



SUMMATIVE (FORMAL) ASSESSMENT: MODULE 2A

THE UNCITRAL MODEL LAWS RELATING TO INSOLVENCY

Commented [BB1]: TOTAL = 39 MARKS

78% - well done!

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 = 8 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

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

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

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

(d) All of the above.

Question 1.3

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

- (a) The registered office of the debtor is not in the jurisdiction where the foreign proceedings were opened, but the debtor has an establishment in the jurisdiction of the enacting State.**
- (b) The registered office of the debtor is in the jurisdiction of the enacting State, but the debtor has an establishment in the jurisdiction where the foreign proceedings were opened.**
- (c) The debtor has neither its COMI nor an establishment in the jurisdiction where the foreign proceedings were opened.**
- (d) The debtor has neither its COMI nor an establishment in the jurisdiction of the enacting State.**

Question 1.4

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

- (a) The *locus standi*/access rules.**
- (b) The public policy exception.**
- (c) The safe conduct rule.**
- (d) The "hotchpot" rule.**

Question 1.5

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

- (a) *The foreign main proceedings in South Africa will not be recognised in the UK because the UK is not a designated country under South Africa's principle of reciprocity, but the foreign non-main proceedings in Argentina will be recognised in the UK despite Argentina not having implemented the Model Law.*
- (b) *Both the foreign main proceedings in South Africa and the foreign non-main proceedings in Argentina will not be recognised in the UK because the UK has no principle of reciprocity and Argentina has not implemented the Model Law.*
- (c) **Both the foreign main proceedings in South Africa and the foreign non-main proceedings in Argentina will be recognised in the UK.**
- (d) *None of the statements in (a), (b) or (c) are correct.*

Question 1.6

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

- (a) *No interim relief based on Article 19 of the Model Law is available if concurrent domestic insolvency proceedings and foreign proceedings exist at the time of the application of the foreign proceedings in the enacting State.*
- (b) *In the case of a foreign main proceeding, automatic relief under Article 20 of the Model Law applies if concurrent domestic insolvency proceedings and foreign proceedings exist at the time of the application of the foreign proceedings in the enacting State.*
- (c) *The commencement of domestic insolvency proceedings prevents or terminates the recognition of a foreign proceeding.*
- (d) **If only after recognition of the foreign proceedings concurrent domestic insolvency proceedings are opened, then any post-recognition relief granted based on Article 21 of the Model Law will not be either adjusted or terminated if consistent with the domestic insolvency proceedings.**

Question 1.7

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

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

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

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

(d) *All of the above.*

Question 1.8

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

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

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

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

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

(d) *All of the above.*

Question 1.9

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

(a) *Court proceedings.*

(b) *Arbitral Tribunals.*

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

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

Question 1.10

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

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

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

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

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

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

Commented [SL5]: SUBTOTAL = 8.5 MARKS

Question 2.1 [maximum 3 marks]

Commented [SL6]: 3 marks

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

DECLERCQ points out that "[t]he appropriate date for determining the COMI, or whether an establishment exists, is the date of commencement of the foreign proceeding".¹ According to the UNCITRAL Guide to Enactment:

"With respect to the date at which the centre of main interests of the debtor should be determined, having regard to the evidence required to accompany an application for recognition under article 15 and the relevance accorded the decision commencing the foreign proceeding and appointing the foreign representative, the date of commencement of that proceeding is the appropriate date. 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 centre of main interests is that foreign proceeding and the activity of the foreign representative in administering the insolvency estate. In such a case, determination of the centre of the debtor's main interests 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 reorganization where, under some laws, it is not the debtor that continues to have a centre of main interests, but rather the reorganizing entity. In such a case, the requirement for a foreign proceeding that is taking place in accordance with article 17, subparagraph 2 (a) is clearly satisfied and the foreign proceeding should be entitled to recognition. Moreover, taking the date of commencement to determine centre of main interests provides a test that can be applied with certainty to all insolvency proceedings".²

The UNCITRAL Guide to Enactment indicates that the same consideration is applicable in determining the existence of a debtor's establishment.³

¹ DECLERCQ, Peter J M, Module 2A Guidance Text: UNCITRAL Model Laws Relating to Insolvency, INSOL International, London (2022), p 28.

² UNCITRAL Guide to Enactment, p 75, para 159.

³ UNCITRAL Guide to Enactment, pp 75-76, para 160.

Considering that the COMI can move over time, especially near the commencement of a foreign proceeding, it can be difficult to establish appropriate evidence, especially considering the factor that the COMI must be identifiable by the debtor's creditors.⁴

Moreover, it is worth mentioning that some jurisdictions consider other dates, such as the date of application for recognition, to determine the COMI. For example, the US has already considered that the COMI must be determined at the time of the Chapter 15 petition.⁵

In this sense, the commencement date of the foreign proceeding to be recognized is the most appropriate, as it ensures that all requests for recognition would have the same analysis parameter. Thus, different jurisdictions would not establish different COMIs when determining the foreign main proceeding, avoiding hierarchy conflict.

Question 2.2 [maximum 3 marks]

Commented [SL7]: 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 relate to the Timely Notice of a foreign creditor, provided for in Article 14 of the Model Law. According to DECLERCQ, the Article 14 "requiring that foreign creditors should be notified whenever notification is required for local creditors in the enacting State".⁶ Paragraph 3 of Article 14 specifies that when a notification of commencement of proceedings to foreign creditors shall: (a) indicate a reasonable time period for filing claims and specify the place for their filing; (b) indicate whether secured creditors need to file their secured claims; and (c) contain any other information required to be included in such a notification to creditors pursuant to the law of this State and the orders of the court.

⁴ DECLERCQ, Peter J M, Module 2A Guidance Text: UNCITRAL Model Laws Relating to Insolvency, INSOL International, London (2022), pp 28-29.

⁵ DECLERCQ, Peter J M, Module 2A Guidance Text: UNCITRAL Model Laws Relating to Insolvency, INSOL International, London (2022), pp 28-29.

⁶ DECLERCQ, Peter J M, Module 2A Guidance Text: UNCITRAL Model Laws Relating to Insolvency, INSOL International, London (2022), p 23.

The “Safe Conduct Rule” mentioned in Statement 2 is provided for in Article 10 of the Model Law. The rule ensures “that the court in the enacting State does not assume jurisdiction over all the assets of the debtor on the sole ground of the fact that the foreign representative has made an application for the recognition of a foreign proceeding”.⁷

Statement 3 refers to the rebuttable presumption that the debtor’s registered office, or habitual residence in the case of an individual, is the COMI, as provided for in paragraph 3 of Article 16 of the Model Law.⁸

Question 2.3 [2 marks]

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

In this case, the English Court of Appeal understood that the Moratorium Continuation would not be a necessary or appropriate means of protecting the interest of IBA's creditors. In addition, the English Court of Appeal also understood that the Model Law does not authorize the granting of relief after the conclusion of the foreign procedure.⁹

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.

Article 29 of the Model Law states that in case of concurrent proceedings, the court shall seek cooperation and coordination under Articles 25, 26 and 27 of the Model Law. The domestic procedure has a superior hierarchy in relation to the foreign proceeding, due to the supremacy of the domestic insolvency procedure. In this case, according to DECLERCQ, “any relief granted either on an interim basis based on Article 19, or post-recognition based on Article 21, must be consistent with the domestic insolvency proceedings. In the case of a foreign main proceeding, the automatic relief of Article 20 does not apply”.¹⁰

⁷ DECLERCQ, Peter J M, Module 2A Guidance Text: UNCITRAL Model Laws Relating to Insolvency, INSOL International, London (2022), p 22.

⁸ DECLERCQ, Peter J M, Module 2A Guidance Text: UNCITRAL Model Laws Relating to Insolvency, INSOL International, London (2022), p 26.

⁹ DECLERCQ, Peter J M, Module 2A Guidance Text: UNCITRAL Model Laws Relating to Insolvency, INSOL International, London (2022), pp 40-41.

¹⁰ DECLERCQ, Peter J M, Module 2A Guidance Text: UNCITRAL Model Laws Relating to Insolvency, INSOL International, London (2022), p 47.

Commented [SL8]: 1 marks

Gibbs rule,

Commented [SL9]: 1.5 marks

Art 29(a)

Furthermore, Article 29(c) provides that when granting, extending or modifying relief granted to a representative of a foreign non-main proceeding, the court in an enacting State must be satisfied that the relief relates to assets that, under the law of this State, should be administered in the foreign non-main proceeding or concerns information required in that proceeding.¹¹

From the time of filing the application for recognition of the foreign proceeding, Article 18 of the Model Law requires that the foreign representative has the duty to update the court in the enacting State of any substantial change in the status of the foreign proceeding or in the status of the foreign representative's appointment. In addition, the foreign representative must report any other foreign proceedings relating to the same debtor that come to his knowledge.¹²

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

Commented [BB10]: SUB TOTAL = 9 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.

According to DECLERCQ,

"[...] typically, a domestic insolvency proceeding is limited to assets located in the enacting State, in certain situations it may be meaningful for the local insolvency proceeding to also include certain assets abroad, especially when there is no foreign proceeding necessary or available in the foreign State where these foreign assets are situated".¹³

Article 9 of the Model Law guarantees access to the foreign representative and creditors to the enacting State court. [1] this access is automatic In turn, Article

¹¹ DECLERCQ, Peter J M, Module 2A Guidance Text: UNCITRAL Model Laws Relating to Insolvency, INSOL International, London (2022), p 47.

¹² DECLERCQ, Peter J M, Module 2A Guidance Text: UNCITRAL Model Laws Relating to Insolvency, INSOL International, London (2022), p 29.

¹³ DECLERCQ, Peter J M, Module 2A Guidance Text: UNCITRAL Model Laws Relating to Insolvency, INSOL International, London (2022), p 46.

12 guarantees the right of the foreign representative to participate in the proceeding under the law of the enacting State. DECLERCQ says that:

“Article 12 is another article that provides the foreign representative with standing, but this time recognition of the foreign proceeding is required for this standing to be available. When a domestic insolvency proceeding in the enacting State is opened in respect of the debtor, and following recognition of the foreign proceeding in the enacting State, the foreign representative will have standing to make petitions, requests or submissions concerning issues such as the protection, realisation or distribution of assets or co-operation with the foreign proceeding. However, article 12 does not vest the foreign representative with any specific powers or rights”.¹⁴

Once the foreign representative's access to the State's court has been established, Article 27(c) of the Model Law provides for the possibility of co-operation in relation to the debtor's assets. [½]

Co-operation allows the alignment of measures taken in insolvency proceedings involving the same debtor. In this way, rights in both processes benefit from the gain of legal certainty and a greater chance of success in the insolvency procedure.

Your answer should have included a discussion on the following:

- **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

¹⁴ DECLERCQ, Peter J M, Module 2A Guidance Text: UNCITRAL Model Laws Relating to Insolvency, INSOL International, London (2022), p 22.

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] [2.5 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.

Assuming that the foreign proceeding opened in State B is qualify as a “foreign proceeding” within the meaning of Article 2(a) of the Model Law and that the applicant is qualify as “foreign representative” within the meaning of Article(d) of the Model Law, the conditions provided for, respectively, in Article 17(1)(a) and 17(1)(b) of the Model Law would be fulfilled.

The requirements of Article 15 of the Model Law must also be met for the foreign proceeding to be recognized under Article 17(1)(c) of the Model Law.

Article 15(2) requires that the application be accompanied by one of the following documents: (a) A certified copy of the decision commencing the foreign proceeding and appointing the foreign representative; or (b) A certificate from the foreign court affirming the existence of the foreign proceeding and of the appointment of the foreign representative; or (c) In the absence of evidence referred to in subparagraphs (a) and (b), any other evidence acceptable to the court of the existence of the foreign proceeding and of the appointment of the foreign representative.¹⁵ [1]

Pursuant to Article 15(3) of the Model Law, the application for recognition must also be accompanied by a statement identifying all foreign proceedings relating to the debtor that are known to the foreign representative.¹⁶

¹⁵ DECLERCQ, Peter J M, Module 2A Guidance Text: UNCITRAL Model Laws Relating to Insolvency, INSOL International, London (2022), p 25.

¹⁶ DECLERCQ, Peter J M, Module 2A Guidance Text: UNCITRAL Model Laws Relating to Insolvency, INSOL International, London (2022), p 25.

Furthermore, Article 15(4) of the Model Law authorizes the court of the enacting State to require a translation of the documents provided in support of the application for recognition into an official language of that State.¹⁷

In addition, the application must be made before a competent court or authority of the enacting State, as described as such in Article 4 of the Model Law, in order to fulfil the condition of Article 17(1)(d) of the Model Law.

Finally, it is worth noting that Article 17(1) of the Model Law subjects recognition to the public policy exception provided for in Article 6 of the Model Law. [1] The public policy exception is a provision of the Model Law in order to protect the sovereignty of the enacting State. According to John "the use of the expression "manifestly" in this exception emphasises that public policy exceptions should be interpreted restrictively and should only apply in exceptional circumstances concerning matters of fundamental importance for the enacting State".¹⁸ [1/2]

In addition, the author indicates that " as a general rule the public policy exception (of article 6 of the Model Law) should rarely be the basis for refusing an application for recognition, even though it might be a basis for limiting the nature of relief accorded".¹⁹

Once the aforementioned requirements are met, DECLERCQ points out that:

"If the foreign proceeding takes place in the State where the debtor has its COMI, the foreign proceedings will be recognised as foreign main proceedings (paragraph 2(a)) and if the debtor only has an establishment in the foreign State where the foreign proceedings were opened, then the foreign proceedings will be recognised in the enacting State as foreign non-main proceedings (paragraph 2(b))".²⁰

Therefore, absent any exception from public policy, an application accompanied by the documents required by Article 15 of the Model Law and which fulfills the conditions of Article 17(1) of the Model Law may be recognized by the court of the enacting State.

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

¹⁷ DECLERCQ, Peter J M, Module 2A Guidance Text: UNCITRAL Model Laws Relating to Insolvency, INSOL International, London (2022), p 25.

¹⁸ DECLERCQ, Peter J M, Module 2A Guidance Text: UNCITRAL Model Laws Relating to Insolvency, INSOL International, London (2022), p 19.

¹⁹ DECLERCQ, Peter J M, Module 2A Guidance Text: UNCITRAL Model Laws Relating to Insolvency, INSOL International, London (2022), p 29.

²⁰ DECLERCQ, Peter J M, Module 2A Guidance Text: UNCITRAL Model Laws Relating to Insolvency, INSOL International, London (2022), p 26.

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

Question 3.3 [maximum 5 marks] [4 out of 5 marks]

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

With regard to relief, the Model Law has three situations: (a) pre-recognition relief under Article 19; (b) automatic relief in case of recognition of a main foreign proceeding pursuant to Article 20; and (c) post-recognition relief provided for in Article 21 of the Model Law.

The foreign representative may request relief of a provisional nature in urgent cases, which will take effect between the application and the decision on the recognition of the foreign proceeding, in accordance with Article 19(3) of the Model Law. In this regard, Article 19(1) of the Model Law provides that the court may grant at its discretion any of the following reliefs: (a) staying execution against the debtor's assets; (b) entrusting the administration or realization of all or part of the debtor's assets located in this State to the foreign representative or another person designated by the court, in order to protect and preserve the value of assets that, by their nature or because of other circumstances, are perishable, susceptible to devaluation or otherwise in jeopardy; (c) suspending the right to transfer, encumber or otherwise dispose of any assets of the debtor to the extent this right has not been suspended under paragraph 1 (c) of article 20; (d) providing for the examination of witnesses, the taking of evidence or the delivery of information concerning the debtor's assets, affairs, rights,

obligations or liabilities; and (g) granting any additional relief that may be available under the law of the enacting State.

Pre-recognition relief cannot interfere with the administration of the foreign main proceeding, otherwise the court may refuse it under Article 19(4) of the Model Law.

In addition, Article 19(2) of the Model Law provides for notice of relief of a provisional nature.

With the recognition of a foreign main proceeding, Article 20(1) of the Model Law stipulates that: (a) commencement or continuation of individual actions or individual proceedings concerning the debtor's assets, rights, obligations or liabilities is stayed; (b) execution against the debtor's assets is stayed; and (c) the right to transfer, encumber or otherwise dispose of any assets of the debtor is suspended.

At the request of the foreign representative, Article 21(1) provides that the court may grant any appropriate relief, including: staying the commencement or continuation of individual actions or individual proceedings concerning the debtor's assets, rights, obligations or liabilities, to the extent they have not been stayed under paragraph 1 (a) of article 20; (b) staying execution against the debtor's assets to the extent it has not been stayed under paragraph 1 (b) of article 20; (c) suspending the right to transfer, encumber or otherwise dispose of any assets of the debtor to the extent this right has not been suspended under paragraph 1 (c) of article 20; (d) providing for the examination of witnesses, the taking of evidence or the delivery of information concerning the debtor's assets, affairs, rights, obligations or liabilities; (e) entrusting the administration or realization of all or part of the debtor's assets located in this State to the foreign representative or another person designated by the court; (f) extending relief granted under paragraph 1 of article 19; and (g) granting any additional relief that may be available under the law of the enacting State.

The relief provided for in Article 21 may be granted either to the foreign main proceeding, in addition to the automatic relief provided for in Article 20, or to the foreign non-main proceeding. According to DECLERCQ, this Article "provides the court in the enacting State with the discretionary power - where necessary to protect the assets of the debtor or the interest of creditors and at the request of the foreign representative - to grant appropriate relief".²¹

²¹ DECLERCQ, Peter J M, Module 2A Guidance Text: UNCITRAL Model Laws Relating to Insolvency, INSOL International, London (2022), p 30.

The relief granted under the Model Law is not unlimited, it must be consistent with the internal law of the State. In this sense, the Model Law protects the sovereignty of the State by establishing the public policy exception in its Article 6.

The English court has already established several limitations on the relief that can be granted under the Model Law.²² An example of this is the Gibbs rule, which, according to DECLERCQ, "stands for the general proposition that a debt governed by English law cannot be discharged or compromised by a foreign insolvency proceeding".²³

Article 22(1) of the Model Law adds that in granting or denying relief under article 19 or 21, or in modifying or terminating relief under article 22(3), the court of the enacting State must be satisfied that the interests of the creditors and other interested persons, including the debtor, are adequately protected. On the subject, DECLERCQ argues that "[t]he court in the enacting State must strike an appropriate balance between the relief that may be granted to the foreign representative and the interests of the persons that may be affected by the relief".²⁴

Therefore, the Model Law provides for various reliefs that may be granted automatically or at the discretion of a court of the enacting State. In this sense, the relief granted must respect the sovereignty of the enacting State and have a balance between the interests involved.

***For full marks your answer should have also briefly discussed the following:
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.***

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 line with the recent English case between Igor Vitalievich Protasov and Khadzhi-Murat Derev,²⁵ the Model Law aims to place the foreign representative in the same

²² DECLERCQ, Peter J M, Module 2A Guidance Text: UNCITRAL Model Laws Relating to Insolvency, INSOL International, London (2022), pp 33-34.

²³ DECLERCQ, Peter J M, Module 2A Guidance Text: UNCITRAL Model Laws Relating to Insolvency, INSOL International, London (2022), p 37.

²⁴ DECLERCQ, Peter J M, Module 2A Guidance Text: UNCITRAL Model Laws Relating to Insolvency, INSOL International, London (2022), p 41.

²⁵ Order of 24 February 2021 by Mr Justice Adam Johnson, [2021] EWHC 392 (CH) (the Protasov v Derev Case).

position as the officeholder appointed in domestic jurisdiction. In this regard, relief measures granted pursuant to Article 21 of the Model Law must respect the same range of relief available in a domestic insolvency proceeding. Therefore, in the case, the English court understood that a freezing order would not be granted in an English proceeding, so that it would not be possible to recognize such an order in a foreign proceeding.²⁶

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

Commented [BB11]: SUB TOTAL = 13.5 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.

²⁶ DECLERCQ, Peter J M, Module 2A Guidance Text: UNCITRAL Model Laws Relating to Insolvency, INSOL International, London (2022), p 34.

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] [13.5 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 [9 out of 10]

4.1.2 whether the Applicants fall within the description of "foreign representatives" as defined by article 2(d) of the MLCBI [maximum 5 marks]. [4.5 out of 5]

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

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

Article 2(i) of the CBIR adopts the definition of "foreign proceeding" provided for in Article 2(a) of the Model Law. According to the UNCITRAL Guide to Enactment:

"The attributes required for a foreign proceeding to fall within the scope of the Model Law include the following: basis in insolvency-related law of the originating State; involvement of creditors collectively; control or supervision of the assets and affairs of the debtor by a court or another official body; and reorganization or liquidation of the debtor as the purpose of the proceeding (article 2, subparagraph (a)). Whether a foreign proceeding possesses or possessed those elements would be determined at the time the application for recognition is considered".²⁷

Aware that a reorganization or liquidation may be operated under a law that is not labelled as an insolvency law, the UNCITRAL Guide to Enactment allows for the recognition of a foreign proceeding carried out under an insolvency-related law.²⁸ The LBBA is not an insolvency law. However, its Article 76 obliges the NB to classify the bank as insolvent if it fulfils its criteria. In that sense, the LBBA can be considered an insolvency-related law.

That was enough for the English court in the Agrokor case, according to DECLERCQ:

"Law relating to insolvency: The Model Law does not require 'insolvency law' as a label; it is sufficient if the law deals with or addresses insolvency or severe financial distress, which the Lex Agrokor does. The 'law relating to insolvency' requirement is satisfied if insolvency is one of the grounds on which the proceeding could be commenced, even if insolvency could not actually be demonstrated and there was another basis for commencing the proceeding. At the commencement of the proceedings, it was unchallenged evidence that Agrokor and the wider group was in a state of serious financial distress".²⁹

²⁷ UNCITRAL Guide to Enactment, p 39, para 66.

²⁸ UNCITRAL Guide to Enactment, p 41, para 73.

²⁹ DECLERCQ, Peter J M, Module 2A Guidance Text: UNCITRAL Model Laws Relating to Insolvency, INSOL International, London (2022), p 16.

It is clear that this is a collective procedure. Considering the powers attributed to the liquidator, the DGF has extensive powers to administer the liquidation of the debtor's assets or affairs, as established in article 37 of the DGF Law. In turn, Article 36(5) of DGF Law establishes a moratorium which prevents 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. Furthermore, on September 7, 2020, the DGF decided to approve an amended list of creditor claims. Such elements demonstrate that the procedure involves the collectively of the debtor's assets and liabilities.³⁰

The control or supervision of the assets and affairs of the debtor by a court or another official body is the most sensitive attribute required in this case. That because, according to the UNCITRAL Guide to Enactment:

"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".³¹

The DGF is a governmental body of Country A whose 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.

Although, according to DECLERCQ, in the Agrokor case, the English court held:

"Court supervision: The level of court supervision required by the Model Law is relatively low. Under the CBIR it can be potential, rather than actual and indirect rather than direct. The fact that the Lex Agrokor also gave some control to the Croatian government, did not negate the supervision of the court".³²

³⁰ DECLERCQ, Peter J M, Module 2A Guidance Text: UNCITRAL Model Laws Relating to Insolvency, INSOL International, London (2022), p 14.

³¹ UNCITRAL Guide to Enactment, p 41, para 74.

³² DECLERCQ, Peter J M, Module 2A Guidance Text: UNCITRAL Model Laws Relating to Insolvency, INSOL International, London (2022), p 16.

In this case, the DGF would qualify as a foreign representative (as we will see below) and cannot be considered at the same time as an official body for control and supervision, although it is a governmental body. Considering its independence and impossibility of interference by the NB or other public authority, the requirement of court supervision would not be met.

*The last attribute is the purpose of reorganization or liquidation. The English court addressed this element on 27 January 2020 In the matter of Sturgeon Central Asia Balanced Fund Ltd [2020] EWHC 123 (Ch) at 6, where it held that “read in context and employing a purposive approach, the words ‘for the purpose’ in [article 2(a) MLCBI] should be read as meaning the purpose of insolvency (liquidation) or severe financial distress (reorganisation)”.*³³ *In this case, the settlement purpose of the proceeding is evident.*

Therefore, although most of the attributes were verified, the lack of court supervision justifies the non-recognition of the procedure as a foreign proceeding under Article 2(a) of the Model Law.

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 the “subject of the control or supervision by a foreign court”, 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

³³ DECLERCQ, Peter J M, Module 2A Guidance Text: UNCITRAL Model Laws Relating to Insolvency, INSOL International, London (2022), p 16-17.

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".

With regard to foreign representatives, Article 2(j) of the CBIR adopts the same definition as Article 2(d) of the Model Law. According to the UNCITRAL Guide to Enactment:

"Subparagraph (d) recognizes that the foreign representative may be a person authorized in the foreign proceedings to administer those proceedings, which would include seeking recognition, relief and cooperation in another jurisdiction, or they may simply be a person authorized specifically for the purposes of representing those proceedings. The Model Law does not specify that the foreign representative must be authorized by the court (as defined in article 2, subparagraph (e)) and the definition is thus sufficiently broad to include appointments that might be made by a special agency other than the court. It also includes appointment made on an interim basis (see paras. 79-80 above). The fact of appointment of the foreign representative in the foreign proceeding to act in either or both of those capacities is sufficient for the purposes of the Model Law; article 15 requires either a certified copy of the decision appointing the representative, a certificate affirming the appointment or other evidence of that appointment that is acceptable to the receiving court. The definition in subparagraph (d) is sufficiently broad to include debtors who remain in possession after the commencement of insolvency proceedings".³⁴

Therefore, as pointed out by the UNCITRAL Guide to Enactment, it is not necessary for the foreign representative to be appointed by the foreign court,³⁵ but may be appointed by a special agent. It is worth adding that Article 2(e) of the Model Law defines that "foreign court" means a judicial or other authority competent to control or supervise a foreign proceeding.

In the specific case, Article 77 of the LBBA provides that the DGF becomes liquidator of the Bank. As liquidator, the DGF has extensive powers to administer the liquidation of the debtor's assets or affairs, as established in article 37 of the DGF Law. Thus,

³⁴ UNCITRAL Guide to Enactment, p 46, para 86.

³⁵ DECLERCQ, Peter J M, Module 2A Guidance Text: UNCITRAL Model Laws Relating to Insolvency, INSOL International, London (2022), p 17.

fulfilling the requirements to be a foreign representative under Article 2(d) of the Model Law and 2(j) of the CBIR.

Ms G, on the other hand, was appointed by Deliberation of the Board of Directors of the DGF, as expressly provided for article 48(3) of the DGF Law that empowers the DGF to delegate its powers. Her appointment was carried out with a restriction of powers, among which the exclusion of the power to arrange for the sale of the Bank's assets, which remained with the DGF as the Bank's formally appointed liquidator.

The exclusion of the power to arrange for the sale of the Bank's assets represents a major limitation on Ms G's ability to manage the liquidation of the Bank's assets. This could be a factor for not recognizing her as a foreign representative. However, considering that the application was made jointly with the DGF, and considering her capacity as DGF's agent, the Applicants, together, fit the definition of foreign representatives.

*Furthermore, it is important to point out that the recognition of foreign representatives does not give them the same powers as an English liquidator, as decided in the cases *n Candey Ltd v Crumpler* another (as joint liquidators of Peak Hotels and Resorts Ltd (in liquidation) [2020] EWHC Civ 26 and *Brian Glasgow (the Bankruptcy Trustee of Harlequin Property (SVG) Ltd v ELS Law Ltd and others* [2017] EWCH 3004 (Ch).³⁶*

Even if the necessary documentation has been presented under Article 15(2) of the Model Law and considering that the foreign representative is qualified as such under Article 2(d) of the Model Law, it is not possible to recognize the foreign procedure that was not fulfilled the requirement of Section 17(1)(a) of the Model Law.

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

**** End of Assessment ****

³⁶ DECLERCQ, Peter J M, Module 2A Guidance Text: UNCITRAL Model Laws Relating to Insolvency, INSOL International, London (2022), p 17.