



SUMMATIVE (FORMAL) ASSESSMENT: MODULE 2A

THE UNCITRAL MODEL LAWS RELATING TO INSOLVENCY

Commented [BB1]: TOTAL = 39.5 MARKS

79%

*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]

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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

Commented [SL3]: 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

Commented [SL4]: 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]

Question 2.1 [maximum 3 marks]

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

*Under Article 17 of the MLCBI, a foreign proceeding is 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 COMI). In determining the COMI of the debtor, the appropriate date to consider is the date on which those foreign proceedings were commenced. While this is not expressly stated in the MLCBI, it is apparent from the evidence that is required to accompany an application for recognition under Article 14, which places great emphasis on the decision by which the foreign proceedings were commenced and the foreign representative appointed. Using the date of the commencement of the foreign proceedings as the relevant date ensures a test that can be applied with certainty to all insolvency proceedings, and avoids the confusion and uncertainty that may arise due to changes in the debtor's operations or dealings after (and/or as a result of) the commencement of the insolvency proceedings.*

Question 2.2 [maximum 3 marks]

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

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

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

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

**Answer:**

Statement 1: "Article 14: Notification to foreign creditors of a proceeding under [identify laws of the enacting State relating to insolvency]", which deals

Commented [SL5]: SUBTOTAL = 8 MARKS

Commented [SL6]: 2 marks

US, chap 15, the *Morning Mist Holdings Ltd v. Krys (Matter of Fairfield Sentry Ltd)*.

Commented [SL7]: 2.5 marks

3 = art 16(3)



*with timely notice to foreign creditors who are entitled to be notified whenever notification is required for local creditors in the enacting state.*

Statement 2: **“Article 10: Limited jurisdiction”, known as the Safe Conduct Rule, which ensures that the foreign representative or foreign assets of the debtor are not made subject to the jurisdiction of the court of the enacting state solely because an application for recognition has been made in the enacting state.**

Statement 3: **“Article 16: Presumptions concerning recognition”, which deals with recognition presumptions and, in particular, includes a rebuttable presumption that the place of the debtor’s registered office, if a company, or habitual residence, if an individual, is the debtor’s center of main interest (COMI).**

**Question 2.3 [2 marks]**

**Commented [SL8]:** 2 marks

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

*The “indefinite Moratorium Continuation” mentioned here refers to an application that was made by an Azeri foreign representative under Article 21 of the MLCBI for an indefinite continuation of the automatic moratorium that resulted from an earlier recognition order made by the English courts. The first instance court refused the application, electing not to exercise its broad powers to grant the indefinite continuation of the automatic moratorium, because doing so would have had the effect of circumventing the application of “the Gibbs Rule” by preventing creditors with debt instruments governed by English law, who had not submitted to the foreign insolvency proceedings, from enforcing their English law claims before an English court. The Court of Appeal, in upholding the decision, found that the indefinite moratorium continuation was neither necessary to protect the interests of the debtor’s creditors nor an appropriate way of achieving such protection.*

**Question 2.4 [2 marks]**

**Commented [SL9]:** 1.5 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.***

Art 29(a)

*Where a domestic proceeding has already been opened, after recognition of a foreign main proceeding, the court in the enacting state should (as per Article 29) ensure that any relief granted under Articles 19 or 21 are consistent with the existing domestic proceedings and, for the avoidance of doubt, should be conscious that the foreign main proceedings will not benefit from the automatic reliefs provided for in Article 20.*

*Under Article 18, the foreign representative has an ongoing obligation to inform the court in the enacting State 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 comes to the foreign representative's attention.*

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

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***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] **[4 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.***

*Access and cooperation are two of the key pillars on which the MLCBI was founded, resulting in provisions that bestow significant benefits on insolvency representatives tasked with administering multi-jurisdictional estates. **[1]***

*The MLCBI's provisions on access are contained in Chapter II thereof, which consists of Articles 9-14. A fundamental Article is Article 9, which vests a foreign representative with the right to apply directly to a court in the enacting state (here, State A). By this provision, the standing of a foreign representative in the local court is put beyond dispute. There is no need to meet formal requirements, such as licensing or consular actions, **[1]** or even to apply for recognition of the foreign proceedings (subject to Article 12, mentioned below), for the foreign representative to access the court. This Article is supplemented by Articles 11 and 12, which provide the foreign representative with standing in the particular circumstances of commencing a domestic insolvency proceeding and, where a foreign proceeding has been recognised, participating in a domestic proceeding, respectively. **[1]** Freed from the unwieldy formal constraints that may otherwise attach to demonstrating *locus standi*, the foreign*

*representative's enshrined direct access will save significant time and costs, protecting the value of the debtor's assets, in State A and otherwise. Moreover, the foreign representative can access the domestic court and apply for recognition without fear of State A assuming jurisdiction over all the assets of the debtor as a result thereof, by virtue of the protection afforded by Article 10, known as the "safe conduct rule". Creditors also benefit from access rights, with Article 13 requiring that foreign creditors be given the same rights as domestic creditors and Article 14 vesting foreign creditors with a right to be provided with the same notifications as local creditors (individually, and without any need to adhere to formalities like the use of letters rogatory). While promoting efficiency (which, in turn, saves costs), these provisions also ensure comfort and transparency, for creditors and the foreign representative alike.*

*The MLCBI's provisions on co-operation are contained in Chapter IV, particularly Articles 25 to 27, of the MLCBI. As per the Guide to Enactment and Interpretation of the MLCBI, the objective of these provisions is to enable courts and insolvency representatives from two or more countries to "be efficient and achieve optimal results", and can be utilised to, for example, prevent the dissipation, and maximize the value, of assets - goals that surely align with those of the foreign representative, in these circumstances. The foreign representative need not obtain recognition of the foreign proceedings in order to take advantage of those provisions in the MLCBI dealing with cross-border co-operation, which means that cooperation can occur at an early stage and before any such application for recognition is made [1]. Indeed, Articles 25 and 26 of the MLCBI don't only facilitate cross-border co-operation, they mandate it. These Articles require that the court and the insolvency representative "cooperative to the maximum extent possible", with the welcomed result of providing a legal basis for cooperation by local courts with foreign courts in the context of cross-border insolvencies when enacted. To aid in illustrating the types of co-operation that are authorised by the MLCBI, Article 27 provides an indicative list, which includes supervision of the debtor's assets and affairs, which may be particularly relevant to this foreign representative.*

*Together, the access and cooperation rights afforded by the MLCBI to the foreign representative allow the foreign representative to access, and invoke the assistance of, the court in State A towards the end of preserving, securing and maximizing the value of the assets situated therein.*

Question 3.2 [maximum 5 marks] [3 out of 5 marks]

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

**as well as the judicial scrutiny that must be overcome for a recognition application to be successful.**

*There are many benefits that can follow the recognition of foreign proceedings in an enacting state, including access for the foreign representative to certain protections available to local insolvency office holders and tailor-made reliefs, allowing for savings in time, costs and complications.*

*Assuming that the foreign proceedings in State B qualify as “foreign proceedings” within the meaning of Article 2(a) and the foreign representative qualifies as a “foreign representative” within the meaning of Article 2(d), the following should still be considered:*

- (1) Evidential considerations - [½] While the MLCBI has significantly reduced the procedural and diplomatic burdens that may have otherwise accompanied an application of this nature, Article 15 of the MLCBI still requires that certain procedural requirements be met. Particularly, Article 15 requires that an application for recognition be accompanied by evidence of the existence of the foreign proceedings and the appointment of the foreign representative, which may take the form of either: (a) a certified copy of the decision commencing the foreign proceedings and appointing the foreign representatives; (b) a certificate from the foreign court affirming the existing of the foreign proceeding and the appointment of the foreign representative; or (c) any other evidence acceptable to the enacting court thereof. Additionally, paragraph (3) of Article 15 requires that the application be accompanied by a statement identifying all foreign proceedings in respect of the debtor that are known to the foreign representative. It is also notable that any documents in a foreign language may need to be translated to the official language of State A, at the request of the Court. Importantly, by Article 16, the court is entitled to presume that these documents are authentic, whether or not they have been legalized, which means that, unless the court instructs otherwise, the foreign representative can avoid the cumbersome and time-consuming procedures sometimes associated with authenticating formal documents. [½]*
- (2) The “public policy” exception - It should be noted that, by virtue of Article 6, [½] State A is entitled to deny the foreign representative’s application for recognition on the grounds of public policy, even where the evidential requirements above have been satisfied. More particularly, the court in State can refuse the application for recognition if doing so would, for some reason, be “manifestly contrary” to the public policy of State A. The UNCITRAL Guide to Enactment and case law on this Article confirm that, based on the use of the expression “manifestly”, the public policy exception should be interpreted restrictively and only applied in exceptional circumstances concerning matters of fundamental importance for the enacting State. Indeed, the threshold is considerably higher than merely “contrary” to public policy (*In the matter of Agorkor DD [2017] EWHC 2791*).*
- (3) Abuse of process - While there is no provision in the MLCBI that expressly provides that a recognition application may be refused on the grounds of abuse*

of process, there is also no provision that provides that it cannot. The foreign representative should, therefore, be conscious that if, under the domestic law or procedural requirements of State A, the application may be considered an abuse of process, this could negatively impact the prospects of the recognition application, although the UNCITRAL Guide to Enactment does encourage enacting States to emphasize international cooperation, uniformity and the narrow construction of Article 6 (discussed above) when considering applying domestic laws and practices as a ground for declining recognition. [½]

- (4) The relevance of the Debtor's COMI - An important consideration in an application of this nature is the location of the Debtor's centre of main interest ("COMI"). In accordance with Article 17, [½] if State B, where the foreign proceeding is occurring, is where the Debtor has its COMI, then the foreign proceeding will be recognised as a foreign main proceeding. If the Debtor only has an establishment in State B, and State B is not where the Debtor's COMI is situated, then the foreign proceedings will be recognised as foreign non-main proceedings. While there is no fixed definition for the concept of COMI in the MLCBI, the location of the central administration of the Debtor and the location that is readily ascertainable as the central administration of the Debtor by its creditors are two factors that will be relevant to determining the location of the COMI. Additionally, the relevant date for determining the COMI is the date of the commencement of the foreign proceedings. The categorization of the foreign proceedings as main or non-main, by reference to the Debtor's COMI, is especially relevant, as it will determine, inter alia, the nature of the relief accorded to the foreign representative on the recognition being made (under Articles 20 and 21) and the interplay between the foreign proceedings and any domestic proceedings.[½]

Regarding the judicial scrutiny that must be overcome for a successful recognition application, other than the considerations above, thanks largely to the presumptions introduced by Article 16(1) and (2), the application is largely considered a "tick-box" exercise (as seen in *Rozhkov v Markus* [2019] EWHC 1519 (Ch)), whereby once the evidential requirements set out above are met, and the jurisdictional pre-conditions set out in the definition of "foreign proceedings" satisfied, recognition will generally be granted as a matter of course pursuant to Article 17 of the MLCBI. The court in the enacting state should not, for example, go behind the judgment in the foreign proceedings to determine whether they were correctly commenced under the foreign law (In the *Trustees in Bankruptcy of Li Shu Chung v Li Shu Chung* [2021] EWHC 3346 (Ch)).

**Your answer should have also included a brief discussion on the following elements:**

- 1. Exclusions:** If the debtor is an entity that is subject to a special insolvency regime in State B, the foreign representative should first check if the foreign proceedings regarding that type of a debtor are excluded in State A based on Article 1(2) of the implemented Model Law in State A.
- 2. Restrictions:** Existing international obligations of State A: Based on Article 3 of the Model Law, the court in State A should also check if there are no existing

**international obligations of State A (under a treaty or otherwise) that may conflict with granting the recognition application under the implemented Model Law in State A.**

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.**

*From the time that an application for recognition is filed, the foreign representative is entitled to request provisional relief, pending determination of the application. Pre-recognition relief is reserved for "urgently needed" relief, and is provided for by Article 19 of the MLCBI, which empowers the court in the enacting State to grant such relief where it is "urgently needed to protect the assets of the debtor or the interests of the creditors". It necessarily follows that such relief will only be available to the foreign representative where he is able to satisfy the Court of the urgency of the measures. The pre-recognition reliefs available to the foreign representative include orders from the enacting court (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 State A 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; or (c) any relief mentioned in Article 21(1)(c), (d) and (g), which include suspending the debtor's rights to transfer or dispose of his assets, examining witnesses and granting any additional relief that may be available to the local insolvency representative. Notably, pre-recognition relief is provisional, in that it terminates when the application for recognition is decided (Article 19(3)), although the court does have the opportunity to extend the measures.*

*Regarding post-recognition relief, where the foreign proceedings are classified as foreign *main* proceedings, there are certain mandatory reliefs that automatically flow from the recognition application being granted. More particularly, the commencement or continuation of individual actions/proceedings concerning the debtor's assets, rights, obligations and liabilities and execution against the debtor's assets are automatically stayed and the right to transfer, encumber or dispose of any assets of the debtor is suspended. Notwithstanding the automatic nature of this relief, it should be noted that Article 20 allows for the application of exceptions or limitations provided for in the domestic law of the enacting state, here - State A. Moreover, the automatic stay and suspension provided for in Article 20 do not operate to prevent anyone from requesting the commencement of a local insolvency proceeding and participating therein (Article 20(4)).*

*Additionally, regardless of whether the proceedings qualify as foreign main or foreign non-main proceedings, the court in the enacting state is given the discretionary power to provide post-recognition relief under Article 21 of the MLCBI. This power can be exercised, on the application of the foreign representative, where the relief requested is “necessary to protect the assets of the debtor or the interests of the creditors”. Article 21 of the MLCBI contains examples of the types of relief that may be sought under this Article, but the Guide to Enactment confirms that this list is not exhaustive and the court in the enacting state may grant any type of relief available under its laws and needed in the circumstances of the case. The list provided in Article 21 includes orders staying actions or proceedings, staying executions, allowing for the examination of witnesses and entrusting the administration or realization of the debtor’s assets to the foreign representatives. By Article 21(2), the Court may also entrust the distribution of all/part of the debtor’s local assets in the foreign representative, once satisfied that the interests of local creditors will be adequately protected. Paragraph 3 of Article 21 provides for an important limitation on the Court’s discretion in the context of foreign non-main proceedings, providing that in granting discretionary relief, the court must be satisfied that the relief relates to assets that, under the law of the enacting State, should be administered in the foreign non-main proceeding or concerns information required in that proceeding. In brief - the court should be careful that relief granted in a non-main foreign proceeding doesn’t interfere with the administration of another insolvency proceeding, particularly the main proceeding. Further limitations to the appropriate relief that may be granted under the MLCBI have developed from case law, including English cases that have concluded that:*

- (1) The enforcement of an insolvency-related in personam default judgment is not covered by the MLCBI (Rubin v Eurofinance SA)*
- (2) The court may not apply foreign insolvency laws to an English-law governed contract (Fibria Celulose S/A v Pan Ocean Co Ltd)*
- (3) A debt governed by English law cannot be discharged or compromised by a foreign insolvency proceedings (Antony Gibbs & Sons v La Societe Industrielle et Commerciale des Metaux and the IBA line of cases)*

*Notably, as clarified by Article 22, in granting or denying either interim pre-recognition relief under Article 19 or discretionary post-recognition relief (Article 21), the court must be satisfied that the interests of the creditors of the debtor and other interested parties are adequately protected. To ensure this goal is achieved, the court in the enacting state is given the power to subject the relief to any conditions it considers appropriate, and may further modify or terminate relief on the request of the foreign representative or an affected person.*

**For full marks your answer should also include a brief discussion on the following:**  
**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?**

*A worldwide freezing order granted as provisional relief under Article 19 will generally not continue following recognition under Article 21, as the bankruptcy regime of the State in which the recognition order was granted is likely to offer other forms of protection that render a worldwide freezing order, or similar injunction, unnecessary (Protasov v Derev). This was the position recently taken by the English courts in 2021 in Igor Vitalievich Protasov and Khadzhi-Murat Derev, where the court found that, in those circumstances, "Absent some exceptional reason, a freezing order...will not in my view be required or justified", as the effect of recognition of a foreign main proceeding is to bring into play the wide infrastructure of the local insolvency legislation, which already accounted for similar relief.*

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

Commented [BB11]: 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]**

Article 2(a) of the MLCBI defines "foreign proceeding" as a "collective *[element 1]* judicial or administrative *[element 2]* proceeding *[element 3]* in a foreign State *[element 4]*, including an interim proceeding, pursuant to a law relating to insolvency *[element 5]* in which proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign court *[element 6]*, for the purpose of reorganization or liquidation" *[element 7]*. This definition purposely avoids the use of expressions that may have different technical meanings in different jurisdictions and, instead, seeks to describe the proceeding's use or function, so that proceedings are not inadvertently excluded solely as a result of terminology. As this definition contains multiple elements, each must be assessed, in turn, to determine whether the Bank's liquidation (the "Bank's Liquidation") is, in fact, a "foreign proceeding" for the purposes of the MLCBI. The relevant time at which the liquidation in State A must be assessed to determine whether it possesses or possessed those elements is the time at which the application for recognition is made. From the facts provided, the recognition application was made after Ms. G's appointment as authorised officer, during the liquidation stage of the proceedings.

**(1) Collective proceeding**

For proceedings to qualify as a "foreign proceeding" within the meaning of Article 2(a), they must be collective in nature. The requirement relates directly to the very purpose of the MLCBI, which is to provide a method for achieving a coordinated, international solution for all stakeholders in an insolvency proceeding, rather than a collection device for one particular creditor or group of creditors. According to the UNCITRAL MLCBI Guide to Enactment and Interpretation, a key consideration in determining whether a proceeding is collective is whether "substantially all of the assets and liabilities of the debtor are dealt with in the proceedings". Collective proceedings may, for example, deal with creditors by providing them with a right to submit claims and receive a distribution out of the debtor's assets or participate in, or receive notice of, the proceedings.

In the Bank's Liquidation, all powers of the Bank's management and control bodies are terminated and its property and funds are alienated. The liquidator has extensive powers, including to take over management of the property and

money of the bank, to find, identify and recover all property belonging to the Bank and to dispose of, and sell, all the Bank's assets. The liquidator also has powers of distribution and is empowered to compile a register of creditor claims and to seek to satisfy those claims. The Bank's Liquidation, therefore, appears to align largely with a "liquidation" in the standard use of that term, whereby the liquidator is tasked with realizing all assets of the debtor and applying the funds received therefrom towards the satisfaction of all creditor claims. By dealing with the collection and sale of all the assets of the Bank and the satisfaction creditor claims, generally, the Bank's Liquidation deals with substantially all of the assets and liabilities of the Bank, the debtor in the proceedings, and should, therefore, stand to be categorised as "collective proceedings".

**(2) Pursuant to a law relating to insolvency**

While the proceedings need not be conducted under law that is expressly labelled as insolvency law, the law should deal with or address insolvency or severe financial distress. The English court in *In the matter of Agrokor DD [2017] EWHC 2791 (Ch)* found that this element will be 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. Notably, though, it went unchallenged that the debtor in the *Agrokor* case was in a state of serious financial distress.

The Bank's Liquidation was commenced pursuant to the Law of Country A on Banks and Banking Activity ("LBBA"). The LBBA appears to provide for a tiered process towards the liquidation of banks. The National Bank (the "NB") plays a vital role in the LBBA and, under Article 76 thereof, is required to classify a bank as insolvent if it meets the criteria set out therein for insolvency. These criteria include that the bank's regulatory capital amount or standard capital ratios have reduced to 1/3 of the minimum level specified by law and that the Bank has failed to meet 2% or more of its obligations to depositors or creditors within five working days. Objectively, these criteria appear to be certain signs of severe financial distress. The LBBA, together with the DGF Law, then provides for a structured process to remove a bank from the market once classified as insolvent and, ultimately, for the NB to remove the Bank's licence, resulting in the automatic appointment of a liquidator (Article 77 of the LBBA).

Accordingly, although the LBBA - the Law of Country A on Banks and Banking Activity - does not carry the label "insolvency" in its title or appear to deal exclusively with insolvency issues, it is clear that it deals with and addresses insolvency and severe financial distress, both of which were key factors leading to the Bank's Liquidation. On that basis, this element will be satisfied.

**(3) Control or supervision by a foreign court**

While the MLCBI does not specify the level of control or supervision required, the definition of "foreign proceeding" requires some formal control or supervision by the court of the foreign jurisdiction which the proceedings have been commenced. The definition, as contained in subparagraph (a) of Article 2, makes it clear that both the assets and the affairs of the debtor (here, the Bank) should be subject to control or supervision of the court, and it is *not* sufficient if

only one or the other are covered by the foreign proceeding. Case law interpreting this provision has concluded that the level of supervision required to satisfy the definition is relatively low, and that the supervision may be potential, rather than actual, and indirect, rather than direct (the Agkoror case, as referenced above). In the Agkoror case, the court found that the fact that the Law on Extraordinary Administration Proceeding in Companies of Systemic Importance in Croatia, to which the debtor was subject, gave some control to the Croatian government did not negate the supervision of the court. However, the *UNCITRAL Guide to Enactment* is clear that the mere supervision of an insolvency representative by a licensing authority is not sufficient.

There is, in the information set out in the Affidavit, very little reference to the court of State A. Both the NB and the Deposit Guarantee Fund (the "DGF") appear to play important roles in the proceedings, with appear to be largely supervisory in nature. The classification of the Bank as insolvent and the decision to commence its liquidation rests with NB, and not a court. The DGF, which is a governmental body, automatically became liquidator on the NB's decision to revoke the Bank's license, and vested with all the powers of a liquidator under the laws of State A, without any intervention or participation by the court. Indeed, the only mention in the Affidavit to the court of State is in the powers of the DGF under Article 37 of the LBBA, which provides that the DGF or its authorised person may, *inter alia*, file property and non-property claims with a court. An ability to commence claims in the court of State A, however, does not equate to subjecting the liquidation to the supervision of the court. There is, therefore, nothing in the information provided in the Affidavit on State A's insolvency procedure for Banks that suggests that the assets or affairs of the debtor in the proceedings are subject to control or supervision by the court of State A. Instead, the assets and affairs appear to be under the control and supervision of the DGF, a governmental body of State A. Mere supervision by a governmental body is unlikely to be sufficient for the purposes of the definition provided in the MLCBI. Without any indication that there is, at least, some control or supervision of the proceedings by the court of State A, the Bank's Liquidation will not satisfy this element of the definition of "foreign proceedings".

**(4) For the purpose of reorganization or liquidation**

For completeness, the final element of the definition is assessed. Even where the proceedings have satisfied the remainder of the definition, it must still be shown that they are for the stated purpose of reorganization or liquidation. In this case, as was discussed in part under element (1) above, it's clear that the Bank's Liquidation is for the purpose of liquidation of the Bank, with the liquidator empowered to, and responsible for, collecting, realizing and distributing the assets of the Bank. This final element would, therefore, be satisfied.

**Conclusion**

In conclusion, while the Bank's Liquidation satisfies the majority of the elements of the definition of "foreign proceedings" provided by Article 2(a) of the MLCBI, by being a (1) collective administrative proceeding in a foreign State, (2) pursuant

*to a law relating to insolvency, and (3) for the purpose of reorganization or liquidation, the Bank's Liquidation, and liquidation proceedings governed by the LBBA generally, does not appear to be subject to control or supervision by a foreign court, which is an essential element of the definition. As a result, despite having satisfied the majority of the requirements, the Bank's Liquidation does not comprise a "foreign proceeding" within the meaning of Article 2(a) of the MLCBI.*

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]**



A "foreign representative" is defined by Article 2(d) of the MLCBI as "a person or body, including one appointed on an interim basis, authorized in a foreign proceeding to administer the reorganization or the liquidation of the debtor's assets or affairs or to act as a representative of the foreign proceedings". This definition can be broken down into three essential elements, which are each assessed in turn below.

**(1) A person or body, including one appointed on an interim basis**

In this case, the "Applicants" are (1) Ms. G, in her capacity as authorised officer of the DGF who has been delegated all liquidation powers in respect of the Bank set out in the DGF Law save for those that were expressly excluded by the Resolution appointing her, which have been retained by the Bank; and (2) the DGF, a governmental body and the Bank's formally appointed liquidator (together, the "Applicants"). Ms. G is a person and the DGF is a body, and they will, therefore, both satisfy this first requirement.

**(2) Authorised in a foreign proceeding**

It should be noted that the MLCBI does not specify that the foreign representative must be authorized by the foreign court, and the Guide to Enactment confirms that the definition is, thus, sufficiently broad to include appointments or authorisation that might be made by a special agency other than the court. In this case, the DGF became liquidator of the Bank by virtue of Article 77 of the LBBA, which provides that the DGF automatically becomes liquidator of a bank on the date that it receives confirmation of the NB's decision to revoke the bank's licence. By operation of law, the DGF is surely authorised in the Bank's Liquidation. Ms. G was appointed by the DGF, pursuant to a Decision of the Executive Board of the Directors of the DGF known as Resolution 1513, which delegated to her all liquidation powers in respect of the Bank set out in the DGF Law, save for those expressly excluded. The DGF is empowered to delegate its powers to an authorised officer, as it did to Ms. G, under Article 48(3) of the DGF Law. According to the laws of State A, Ms. G is, therefore, lawfully authorised in the Bank's Liquidation, and, for the purposes of the MLCBI, this authorisation would not be negated due to the fact that her appointment was made by a special, governmental agency, DGF, and not the court. However, the definition of "foreign representative" specifies that the person or body must be authorised not in any proceeding, but in a "foreign proceeding". As discussed above, "foreign proceeding" is a defined term under the MLCBI, with unique parameters that must be satisfied before a proceeding can be classified as such. By using the term "foreign proceeding" within the definition of "foreign representative", the two become extrinsically linked. It follows that, even if Ms. G and DGF are adequately authorised to act in the Bank's Liquidation, this is of little import if the Bank's Liquidation does not qualify as a "foreign proceeding" for the purposes of the MLCBI. On the analysis conducted above, we have concluded that the Bank's Liquidation is *not* a foreign proceeding for the purposes of the MLCBI, which would mean that, despite the Applicants' otherwise compliance with the aspects of the definition, they are not "authorised to act in a foreign proceeding".

(3) ...To administer the reorganisation or liquidation of the debtor's assets or affairs or to act as representative of the foreign proceeding

By Article 77 of the LBBA, the DGF was appointed as liquidator of the Bank with the full powers of a liquidator under the law of State A. As liquidator, the DGF has extensive powers, and is undoubtedly responsible for, and authorised to, administer the liquidation of the Bank's assets and affairs under the LBBA. 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". 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. This was, indeed, what was done by the DGF in this instance, when it delegated its powers to Ms. G pursuant to Article 48(3) of the DGF Law. At the time of the application for recognition, Ms. G was vested with all of the DGF's liquidation powers in respect of the Bank by virtue of Resolution 1513, save for the authority to claim damages from a related party of the Bank, the power to make a claim against a non-banking financial institution that raised money as loans or deposits from individuals, and the power to arrange for the sale of the Bank's assets. Each of the excluded powers remains vested in the DGF as the Bank's formally appointed liquidator. It follows that, while the Bank has delegated important powers and duties to Ms. G, it has also retained some of the most critical powers involved in the Bank's liquidation, particularly: the power to sell the Bank's assets. Concurrently, Ms. G is vested with powers similarly essential to the liquidation of the Bank's assets and affairs, including the powers to exercise management powers, manage the Bank's property and seek to satisfy creditor claims. It, therefore, cannot be said that, between the DGF and Ms. G, one or the other is authorised to administer the liquidation of the Bank's assets and affairs. Indeed, both Ms. G and DGF satisfy this element of the definition of "foreign representative", as they, together, are the persons authorised to administer the liquidation.

Conclusion

Despite the Applicants satisfying each element of the definition, on its face, they will not fall within the description of "foreign representatives" under the MLCBI if the Bank's Liquidation, over which they are appointed, does not fall within the description of a "foreign proceeding". To the extent that we have concluded that the Bank's Liquidation is not a foreign proceeding, then the Applicants, too, will not be "foreign representatives". However, if the former conclusion is incorrect, and the Bank's Liquidation is, indeed, a "foreign proceeding", then the Applicants will qualify as foreign representatives, having satisfied every other aspect of the definition.

**Excellent response. For full marks you should also address the assumption of article 16(1) MLCBI in your response.**

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 \*