



SUMMATIVE (FORMAL) ASSESSMENT: MODULE 2A

THE UNCITRAL MODEL LAWS RELATING TO INSOLVENCY

Commented [BB1]: TOTAL = 38 MARKS

76% - well done!

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

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

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

INSTRUCTIONS FOR COMPLETION AND SUBMISSION OF ASSESSMENT

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

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

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

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

ANSWER ALL THE QUESTIONS

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

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

Commented [SL2]: SUBTOTAL = 9 MARKS

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

Question 1.1

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

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

Question 1.2

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

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

(d) All of the above.

Question 1.3

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

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]

Question 2.1 [maximum 3 marks]

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

The Model Law is only concerned with existing foreign proceedings when they commenced. In determining the appropriate date at which the centre of main interest of the debtor is, the court should consider the evidence required for an application for recognition under Article 15, the relevance for the decision to commence foreign proceedings. Thus the date of commencement of those proceedings is the appropriate date.

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

Statement 2:

Article 10. Limited Jurisdiction

Statement 3:

Article 16. Presumptions concerning recognition

Question 2.3 [2 marks]

Commented [SL4]: SUBTOTAL = 8 MARKS

Commented [SL5]: 1.5 marks

1. 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 [SL6]: 2,5 marks

Statement 3 = Art 16(3)

Commented [SL7]: 2 marks

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

The English Court of Appeal in deciding whether or not to uphold the lower court's decision not to grant the indefinite Moratorium Continuation decided that the real issues for determination were whether or not by granting the Moratorium Continuation in substance would prevent English creditors from enforcing their English law rights in accordance with the Gibbs rule and/ or prolong the stay after the Azeri reconstruction had come to an end. The court decided that they could only grant the indefinite Moratorium Continuation if the stay would be necessary to protect the interest of IBA's creditors and that the stay was the appropriate way of any substantial change in achieving the protection. The court decided that the creditors needed no further protection. The court also held that once a foreign proceeding has come to an end and the foreign representative no longer holds office there is no scope for further orders.

Question 2.4 [2 marks]

Commented [SL8]: 2 marks

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

Article 29 sets out the rules relating to concurrent proceedings, After recognition of a foreign main proceeding the court should take into consideration of any relief granted with the insolvency proceedings in the enacting state see Article 29(a)(i). Any relief that is granted in terms of Articles 19 and 21 must be consistent with the proceedings in the enacting state. In terms of Article 29(a)(ii) the effect of recognition of a "Foreign Main Proceeding" in terms of Article 20 do not apply.

With regard to the duty provide information by the foreign representative to the enacting court the following applies. From the time of filing the application there is a duty on the foreign representative to inform the court promptly of the following:

- 1. Any substantial change in the status of the foreign proceeding or the foreign representatives appointment - Article 18(a)*
- 2. Any foreign proceeding regarding the same debtor that the foreign representative becomes aware of - Article 18(b)*

Articles 25 and 26 also place a duty on the foreign representative to provide information to the court. In terms of article 25 the court is entitled to communicate and request information directly from the foreign representative.

Article 26 also allows the insolvency practitioner appointed in the enacting state to communicate or request information from the foreign representative, subject to the supervision of the court.

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

Commented [BB9]: SUB TOTAL = 9.5 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] [1.5 marks out of 4]

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 regard to access, Articles 9, 11, 12, 15 and 16 are applicable.

Article 9 allows the foreign representative to apply directly to the foreign court.

Article 11 allows the foreign representative to commence a proceeding under the enacting states laws if the requirements are met. [1]

Article 12 provides the foreign representative, upon recognition of the foreign proceeding, to participate in any proceedings regarding the debtor

Article 15 entitles the foreign representative to apply for recognition of the foreign proceeding

Article 16 sets out recognition.

*These rights awarded to the foreign representative allow the foreign representative to apply in State A for recognition of the foreign proceedings and have *locus standi*.*

Cooperation:

Article 25 allows and promotes cooperation between the court in the enacting state and the foreign court and/ or the foreign representative. [½]

This cooperation is not dependant on the granting of the recognition order and leads to the avoidance of time-consuming traditional procedures that are normally in place.

Your answer should have included a discussion along the following lines:

- **Legal standing (Article 9 MLCBI):** The key access for the foreign representative is set forth in Article 9 MLCBI. In the capacity of foreign representative, the foreign representative has automatic standing before the courts in State A without having to meet any formal requirements such as a license or any consular action. In other

words, the "status" in State B of the foreign representative is automatically recognised in State A for the purpose of granting the foreign representative standing before the courts in State A. This allows the foreign representative to safeguard and pursue assets of the debtor estate in State A before its courts.

- **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?
- **Cooperation:** Similar to access rights, the cooperation provisions in the MLCBI (articles 25-27) also operate independently of recognition and it is not a prerequisite to the use of the cooperation provisions that recognition of the foreign proceedings is obtained in advance. Courts in State A can freely cooperate with the foreign representative without having to worry whether the status in State B of the foreign representative can be recognised in State A.
- **Save Time & Costs:** The key benefits of both the access provisions and the 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 being promoted.

Question 3.2 [maximum 5 marks] [5 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 evidential requirements to grant an application for recognition are set out in Article 15. Article 15(2)(a) states that an application must be accompanied by a certified copy of the decision commencing the foreign proceeding and the appointment of the foreign representative. Or Article 15(2)(b) requires a certificate from the foreign court affirming the existence of the foreign proceeding and the appointment of the foreign representative. Article 15(2)(c) requires any other evidence that is acceptable to the court for the existence of the foreign proceeding and the appointment of the foreign representative, if the documents required in terms of sub-paragraphs (a) or (b) cannot be provided. In terms of Article 15(3) an application must be accompanied by a statement from the foreign representative identifying all

foreign proceedings concerning the debtor that are known to the foreign representative. [1]

The court is limited to the jurisdictional pre-conditions set out in the definitions of "foreign proceedings" set out in Article 2(a) or that of a "foreign representative" set out in Article 2(d).

Not all insolvency proceedings are included in the model law and Article 17(1)(a) provides that a foreign proceeding must fall within the meaning of foreign proceeding in terms of Article 2(a). Namely it must be a proceeding (including an interim proceeding) that is: [1]

- Either judicial or administrative
- Collective in nature
- Granted in a foreign State
- Authorised or conducted under a law of insolvency
- Where the assets and affairs of the debtor must be subject to control by a foreign court
- For which purpose is for reorganisation or liquidation. [1]

In deciding the application the court need not consider whether or not the foreign proceeding was correctly commenced under the applicable law. Article 16 provide for presumptions regarding documents provided in terms of Article 15, are correct. Article 6 allows the court to disallow an order if goes against public policy. [1] Certain proceeding may be excluded if they are listed in Article 1(2). Article 3 provides that if there is a conflict with the obligation of the State as a result of a treaty or any other agreement; [1] that treaty shall prevail. The court in deciding the application should take a tick-box approach and it should be a straight forward exercise.

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.

Pre-recognition relief can be granted in terms of Article 19, at the time of filing the application for relief until the application is decided. The Foreign Representative may request the court to grant urgent interim relief to protect the assets of the debtor or the interests of creditors - Article 19(1). This relief is of a temporary nature and will only last until the recognition application is decided - Article 19(3). The court may refuse to grant the relief, if the relief would interfere with the administration of the foreign main proceeding - Article 19(4). Article 22(1) states that the court must take into consideration that the interests of creditors and other interested persons, including the debtor are adequately protected when considering the application. The relief under Article 19 can either be granted, refused or modified - Article 22(1). The court has the power to grant any relief, subject to any conditions which it considers

appropriate - Article 22(2). The court may at the request of the foreign representative, a person affected by the relief granted under Article 19 or at the courts own motion modify or terminate such relief - Article 22(3).

Post recognition relief is automatically granted in terms of article 20(1) of the Model Law when a foreign proceeding is recognised that is a foreign main proceeding. The relief that is automatically granted in terms of Articles 20(1)(a), (b) & (c) include:

- *Staying all proceedings against the debtors assets*
- *The execution of the debtors assets are stayed*
- *The right to transfer, encumber or dispose of any of the debtors assets are suspended*

The granting of the recognition order doesn't affect the rights to commence actions or proceedings to the extent necessary to preserve a claim against the debtor - Article 20(3). The recognition order doesn't affect the right to request the commencement of a proceeding under the law of the enacting State relating to insolvency, or the right to file a claim in such a proceeding Article 20(4).

Post recognition relief may be granted in terms of article 21 of the Model Law when a foreign proceeding that is either a "foreign main proceeding" or "foreign non-main proceeding". This relief is discretionarily granted by the court where it is necessary to protect the assets of the debtor or the interests of creditors. The court may at the request of the foreign representative grant the following relief in terms of Articles 21(1)(a) - (g):

- *Staying the commencement or continuation of individual actions concerning the debtors assets, rights, obligations or liabilities to the extent that these rights have not already been suspended under the relief granted under Article 20*
- *The execution of the debtors assets are stayed to the extent that these rights have not already been stayed under the relief granted under Article 20*
- *Suspending the right to transfer, encumber or otherwise dispose of any assets of the debtor to the extent that this right has not been suspended under Article 20*
- *An order in respect of the examining of witnesses, the taking of evidence or the delivery of information concerning the debtors assets, affairs, rights, obligations or liabilities*
- *Entrusting the administration or realization of all or part of the debtors assets located in the State to the foreign representative or another person designated by the court*
- *Extend the relief granted under Article 19(1)*
- *Granting any relief that may be available under the laws of the enacting State*

The court may entrust all or part of the debtors assets located in the enacting State to the foreign representative or another person designated by court, provided the court is satisfied that the interests of creditors in the enacting State are adequately protected- Article 21(2). The court, in considering the relief granted under Article 21, must be satisfied that the relief relates to the assets, under the law of the enacting State

and should be administered in the foreign non-main proceeding or concerns information required in that proceeding.

The relief under Article 21 can either be granted, refused or modified - Article 22(1). The court has the power to grant any relief, subject to any conditions which it considers appropriate - Article 22(2). The court may at the request of the foreign representative, a person affected by the relief granted under Article 21 or at the courts own motion modify or terminate such relief - Article 22(3).

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] [0 marks]

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 reason for this would be because the relief granted in terms of Article 19 is temporary in nature and is only in force until the recognition order is granted. This was one of the issues that had to be decided in *In the Matter of the OJSC International Bank of Azerbaijan and the CBIR 2006 - Bakshiyeva v Sberbank of Russia, et al* [2018] EWHC 59

Suggested answer:

A recent English case between Igor Vitalievich Protasov and Khadzhi-Murat Derev [Order of 24 February 2021 by Mr Justice Adam Johnson, [2021] EWHC 392 (CH)] exactly addressed the question.

While the English court held to have jurisdiction in the strict sense to grant such post-recognition discretionary relief, it found that relevant restrictions and limitations existed which served to inhibit the proper exercise of that jurisdiction. The English court found that the English bankruptcy regime offers other forms of protection which mean that relief in the form of a freezing order or similar injunction is simply not warranted. According to the court, "(...) the scheme of the Model Law is intended to put the foreign trustee or bankruptcy manager in the same position, as far as practicable, as an officeholder appointed under domestic law, and consistent with that, the effect of recognition of a foreign main proceeding is to bring into play the same wide infrastructure of the insolvency legislation. Absent some exceptional

reason, a freezing order or other similar order will not in my view be required or justified.

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

Commented [BB10]: SUB TOTAL = 11.5 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] [11.5 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 [7 out of 10]

4.1.1 In order for a "foreign proceeding" to be recognised, the proceeding must meet the requirements listed in Article 2(a) of the Model Law. The definition of foreign proceeding avoids the use of expressions that may have different technical meanings in different legal systems so it describes their purpose or function instead. This is to apply broadly to proceedings involving debtors that are in severe financial distress or are insolvent. In order for a proceeding to fall within the definition of "foreign proceeding" the foreign proceeding must meet

the elements as prescribed by Article 2(a) at the time the application for recognition is considered. The elements to be considered are:

- I. The proceeding must collective in nature*
- II. The proceeding must be pursuant to a law relating to insolvency*
- III. Subject to control or supervision by a foreign court*
- IV. For the purpose of reorganisation or insolvency*

Please note there are 7 separate elements to address: the "proceeding" element, the "judicial or administrative" element, the "collective nature" element, the "of a foreign State" element, the "pursuant to a law relating to insolvency" element, the "subject to control or supervision by a foreign court" element, and the "for the purpose of reorganisation or insolvency" element.

All these elements must be considered as a whole

Collective in Nature:

Key consideration must be given whether substantially all the assets and liabilities are dealt with in the proceedings. Proceedings should not fail the test of collectivity because a class of creditors rights are unaffected by it i.e. that some excluded assets are encumbered. Those creditors have the right to participate through the wording of the Model Law and are thus included. Collective proceedings can be compulsory, voluntary, corporate, individual, winding-up or reorganisation. Proceedings also include proceedings where the debtor retains some control of the assets while under supervision. The proceedings can also derive from interim and final orders.

The proceeding must be pursuant to a law relating to insolvency:

The proceedings must relate to a proceeding relating to an insolvency or severely financially distressed. This description is broad in order to encompass a range of insolvency rules irrespective of whether or not statute it's derived from relates exclusively to insolvency

Subject to control or supervision by a foreign court:

The Model Law doesn't specify the level of control required to satisfy the definition nor the time at which the control should be in place. Control must be formal in nature or potential. Control must be exercised by a court or a representative subject to the control or supervision of a court. Both the assets and affairs of the debtor must be subject to the control to meet the definition.

For the purpose of reorganisation or insolvency:

The application must be brought for the purpose of an insolvent debtor or severely distressed debtor. It cannot simply be used as a debt collection procedure.

Applying the facts I believe that the Commercial Bank for Business Corporations (the Bank) liquidation would fall within the definition of “foreign proceeding”. The first element is that of a collective procedure in which substantially all of the Banks assets and liabilities are dealt with in the proceedings. The Bank was formally liquidated in terms of article 77 on the 17th of December 2015 following the revocation of the Banks licence by the National Bank. Once placed in liquidation. On liquidation the Banks powers of management and control are handed over to The Deposit Guarantee Fund (DFG). The DFG has numerous powers which include the power to exercise management powers and to take over management of the property (including the money of the bank and the power to compile a register of creditor claims and to seek satisfaction of those claims. Furthermore a public encumbrances and restriction of disposal of the Bank property are terminated and offsetting of counter-claims is prohibited. This clearly would meet the requirement of a collective nature of the proceeding as all the bank’s assets and liabilities are included and considered in its liquidation and the liquidation clearly doesn’t relate to only part of the bank’s assets or liabilities.

For full marks, when discussing this element, your response should also reference the following supporting guidance and source references:

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.”

The next requirement of proceedings must relate to an insolvency or severely financially distressed debtor is clearly addressed when the Bank is placed in liquidation in terms of Article 77 of LBBA.

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

1. The Guide to Enactment provides at paragraph 48:

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

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

Further explanation is provided at paragraph 73:

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

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

The subject to control or supervision by a foreign court requirement is met when the DGF automatically becomes liquidator of the Bank in terms of article 77. Article 48(3) of the DGF Law authorises the DGF to delegate its power to an authorised officer. Article 35(1) of the DGF Law goes further to describe the qualities and qualifications required of the authorized official; thus DGF is empowered to delegate the liquidation authority to a liquidator who acts independently subject to the control of the DGF. Initially Ms C was appointed liquidator by the DGF, who was subsequently replaced as liquidator by Ms G. The appointment of the liquidators would meet the requirement because the DGF is tasked with the overseeing the liquidation of the Bank. The DGF is also empowered to appoint a liquidator which although appointed is still subject to the control and supervision of the DGF which is empowered to act in Country A in terms of the LBBA.

For full marks addressing this element, we are looking for a 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” .

The final requirement that the proceedings be for the purpose of reorganisation or insolvency are also met when one considers the obligation of the liquidator of the Bank. The approved list of creditors dated the 7th of September 2020 total USD 1.113 billion and there is an asset deficiency of USD 823 million. One can see that the Bank is hopelessly insolvent and as per the resolution of the 14th of December 2020 it is clear that the liquidation relates to all the Banks assets and liabilities because the liquidation was extended to an indefinite date pending the sale of the Banks assets and satisfaction of its creditors’ claims.

Consequently I believe that the proceedings in Country A would fall within the definition of “foreign proceedings”.

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 does not specifically address all 7 elements. In addition, as already indicated in the comments above, a bit more detail was missing in some of the elements your response did specifically discuss.

- 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]

Article 2(d) of the Model law describes a “foreign representative” as a person or body, including an appointment on an interim basis, authorized in a foreign proceeding to administer the reorganization or liquidation of the debtor’s assets or affairs or act as a representative of the foreign proceeding. The model law doesn’t specify that the foreign representative must be authorized by court. The reason being is that the definition of “foreign court” as defined in article 2(e) is sufficiently broad to include appointments that were made in special proceedings other than a court. The appointment of the foreign representative

includes final and interim appointments. Applying the facts I believe Ms G firstly because she was the appointed person authorised to act in the foreign proceeding by virtue of article 48(3) of the DGF Law which authorises the DGF to delegate powers to authorised officer. Secondly the other criteria of the representative must be appointed to administer the debtor's assets or act as a representative in foreign proceedings clearly authorise Ms G to act and she therefore would meet the criteria of "foreign representative". The DGF would also fall within the definition as "foreign representative" because the article allows an appointed person or body to be included as a foreign representative. Article 77 of the LBBA provides that the DGF automatically becomes liquidator of the Bank when the NB revokes the Banks licence and places it in liquidation. Also the fact that the bank was placed in liquidation through a legal proceeding that wasn't issued by way of a court order will still suffice as article 2(d) refers to a foreign proceeding, which doesn't require the liquidation to have commenced by way of a court order.

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

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

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

* End of Assessment *