form of a freezing order or similar injunction is not warranted/

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

Commented [BB13]: SUB TOTAL = 7 MARKS

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

(1) Background

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

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

Proceedings were commenced in the High Court of England and Wales (Chancery Division) against various defendants on 11 February 2021 (the English Proceedings).

An affidavit (the Affidavit) sets out a detailed summary of the legislation of Country A's specific insolvency procedure for Banks. The procedure involves initial input from the National Bank (the NB) and at the time that the Bank entered liquidation, followed by a number of stages:

Classification of the bank as troubled

The NB may classify a bank as "troubled" if it meets at least one of the criteria set down by article 75 of the Law of Country A on Banks and Banking Activity (LBBA) or for any of the reasons specified in its regulations.

Once declared "troubled", the relevant bank has 180 days within which to bring its activities in line with the NB's requirements. At the end of that period, the NB must either recognise the Bank as compliant, or must classify it as insolvent.

Classification of the bank as insolvent

The NB is obliged to classify a bank as insolvent if it meets the criteria set out in article 76 of the LBBA, which includes:

- (i) the bank's regulatory capital amount or standard capital ratios have reduced to one-third of the minimum level specified by law;**
- (ii) within five consecutive working days, the bank has failed to meet 2% or more of its obligations to depositors or creditors; and**

(iii) the bank, having been declared as troubled, then fails to comply with an order or decision of the NB and / or a request by the NB to remedy violations of the banking law.

The NB has the ability to classify a bank as insolvent without necessarily needing to first go through the troubled stage. Article 77 of the LBBA accordingly provides that a bank can be liquidated by the NB directly, revoking its licence.

Provisional administration

The Deposit Guarantee Fund (DGF) is a governmental body of Country A tasked principally with providing deposit insurance to bank depositors in Country A. However, the Affidavit explained that the DGF is also responsible for the process of withdrawing insolvent banks from the market and winding down their operations via liquidation. Its powers include those related to early detection and intervention, and the power to act in a bank's interim or provisional administration and its ultimate liquidation.

Pursuant to article 34 of the DGF Law, once a bank has been classified as insolvent, the DGF will begin the process of removing it from the market. This is often achieved with an initial period of provisional administration. During this period:

- (i) the DGF (acting via an authorised officer) begins the process of directly administering the bank's affairs. Articles 35(5) and 36(1) of the DGF Law provide that during provisional administration, the DGF shall have full and exclusive rights to manage the bank and all powers of the bank's management.**
- (ii) Article 36(5) establishes a moratorium which prevents, *inter alia*: the claims of depositors or creditors being satisfied; execution or enforcement against the bank's assets; encumbrances and restrictions being created over the bank's property; and interest being charged.**

Liquidation

Liquidation follows provisional administration. The DGF is obliged to commence liquidation proceedings against a bank on or before the next working day after the NB's decision to revoke the bank's licence.

Article 77 of the LBBA provides that the DGF automatically becomes liquidator of a bank on the date it receives confirmation of the NB's decision to revoke the bank's

licence. At that point, the DGF acquires the full powers of a liquidator under the law of Country A.

When the bank enters liquidation, all powers of the bank's management and control bodies are terminated (as are the provisional administrators' powers if the bank is first in provisional administration); all banking activities are terminated; all money liabilities due to the bank are deemed to become due; and, among other things, the DGF alienates the bank's property and funds. Public encumbrances and restrictions on disposal of bank property are terminated and offsetting of counter-claims is prohibited.

As liquidator, the DGF has extensive powers, including the power to investigate the bank's history and bring claims against parties believed to have caused its downfall. Those powers include:

- (i) the power to exercise management powers and take over management of the property (including the money) of the bank;**
- (ii) the power to compile a register of creditor claims and to seek to satisfy those claims;**
- (iii) the power to take steps to find, identify and recover property belonging to the bank;**
- (iv) the power to dismiss employees and withdraw from/terminate contracts;**
- (v) the power to dispose of the bank's assets; and**
- (vi) the power to exercise "such other powers as are necessary to complete the liquidation of a bank".**

The DGF also has powers of sale, distribution and the power to bring claims for compensation against persons for harm inflicted on the insolvent bank.

However, article 48(3) of the DGF Law empowers the DGF to delegate its powers to an "authorised officer" or "authorised person". The "Fund's authorised person" is defined by article 2(1)(17) of the DGF Law as: "an employee of the Fund, who on behalf of the Fund and within the powers provided for by this Law and / or delegated by the Fund, performs actions to ensure the bank's withdrawal from the market during provisional administration of the insolvent bank and/or bank liquidation".

Article 35(1) of the DGF Law specifies that an authorised person, must have: "...high professional and moral qualities, impeccable business reputation, complete higher education in the field of economics, finance or law...and professional experience necessary." An authorised person may not be a creditor of the relevant bank, have a criminal record, have any obligations to the relevant bank, or have any conflict of

interest with the bank. Once appointed, the authorised officer is accountable to the DGF for their actions and may exercise the powers delegated to them by the DGF in pursuance of the bank's liquidation.

The DGF's independence is addressed at articles 3(3) and 3(7) of the DGF Law which confirm that it is an economically independent institution with separate balance sheet and accounts from the NB and that neither public authorities nor the NB have any right to interfere in the exercise of its functions and powers.

Article 37 establishes that the DGF (or its authorised person, insofar as such powers are delegated) has extensive powers, including powers to exercise managerial and supervisory powers, to enter into contracts, to restrict or terminate the bank's transactions, and to file property and non-property claims with a court.

(2) The Bank's liquidation

The Bank was formally classified by the NB as "troubled" on 19 January 2015. The translated NB resolution records:

"The statistical reports-based analysis of the Bank's compliance with the banking law requirements has found that the Bank has been engaged in risky operations."

Those operations included:

- (i) a breach, for eight consecutive reporting periods, of the NB's minimum capital requirements;**
- (ii) 10 months of loss-making activities;**
- (iii) a reduction in its holding of highly liquid assets;**
- (iv) a critically low balance of funds held with the NB; and**
- (v) 48% of the Bank's liabilities being dependent on individuals and a significant increase in "adversely classified assets" which are understood to be loans, whose full repayment has become questionable.**

Despite initially appearing to improve, by September 2015 the Bank's financial position had deteriorated further with increased losses, a further reduction in regulatory capital and numerous complaints to the NB. On 17 September 2015, the NB classified the Bank as insolvent pursuant to article 76 of the LBBA. On the same day, the DGF passed a resolution commencing the process of withdrawing the Bank from the market and appointing Ms C as interim administrator.

Three months later, on 17 December 2015, the NB formally revoked the Bank's banking licence and resolved that it be liquidated. The following day, the DGF initiated the liquidation procedure and appointed Ms C as the first of the DGF's authorised persons to whom powers of the liquidator were delegated. Ms C was replaced as authorised officer with effect from 17 August 2020 by Ms G.

Ms G's appointment was pursuant to a Decision of the Executive Board of the Directors of the DGF, No 1513 (Resolution 1513). Resolution 1513 notes that Ms G is a "leading bank liquidation professional". It delegates to her all liquidation powers in respect of the Bank set out in the DGF Law and in particular articles 37, 38, 47-52, 521 and 53 of the DGF Law, including the authority to sign all agreements related to the sale of the bank's assets in the manner prescribed by the DGF Law. Resolution 1513 expressly excludes from Ms G's authority the power to claim damages from a related party of the Bank, the power to make a claim against a non-banking financial institution that raised money as loans or deposits from individuals, and the power to arrange for the sale of the Bank's assets. Each of the excluded powers remains vested in the DGF as the Bank's formally appointed liquidator.

On 14 December 2020, the Bank's liquidation was extended to an indefinite date, described as arising when circumstances rendered the sale of the Bank's assets and satisfaction of creditor's claims, no longer possible.

On 7 September 2020, the DGF resolved to approve an amended list of creditors' claims totalling approximately USD 1.113 billion. The Affidavit states that the Bank's current, estimated deficiency exceeds USD 823 million.

QUESTION 4.1 [maximum 15 marks] [7 out of 15]

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

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

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

Article 2(a) states that a foreign proceeding means a collective [element 1] judicial or administrative [element 2] proceeding [element 3] in a foreign State [element 4], including an interim proceeding, pursuant to a law relating to insolvency [element 5] in which proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign court [element 6], for the purpose of re-organisation or liquidation [element 7].

Under this approach, the judge would need to be satisfied that the foreign proceeding for which recognition is sought is a judicial or administrative proceeding in a foreign state; the proceeding is collective in nature; the judicial or administrative proceeding arose of a law relating to insolvency and, in that proceeding; the debtors assets and affairs are subject to control or supervision by a foreign court for the purpose of re-organisation or liquidation; the control or supervision is being effected by a foreign court name a judicial or other authority competent to control or supervise a foreign proceedings and the applicant has been authorised in the foreign proceeding to administer the re-organisation or the liquidation of the debtors assets or affairs or to act as a representative of the foreign proceeding.

Firstly with respect to the facts, we understand that the Bank is registered in Country A, which has not adopted the MLCBI. The Bank went into provisional administration on 17 September 2015 and Liquidation on 17 December 2022. The provisional administration was under the authority of Deposit Guarantee Fund (DGF), and the liquidation was also commenced by the DGF when the license was taken away and the DGF automatically becomes the liquidator and acquires all powers under the law of country A. The DCF, whilst it has a number of powers including the rights to compile a register of creditors claims and seek to satisfy those claims, and the power to take steps to identify and recover property belonging to the bank, and the power to dispose of the banks assets, must delegate its powers to "an authorised officer". Any authorised person must not be a creditor of the bank, have any obligations to the bank, or any conflict of interest with the bank.

We understand that Ms C. took on as interim administrator, and subsequently was delegated the powers from DCF as liquidator and in 17 August 2020 Ms G. replaced Ms C as the authorised officer. We understand that Ms G. in her capacity as authorised officer of the DCF together with the DCF 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.

In principle the model law should apply to any proceeding that qualifies as a foreign proceeding within the meaning of article 2(a).

There are elements of the definition of foreign proceeding which a judge will need to consider. Firstly the judge will need to consider with it is a collective judicial or administrative proceeding. Collective is defined as the desire of achieving a co-ordinate goal solution for all stakeholders in an insolvency proceeding. We understand there are proceedings commenced in England with respect to a multi-million-dollar fraud resulting in monies being sent to many overseas companies incorporated or registered in England. A judge could argue, depending on who brought on the claims, that this could be in fact a collective proceeding as with the Stanford International Bank Case where the SEC instituted the receivership for the benefit of all investor victims and creditors. One could argue that the banks liquidation comprises a foreign proceeding based on the basis of being collective.

For full marks, we are looking for this element 1 to be addressed in your response along the following lines:

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

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

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

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

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

Secondly, the foreign proceeding must be pursuant to a law relating to insolvency. The National Bank is to classify the bank as insolvent if it meets the criteria in article 76 of the Law of Country A on Bank and Banking Activity. One would suggest that this is a matter for company law rather than insolvency law however similar to Stanford International Bank (case no.31) that the English court, which initially ruled that the liquidation of an Antiguan Company was just and equitable to do so, the insolvency of the company was a factor relevant to the Antiguan court's discretion to make the order. Therefore, the judge would have to consider the decision to make the order in Country

A as infringements of regulatory requirements as well as insolvency could be characterised as pursuant to a law relating to insolvency.

Thirdly a foreign proceeding is characterised as being subject to control or supervision by a foreign court. Control or supervision may be exercised not only directly by the court but also an insolvency representative who is subject to control or supervision by the court.

For full marks, we are looking for this element 6 to be addressed in your response along the following lines:

- 1. The term "foreign court" is defined at article 2(e) of the MLCBI and means: "a judicial or other authority competent to control or supervise a foreign proceeding".**
- 2. The Guide to Enactment notes: "87) A foreign proceeding that meets the requisites of article 2, subparagraph (a), should receive the same treatment irrespective of whether it has been commenced and supervised by a judicial body or an administrative body. Therefore, in order to obviate the need to refer to a foreign non-judicial authority whenever reference is made to a foreign court, the definition of "foreign court" in subparagraph (e) includes also non-judicial authorities."**
- 3. In Re Sanko Steamship Co Ltd [2015] EWHC 1031 (Ch) Simon Barker QC, noted that a foreign proceeding may be recognised where the control or supervision of the proceeding is undertaken by a non-judicial administrative body.**
- 4. The Guide to Enactment states: "74) The Model Law specifies neither the level of control or supervision required to satisfy this aspect of the definition nor the time at which that control or supervision should arise. Although it is intended that the control or supervision required under subparagraph (a) should be formal in nature, it may be potential rather than actual. As noted in paragraph 71, a proceeding in which the debtor retains some measure of control over its assets, albeit under court supervision, such as a debtor-in-possession would satisfy this requirement. Control or supervision may be exercised not only directly by the court but also by an insolvency representative where, for example, the insolvency representative is subject to control or supervision by the court. Mere supervision of an insolvency representative by a licensing authority would not be sufficient."**
- 5. In this case the DGF has control of all of the Bank's assets and overall control of the liquidation.**
- 6. The DGF's independence is addressed at articles 3(3) and 3(7) of the DGF Law which confirm that it is an economically independent institution with separate balance sheet and accounts from the NB and that neither public authorities nor the NB have any right to interfere in the exercise of its functions and powers.**
- 7. Article 37 establishes that the DGF (or its authorised person, insofar as such powers are delegated) has extensive powers, including powers to exercise managerial and supervisory powers, to enter into contracts, to restrict or terminate the bank's transactions, and to file property and non-property claims with a court.**

8. The assets and affairs of the Bank are subject to the control of the DGF, an official body which exercises its powers in the liquidation free from intervention by government or the NB and which should be considered, for the purposes of the definition set out in article 2(e) of the MLCBI, as a "foreign court".

Finally, the foreign proceeding must be for the purpose of liquidation or re-organisation. On 14 December 2020 the banks liquidation was extended to an indefinite date arising when circumstances rendered the sale of the Banks assets and satisfaction of creditor claims no long possible. We also are aware that the application was mad prior to the determination of the English proceedings. Given that he application was made prior to the determination, one would consider that this was made to protect the estate and provide a better return to creditors.

There are also a number of exclusions to the rule which the judge might consider, whether or not the banks liquidation being a foreign proceeding as per article 2(a). Here the implemented model law will be the adopted English version of the MLCBI. Given that the liquidation is of a bank, then the judge might decide to exclude from the model law as the insolvency of such entities would give rise to the particular need to protect vital interest of a large number of individuals or the insolvency of such entities requires prompt and circumspect action and for these reasons banks need to be administered in may states under a special regime.

However given that we do not need to consider the exclusion, I would consider, as a judge, that this does classify as a foreign proceeding.

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. Your response has not specifically addressed elements 2, 3 and 4 and in respect of elements 1 and 6, see the comments already provided above.

Similarly, the definition of a foreign representative as per 2(d) "means a person or body, including one appointed on an interim basis authorised in a foreign proceeding to administer the re-organisations or the liquidation of the debtors assets or affairs or to act as a representative.

We understand that applicants for the recognition of the liquidation was made by Ms G. in her capacity as authorised officer of the DCF and DCF themselves. For this section it is important to consider whether the applicant has been authorised to administer a qualifying re-organisation or liquidation of the debtors assets or affairs or to act as a representative for the foreign proceeding. The Model law foes not specify that the foreign representative must be authorised by the court and therefore might include appointments that be made by special agency other than the court.

We understand that DCF has the power to exercise “such other powers as are necessary to complete the liquidation of the bank” so one would consider that the applicant has been authorised to qualify a liquidation of the Banks assets or affairs.

However we must consider Ms G. who does not have the same powers by resolution 1513, where it excludes Ms G power to claim damages from a related party to 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 sale of the bank assets. One would consider that Ms G. would not have the authority and that all of these powers would vest in the formally appointed liquidator which is DCF. On this basis the judge would rule that whilst DCF would be considered a foreign representative, Ms G would not.

For full marks, we are looking for a response along the following lines:

1. “Foreign representative” is defined by article 2(d) of the MLCBI to mean:

‘a person or body, including one appointed on an interim basis, authorised in a foreign proceeding to administer the reorganisation or the liquidation of the debtor’s assets or affairs or to act as a representative of the foreign proceeding’

2. Article 16(1) of the MLCBI provides:

‘If the decision or certificate referred to in paragraph 2 of article 15 indicates that the foreign proceeding is a proceeding within the meaning of sub-paragraph (i) of article 2 and that the foreign representative is a body or person within the meaning of sub-paragraph (j) of article 2, the court is entitled to so presume.’

3. This application is brought jointly by the DGF and Ms G. The DGF’s role as liquidator arises under statute and article 77 of the LBBA provides that the DGF is automatically appointed as liquidator on the day it receives the NB’s decision pursuant to article 77 revoking a bank’s licence and commencing its liquidation.

4. 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”.

5. 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.

6. 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.

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

** End of Assessment **