



SUMMATIVE (FORMAL) ASSESSMENT: MODULE 2A

THE UNCITRAL MODEL LAWS RELATING TO INSOLVENCY

Commented [BB1]: TOTAL = 36.5 MARKS

73%

*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 = 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

**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

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

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

**(a) Court proceedings.**

**(b) Arbitral Tribunals.**

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

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

Question 1.10

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

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

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

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

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

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

Commented [SL4]: SUBTOTAL = 8 MARKS

**Question 2.1** [maximum 3 marks]

Commented [SL5]: 3 marks

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

*[According to the MLCBI, the appropriate date that is considered when determining the COMI of a debtor is the date of the commencement of foreign proceedings. Should the COMI of a debtor move near the date of the commencement of the proceedings, the COMI must be readily ascertainable by the parties, such as the creditors of a debt.]*

*In the event the business activity of a debtor is discontinued after the commencement of the foreign proceedings, the existence of a foreign proceeding and the activity of the foreign representative administering the insolvency estate is sufficient to determine the COMI. In such a case, the date of commencement is a clear reference point to determine the COMI.*

*In the case where a reorganizing entity continues to have COMI, the requirement for a foreign proceeding that is taking place in accordance with article 17, subparagraph 2 (a) is satisfied and the foreign proceeding should be entitled to recognition. Article 17 2(a) stipulates that the foreign proceeding shall be recognized as a foreign main proceeding if it is taking place in the State where the debtor has the centre of main interests.*

*Using the date of commencement to determine the centre of main interest provides a test that can be applied with certainty to all insolvency proceedings.*

*In the US based on the judgement of Morning Mist Holdings Ltd v Kryz (Matter of Fairfield Sentry Ltd, the US courts held that a debtor's COMI should be determined based on its activities at or around the time the Chapter 15 petition is filed.*

*In light of the EIR and other international interpretations, a court may consider the period between the commencement of the foreign proceedings and the filing of the Chapter 15 petition to ensure that a debtor has not manipulated its COMI in bad faith.*

*The US courts further held that relevant activities such as liquidation activities and administrative functions may be considered while performing COMI analysis.]*



**Question 2.2 [maximum 3 marks]**

**Commented [SL6]:** 2 marks

Statement 3 = Art 16(3)

**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."*

**[This Article lays down the requirements of notification of creditors**

Notification to foreign creditors of a foreign proceeding is covered by Article 14. The Article provides that whenever notification is to be given to creditors of a given state, the notification shall be given to the known creditors that do not have addresses in the state. A court may order that appropriate steps be taken with a view to notifying any creditor whose address is not yet known.

Where notification is to be given to foreign creditors, the notification shall,

- indicate a reasonable time period for filing claims and specify the place for their filing.
- Indicate whether secured creditors need to file their secured claims
- Contain any other information required to be included in such a notification for creditors pursuant to the law of the State and the orders of the Court.

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

This is covered under Article 10. The "safe conduct" rule is to ensure that the court in an enacting State does not assume jurisdiction over all assets of a debtor on the sole ground of the fact that the foreign representative has made an application for the recognition of a foreign proceeding. The articles provides a response to foreign representatives and creditors about being exposed to an all-embracing jurisdiction triggered by an application under the Model law. The immunity afforded by Article 10 has been reiterated by orders issued by some courts.

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

This is covered under article 31. Article 31 provides that, in the absence of any evidence to the contrary, recognition of a main proceeding, for purposes of commencing a proceeding in an enacting state, is proof that a debtor is insolvent.

Article 31: Presumption of insolvency based on recognition of a foreign main proceeding.]

**Question 2.3 [2 marks]**

**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.***

*[In the IBA case appeal, the Court of appeal upheld the decision that the court should not exercise its power to grant the indefinite Moratorium Continuation focusing on the question of jurisdiction.*

*The main question was whether granting the indefinite moratorium continuation would:*

- *Prevent English creditors, the challenging creditors, from enforcing their rights under English Law, in accordance with the Gibbs rule.*
  
- *Prolong the stay after the reconstruction in the foreign proceeding was completed. (in the IBA case the reconstruction was in Azerbaijan and had been completed) - further detail is included below:*

*The considerations of the court are explained below:*

*Prevent English creditors, the challenging creditors, from enforcing their rights under English Law, in accordance with the Gibbs rule.*

*The Gibbs Rule is designed to protect the interests of creditors and provides that a debt governed by English law cannot be discharged or compromised by a foreign insolvency proceeding.*

*The Court held that it could only grant the indefinite moratorium if the stay would have a) been necessary to protect the interests of the IBA creditors and b) been an appropriate way to protect the creditors. However, according to the court, none of these two conditions had been satisfied.*

*The Court held that the IBA creditors did not need any further protection in order for the foreign proceeding to achieve its purpose. The Court found that, in the case of IBA, they could have commenced a parallel scheme of arrangement in the UK but opted not to.*

*Prolong the stay after the reconstruction in Azerbaijan was completed.*

*The court also considered article 18 of the Model Law, which relates to "Subsequent information".*

*Article 18 states that, from the time of filing an application for recognition of a foreign proceeding, a foreign representative should inform the court promptly of:*

- *Any substantial change in the status of the recognized 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.

The Court considered that the information obligation above in Article 18 is on the basis that the foreign proceeding is still in existence and the foreign representative was still in office. The Court held that once the foreign proceeding has come to an end, a foreign representative no longer holds office and there is no scope for further orders in support of the foreign proceeding and the relief granted under the Model Law should terminate.

The court held that if the Model Law wanted relief to continue after the end of a relevant foreign proceeding, this would have been addressed and provided for appropriately in the Model Law. ]

**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.**

[According to Article 20, *Effects of recognition of a foreign main proceeding*, the recognition of foreign main proceedings has the following immediate effects, which should also be implemented by the court:

- A) Automatic stay on the commencement or continuation of individual actions or individual proceedings concerning a debtor's assets, rights, obligations or liabilities
- B) Stay of execution against the debtor's assets
- C) The right to transfer, encumber or otherwise dispose of any assets of the debtor is suspended.

The scope, modification and/or termination of the three conditions above are subject to the provisions of the enacting state.

The automatic stay does not affect the right to commence individual actions or proceedings, where such proceedings are necessary to preserve the assets of a debtor. Additionally, it does not affect the right to request the commencement of a proceeding under the laws of an enacting state or the right to file claims in a proceeding.

Under Article 18, *Subsequent Information*, a foreign representative is required to keep the court in the enacting State informed of any substantial changes. The article provides that from the time of filing the application for recognition of the foreign proceeding, the foreign representative should inform the court of any

**Commented [SL8]:** 1 mark

Arts 29(a) and 18 (discussed)

*substantial change in the status of the recognized foreign proceeding or the status of their appointment as a foreign representative.*

*Additionally, the foreign representative should also inform the court of any other foreign proceeding that the foreign representative becomes aware of in respect of the same debtor]*

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

Commented [BB9]: 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.***

*[ The Model Law provisions on access and co-operation provide a foreign representative with standing, *locus standi*, in an enacting State. The key articles that relate to providing the foreign representative standing include Article 9, Article 11 and Article 12.*

*According to the Model Laws, a foreign representative is entitled to apply directly to a Court in an enacting state. This means that the foreign representative of the foreign proceedings that were opened in State B has direct access to the courts in State A to make an appropriate application. (Article 9). [1]*

*The foreign representative must note that, while they have a right of direct access to the court of the enacting State, the access does not automatically vest the foreign representative with any additional rights or powers.*

*Article 1, Scope of application, further sets out the cases in which the Model law applies, which are, where:*

- Assistance is sought in an enacting State by a foreign court or a foreign representative in connection with a foreign proceeding*
- Assistance is sought in a foreign state in connection with a proceeding under the laws of an enacting State relating to insolvency*
- A foreign proceeding and a proceeding under the laws of an enacting State in respect of the same debtor are taking place concurrently.*

- Creditors or other interested persons in a foreign State have an interest in requesting the commencement of, or participating in, a proceeding under the enacting state.

The models laws therefore apply in this matter. The relevant articles on access and co-operation are highlighted below.

Article 11, *Application by a foreign representative to commencing a proceeding under [the laws of an enacting state relating to insolvency]*, provides a foreign representative with the right to apply to commence a proceeding under the laws of the enacting state that relate to insolvency. This is based on the assumption that the conditions for commencing such proceedings are met. [1] Essentially, under the Model Laws, no prior recognition of the foreign proceeding is required in order to give the foreign representative access to make an application to commence foreign proceedings in an enacting State.

Article 12, *Participation of a foreign representative in a proceeding under [the laws of an enacting state relating to insolvency]*, prescribes that once a foreign proceeding has been recognized, the foreign representative is entitled to participate in a proceeding regarding the debtor under the laws of the enacting State. Once a foreign proceeding is recognized in the enacting State, a foreign representative has *locus standi* and can make applications to court, make petitions and/or submissions concerning certain issues.

Once the foreign representative is recognized they can make submissions to court concerning the protection, realisation, distribution of assets or co-operation with the foreign proceeding.

Articles 25, 26, and 27 provide for cross-border co-operation where the conditions of Article 1, highlighted above, are met. The conditions of Article 1 are highlighted above. [1]

Article 25, *Cooperation and direct communication between a court of the [enacting] state and foreign court or representatives*, provides that the court shall cooperate to the maximum extent possible with foreign courts or foreign representatives. Article 25(2) provides that a court is entitled to communicate directly with or to request information or assistance directly from foreign courts or foreign representatives.

Cooperation is available for application for assistance in the enacting state but also for applications from proceedings in the enacting state. In this case, the courts between State A and State B may be willing to cooperate especially if the actions being taken are in the best interest of creditors.

Article 26 provides for cooperation and director communication between the officeholder and the foreign courts or representatives. The Article provides that the court in the enacting state and the office holder must co-operate to the maximum extent possible with foreign courts or foreign representatives. The

*office holder is entitled to communicate directly with the foreign courts or foreign representatives in the exercise of their functions subject to the supervision of the court.*

*Article 27 provides for forms of cooperation and provides an indicative list of the types of co-operation that are permitted under the Model Law.*

- *Appointment of a person or body to act at the direction of the court*
- *Communication of information by any means considered appropriate by the court*
- *Co-ordination of the administration and supervision of the debtor's assets and affairs*
- *Approval or implementation by courts of agreements concerning the coordination of proceedings*
- *Co-ordination of concurrent proceedings regarding the same debtor*
- *Any additional cooperation that an enacting state may wish to list.*

*The foreign representative in this case would therefore benefit under the Model Law because:*

- 1. They have standing under the Model Laws and have direct access to the courts*
- 2. They can make an application for recognition directly to the court for the foreign proceeding to be recognized*
- 3. The Model Laws provide a framework for the cooperation between the foreign representative and the courts*
- 4. The foreign representative will essentially have the same standing in the enacting state as they would if the proceeding had been opened in their domestic state*

*The foreign representative can therefore secure the assets on that basis.]*

***For full marks you should have included a discussion on the key benefits of both the access and cooperation provisions as follows:***

***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] [2 out of 5 marks]

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

*[Assuming that the foreign proceedings and the foreign representative qualify, the following articles on recognition of a foreign proceeding and relief will apply.*

*Assuming that the proceeding qualifies as a foreign proceeding, the foreign representative may apply for recognition by following the guidelines below:*

*Article 15, Application for recognition of a foreign proceeding, the application for recognition must be accompanied by: [½]*

- A certified copy of the decision commencing the foreign proceeding and appointing the foreign representative; or*
- A certificate from the foreign court affirming the existence of the foreign proceeding and of the appointment of the foreign representative*
- In the absence the above, any other evidence acceptable to the court of the existence of the foreign proceeding and of the appointment of the foreign representative. [½]*

*An application for recognition should also be accompanied by a statement identifying all the foreign proceedings in respect of the debtor that are known to the foreign representative.*

*The court may also require a translation of the documents supplied in support of the application for recognition in the official language of the enacting State.*

*According to Article 16, Presumptions concerning recognition, the court is entitled to presume that the documents provided in support of the recognition application are authentic, whether or not the documents have been legalized.*

*Further, the debtor's registered office or habitual residence, for an individual, is presumed to be the centre of main interests for the debtor. [½]*

*Further, as prescribed by article 17, a foreign proceeding shall be recognized if:*

*The foreign proceeding is within the meaning of article 2(a). In this case it has been assumed that the proceeding qualified as a foreign proceeding [½]*

*The foreign representative applying for recognition is a person or body within the meaning of article 2(d). In this case, based on the information provided, it has been assumed that the foreign representative qualifies as such.*

*Further, the application meets the requirements set out in paragraph 2, article 15, which is set out above,*

*The application must be submitted to a competent court or authority as prescribed in article 4. Article 4 provides that an enacting State can determine the court/courts, authority or authorities that may address matters relating to recognition of proceedings and cooperation with foreign courts. The foreign representative must therefore ensure that they apply to the appropriate court.*

*Article 17(2) stipulates that a foreign proceeding shall be recognized:*

- As a foreign main proceeding if it is taking place in the State where the debtor has the centre of its main interests; or*

- *As a foreign non-main proceeding if the debtor has an establishment in the foreign state*

*Further, Article 17(3) provides that an application for a foreign proceeding shall be decided upon at the earliest possible time.*

*Recognition may be modified or terminated, if it is shown that the grounds for granting it were fully or partially lacking or have ceased to exist. ]*

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

- 1. **Exclusions:** If the debtor is an entity that is subject to a special insolvency regime in State B, the foreign representative should first check if the foreign proceedings regarding that type of a debtor are excluded in State A based on Article 1(2) of the implemented Model Law in State A.*
- 2. **Restrictions: Existing international obligations of State A:** Based on Article 3 of the Model Law, the court in State A should also check if there are no existing international obligations of State A (under a treaty or otherwise) that may conflict with granting the recognition application under the implemented Model Law in State A.*
- 3. **Public policy exception:** Finally, the court in State A should also ensure based on Article 6 of the Model Law that the recognition application is not manifestly contrary to public policy of State A.*

Question 3.3 [maximum 5 marks] [2.5 out of 5 marks]

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

*[According to Article 19, Relief that may be granted upon application for recognition of foreign proceeding, the court may grant the following relief at the request of the foreign representative.*

- o A stay on execution against the debtor's assets.*
- o Entrusting the administration or realization of all or part of the debtor's assets located in the enacting that to the foreign representative, or another person designated by the court in order to protect and preserve the value of the assets, that b their nature or because of other circumstances, are perishable, susceptible to devaluation or otherwise in jeopardy.*
- o Any of the various reliefs in Article 21, set out below*



*(The relief is granted where there is a need to protect the assets of a debtor or it is in the best interest of the creditors and may be granted provisionally from the time of the filing of the recognition application until the application is decided upon.)*

*The pre-recognition relief applies to both foreign main and foreign non-main proceedings.*

*The article notes that the provisions above are subject to the provisions in force in the enacting state relating to notice.*

*Unless otherwise specified or extended, under paragraph f of article 21, the relief granted under article 19 terminates when the application for recognition is decided upon.*

*A court may decline to grant relief under article 19 if the courts deems that the relief would interfere with the administration of a foreign main proceeding.*

*Article 21 provides the following post recognition relief which is available upon recognition of a foreign main or non-main proceeding in order to protect the assets of a debtor or the interests of creditors:*

- *Stay on the commencement or continuation of individual actions or individual proceedings concerning the debtor's assets, rights, obligation or liabilities, to the extent they have not been stayed under paragraph 1(a) of article 20. Paragraph 1(a) or article 20 provides for an automatic stay on proceedings upon recognition.*
- *Stay on execution against the debtor's assets to the extent it has not been stayed under paragraph 1b or article 20, which provides for an automatic stay on execution against the debtors' assets*
- *Suspending the right to transfer, encumber, or otherwise dispose of any assets of the debtor to the extent this right has not been suspended under paragraph 1(c) of article 20 which provided for an automatic suspending.*
- *Providing for the examination of witnesses, the taking of evidence or the delivery or information concerning the debtor's assets, affairs, rights, obligations or liabilities*
- *Entrusting the administration or realization of all or part of the debtor's assets located in the enacting state to the foreign representative, or another person designated by the court*
- *Granting any additional relief that may be available to a domestic liquidator / office holder under the laws of the enacting State.*
- *Extending the relief granted under paragraph 1 of article 19, highlighted above.*

*Where the court is satisfied that the interests of creditors in the enacting state are adequately protected, the court may, at the request of the foreign representative (in a main or non-main proceeding), entrust the distribution of all or part of the debtor's*

assets located in the enacting State to the foreign representative, or any other person designated by the Court.

Article 21 further provides that in granting the relief, in the case of non-main proceedings, the court must be satisfied that the relief relates to the assets or information that, according to the laws of the enacting state, should be administered in the foreign non-main proceedings.

Article 22 of the Model Law provides that in granting or denying the relief requested, the court in the enacting state must be satisfied that the interests of a debtor, creditors and other stakeholders are protected. The court can therefore grant relief subject to conditions that it deems appropriate. The court may, at the request of the foreign representative, at the request of an affected person, or at its own motion, modify or terminate a relief that has been granted.]

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

1. **Adequate protection:** Pursuant to Article 22 of the Model Law any interim relief under Article 19 of the Model Law or any post-recognition relief under Article 21 of the Model Law require the court in State A to be satisfied that the interests of the creditors and the other interested persons, including the debtor, are adequately protected and any relief may be subject to conditions as the court considers appropriate.
2. **Existing international obligations of State A:** Based on Article 3 of the Model Law, the court in State A should again verify that there are no existing international obligations of State A (under a treaty or otherwise) that may conflict with granting the requested relief under the implemented Model Law in State A.
3. **Public policy exception:** The court in State A should, based on Article 6 of the Model Law, also again verify that the relief application is not manifestly contrary to public policy of State A.

Question 3.4 [maximum 1 mark] [1 mark]

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

[in the case of *Igor Vitalievich Protason and Khadzhi-Murat Derev*, the court addressed the question of whether a freezing order granted as provisional relief under article 19 would continue under article 21 following recognition of a Russian Bankruptcy proceeding as a foreign main proceeding in the UK.

The UK court held that it had jurisdiction to grant such a post-recognition discretionary relief, however, the court found that relevant restrictions and limitations were in place to control the proper exercise of the court's jurisdiction. The Court in England found that the English bankruptcy regime provides other forms of protection which meant that the freezing order or a similar injunction was not

warranted. The Court held that the purpose of recognition under the Model Law is to put a foreign representative in the same position as far as position as an officeholder appointed under domestic law. According to the court, the effect of the recognition of a foreign main proceeding is the put into play the same infrastructure of the insolvency legislation. The court held that without an exception reason, the freezing order was not required or justified. The Judge held that he "was not persuaded that any special or exceptional circumstances exist to grant the order.

Based on the judgement, a worldwide freezing order is unlikely to continue post-recognition especially in the case where the enacting state has provisions in its insolvency laws that a foreign representative can rely on to seek the appropriate relief. As ruled by the court in the *Igor Vitalievich Protason and Khadzhi-Murat Derev* case, the purpose of recognition is to put a foreign representative in the same position as a representative that is appointed under the domestic laws of an enacting state.]

**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]**

*[The bank's proceeding of a foreign proceeding if it is 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 the assets and affairs of the debtor are subject to control or supervision by a foreign court [element 6] for the purpose of recognition of reorganization or liquidation [element 7].*

Therefore it needs to:

- a. be a collective proceeding
- b. be pursuant to a law relating to insolvency
- c. be under control or supervision by a foreign court
- d. be for the purpose of reorganization or liquidation

These are explored in further detail below:

a. collective proceeding:

*in order for a proceeding to meet the requirements of article 2, the proceedings must be a collective proceeding. This is based on the principle of the Model Law, that the Model law is aimed at providing a mechanism to achieve a coordinated, global solution for all stakeholders of an insolvency proceeding. The model law is not designed to be used for the benefit of one particular creditor or a particular group of creditors who might have initiated a collection proceeding in a difference state. It is also not aimed at being implemented only to gather up assets in a winding up or conservation proceeding that does not have any provisions to address the claims of creditors.*

*The Model Law may be used for certain actions with a regulatory objective such as the regulation of publicly regulated entities such as insurance companies and brokerage firms on the condition that the proceeding is collective and for the benefit of all parties. For a proceeding to be collective, it must also be for the purposes of liquidation.*



*In this case, the proceeding is for the purposes of liquidation and therefore meets that requirement.*

*The proceeding in this case also appears to be for the benefit of all the creditors of the Company. Based on the information provided, 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. This implies that the purpose of the liquidation is for the purpose of satisfying creditor's claims, which would qualify as a collective proceeding.*

*Additionally, based on the information provided, 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. The resolution to approve an amended list of creditors' claims reinforces the argument that this proceeding appears to be a collective proceeding and is in the interest of the creditors as a whole.*

**b. be pursuant to a law relating to insolvency:**

*the aim of this provision was to encompass proceedings that involve liquidation and reorganization but that may be carried out under a law that is not necessarily "labelled" as insolvency law. In some instances, this may be company law for example. However, the law would still deal with or address insolvency or severe financial distress. The purpose of this condition is provide a description that is sufficiently broad to address the range of insolvency rules irrespective of the type of statute or law in which they might be contained and irrespective of whether the rules relate exclusively to insolvency. In this case, the ultimate purpose of the proceedings is to liquidate the bank.*

*The law within which the proceedings are being initiated has provisions relating to insolvency. Therefore, the proceedings qualify on the basis that they are brought pursuant to laws that have provisions relating to insolvency.*

**c. be under control or supervision by a foreign court**

*The Model Law stipulates that for a proceeding to satisfy this condition, there must be control or supervision by a court. As such, mere supervision of an insolvency representative by a licensing authority or a special agency is not sufficient and does not meet this requirement. The control or supervision required should be formal in nature and it may be potential rather than actual. For example, proceedings where a debtor remains in possession but with some court supervision, this condition would be met.*

*In the proceedings above, Article 37 prescribes 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.*

*However, the case does not appear to provide any indication as to whether the proceedings are supervised or controlled by the court. The condition to file property and non-property claims with a court might be considered to only cover one part of the proceeding. Therefore, the authorised representatives will need to consider whether the proceedings, as they stand, qualify proceedings that are controlled or supervised by the court.*

*Based on the fact pattern set out above, it appears that the proceedings are controlled or supervised by the Deposit Guarantee Fund ("DGF") as most of the decisions made in the proceedings appear to be made by was or resolutions by the DGF board. Therefore, we would need more information on the extent to which the proceedings are controlled or supervised by a court in addition to the supervision by the DGF as the supervision by a licensing authority is not sufficient for purposes of a recognition.*

**d. be for the purpose of reorganization or liquidation**

*Article 2 requires that proceedings be for the purposes of reorganization or liquidation. While certain proceedings may meet other conditions of article 2, if the proceedings are not for reorganization or liquidation, the proceedings are ineligible for recognition as foreign proceedings.*

*In this case, based on the information provided, the proceedings are for purposes of liquidation and therefore meet this requirement of article 2.*

***Based on the fact pattern and the requirements under article 2, it appears that points a, b and d are covered and that the proceedings satisfy those requirements. However, it is does not appear that the matter meets the requirement that the proceeding be under control or supervision by a foreign court. It appears that the Deposit Guarantee Fund is supervising and controlling the 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.

As for element 6, for the following reasons we believe it could be argued that this element is also met:

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".

**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]**

*[According to article 2(d) of the Model Laws, in order to fall within the description of foreign representatives, the representative must be a person or body [element 1], including one appointed on an interim basis, authorized in a foreign proceeding [element 2] to administer the reorganization or the liquidation of the debtor's assets or affairs or act as a representative of the foreign proceeding [element 3].*

*In administering the reorganization or the liquidation of the debtor's assets or affairs, the foreign representative would be able to carry out activities such as seeking recognition, relief and cooperation in another jurisdiction. Alternatively, they may simply be a person that is authorised for the purpose of acting as a representative in the foreign proceedings.*

*The Model Law does not include any specification that the foreign representative must be authorized by a court. The definition is broad to include appointments that may be made by a special agency in addition to appointments made by court.*

*The appointment of a foreign representative may also be on an interim basis.*

*Article 15 does require a certified copy of the decision appointing the representative, a certificate affirming the appointment or other evidence of the appointment that is acceptable to the court which is being applied to.*

*The definition in article 2(d) is broad to include proceedings in which debtor in possession proceedings.*

*In this case, the DGF laws prescribe the following:*

- that an authorised representative is "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" and specified 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."*
- that once appointed, the authorised officer is accountable to the DGT for their actions and may exercise the powers delegated to them by the DGF in pursuance of the Banks Liquidation.*
- 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.*

*Article 2d does not require that a foreign representative be authorized by a court but provides that a foreign representative might be authorised by a special agency. In this case, the Deposit Guarantee Fund (DGF), which is a governmental body of Country A tasked with providing deposit insurance to bank depositors in Country A, may be considered to be a special agency. The DGF laws provide the requirements that a representative must meet. As such, if the requirements stipulated in the DGF law are met, then the authorized representatives may qualify as a foreign representative under article 2(d) of the model laws.*

*Article 2d also does provide that a representative may meet the definition of a foreign representative even where their only duty is to act as a representative of/in the foreign proceeding. In the case above, some of the powers remain vested with the DGF and the representative does not have full powers. However, since article 2 provides a representative may still be considered a foreign*

*representative even in the case where they are simply “acting as a representative” in the foreign proceeding, the Ms. G may still qualify as a foreign representative i.e. the fact that some of the powers remain vested with the DGF does not mean that Ms. G does not meet the requirements of a foreign representative under the definitions of article 2.*

*Article 2 also provides that the appointment of a foreign representative may also be on an interim basis. As such, Ms. C would also qualify as a foreign representative despite being appointed on an interim basis (i.e. falls within the description of a foreign representative under the provisions of article 2d).*

***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 \*