



SUMMATIVE (FORMAL) ASSESSMENT: MODULE 2A

THE UNCITRAL MODEL LAWS RELATING TO INSOLVENCY

Commented [BB1]: TOTAL = 49.5 MARKS

99% - Excellent work!

*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 = 10 MARKS

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

Question 1.1

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

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

Question 1.2

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

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

**(d) All of the above.**

Question 1.3

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

**(a) The registered office of the debtor is not in the jurisdiction where the foreign proceedings were opened, but the debtor has an establishment in the jurisdiction of the enacting State.**

**(b) The registered office of the debtor is in the jurisdiction of the enacting State, but the debtor has an establishment in the jurisdiction where the foreign proceedings were opened.**

**(c) The debtor has neither its COMI nor an establishment in the jurisdiction where the foreign proceedings were opened.**

**(d) The debtor has neither its COMI nor an establishment in the jurisdiction of the enacting State.**

Question 1.4

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

**(a) The *locus standi*/access rules.**

**(b) The public policy exception.**

**(c) The safe conduct rule.**

**(d) The "hotchpot" rule.**

Question 1.5

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

*(a) The foreign main proceedings in South Africa will not be recognised in the UK because the UK is not a designated country under South Africa's principle of reciprocity, but the foreign non-main proceedings in Argentina will be recognised in the UK despite Argentina not having implemented the Model Law.*

*(b) Both the foreign main proceedings in South Africa and the foreign non-main proceedings in Argentina will not be recognised in the UK because the UK has no principle of reciprocity and Argentina has not implemented the Model Law.*

*(c) Both the foreign main proceedings in South Africa and the foreign non-main proceedings in Argentina will be recognised in the UK.*

*(d) None of the statements in (a), (b) or (c) are correct.*

Question 1.6

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

*(a) No interim relief based on Article 19 of the Model Law is available if concurrent domestic insolvency proceedings and foreign proceedings exist at the time of the application of the foreign proceedings in the enacting State.*

*(b) In the case of a foreign main proceeding, automatic relief under Article 20 of the Model Law applies if concurrent domestic insolvency proceedings and foreign proceedings exist at the time of the application of the foreign proceedings in the enacting State.*

*(c) The commencement of domestic insolvency proceedings prevents or terminates the recognition of a foreign proceeding.*

*(d) If only after recognition of the foreign proceedings concurrent domestic insolvency proceedings are opened, then any post-recognition relief granted based on Article 21 of the Model Law will not be either adjusted or terminated if consistent with the domestic insolvency proceedings.*

Question 1.7

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

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

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

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

**(d) All of the above.**

Question 1.8

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

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

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

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

**(d) All of the above.**

Question 1.9

**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 [SL3]: SUBTOTAL = 10 MARKS

Question 2.1 [maximum 3 marks]

Commented [SL4]: 3 marks

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

*Two divergent approaches have been adopted in the international jurisprudence on when the COMI of a debtor should be decided: (a) that the appropriate date is the date of commencement of the foreign proceeding (the "Commencement Approach"); and (b) that the appropriate date is the date of the filing of the recognition application (the "Filing Approach"). In my view, the Commencement Approach is to be preferred.*

*On one hand, the US cases support the Filing Approach. In *Morning Mist Holdings Ltd v. Kryz (Matter of Fairfield Sentry Ltd)* 714 F.3d 127 (2nd Cir, 2013), the Second Circuit Court of Appeals reasoned that a court should examine a debtor's COMI at the time the Chapter 15 petition is filed, as 11 USC §1517(b) is phrased in the present tense (namely, that a "foreign proceeding shall be recognized ... as a foreign main proceeding if it is pending in the country where the debtor has the center of its main interests" (emphasis added)). 11 USC §1517(b) mirrors the wording of Art 17(2)(a) MLCBI. This reasoning was followed by the Singapore High Court in *Re Zetta Jet Pte Ltd and others (Asia Aviation Holdings Pte Ltd, intervener)* [2019] 4 SLR 1343, where the honourable Judge agreed that the use of present tense indicated that "what matters is the situation at the point of the application for recognition" (at [56]). It appears that a similar argument was also made in the English case of *Re Toisa Ltd*,<sup>1</sup> and accepted by the High Court Judge.*

*However, I respectfully take the view that the above reasoning is unpersuasive. On a plain reading of Art 17 MLCBI, the use of present tense does not necessarily mean that the debtor's COMI must be determined on the date when the recognition application was filed. Art 17 simply refers to "the State where the debtor has the centre of its main interests" - if the debtor's COMI is determined on the date when the foreign proceeding is commenced, it follows that the debtor continues to have the same COMI even when an*

<sup>1</sup> This case is unreported but was noted in Ian Fox, "Timing is everything: different approaches to the relevant date for determining COMI in cross-border recognition proceedings" (2019) 4 CRI 142; available via LexisNexis.



*application for recognition is later filed in another State. In other words, if a debtor has its COMI in State X when the foreign proceeding was commenced, it would still be accurate to say that the debtor's COMI is State X at the point when the application for recognition is filed, because any events that happen between the commencement of the foreign proceeding and the application for recognition are irrelevant. In my view, the use of present tense in Art 17 is therefore not determinative of when COMI should be decided.*

*In a similar vein, the UNCITRAL Guide to Enactment and Interpretation of the MLCBI (2014) (the "Guide to Enactment") clarifies that the use of present tense in Art 17 "does not address the question of the relevant date, but rather requires the foreign proceeding to be current or pending at the time of the recognition decision" (at para 158).*

*Re Toisa Ltd is also of limited assistance given that it remains an unreported decision, and in any case that case was not followed by another English High Court Judge in *Re Li Shu Chung (also known as Ken Li Shu Chung) Chen and another v Li Shu Chung (also known as Li Shu Chung Ken)* [2021] EWHC 3346 (Ch).*

*I suggest that the Commencement Approach better accords with the rationale behind the concept of COMI. As explained in the Guide to Enactment at para 82, the Virgos-Schmit Report arguably remains relevant to interpretation of the MLCBI, since the Report has been accepted as an aid to interpretation of the EC Regulation, and the concept of COMI in the EC Regulation corresponds to that in the Model Law. The Virgo-Schmit Report states (at para 75) that the rationale of COMI is to ensure that international insolvency jurisdiction is "based on a place known to the debtor's potential creditors ... This enables the legal risks which would have to be assumed in the case of insolvency to be calculated". In my view, the Filing Approach undermines this principle. A creditor presumably calculates its risks based on the debtor's COMI while the debtor is still in operation and doing business with the creditor - allowing the debtor to shift its COMI after a foreign proceeding is commenced would subvert any prior calculation of risk by the debtor's creditors.*

*The Commencement Approach may also produce clearer results. As noted in the Guide to Enactment at para 159, the business activity of the debtor may have ceased by the time of the recognition application, and all that remains to indicate the debtor's COMI is the foreign proceeding and the activities of the foreign representative. Likewise, in a reorganisation application, it may be the reorganising entity that continues to have COMI, rather than the debtor itself. It is therefore more appropriate to decide COMI based on the date of commencement of the foreign proceeding, "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" (Guide to Enactment at para 159).*

**Finally, the Commencement Approach also arguably better guards against forum shopping by debtors, wherein debtors may artificially try to shift their COMI before a recognition application is filed.**

Question 2.2 [maximum 3 marks]

Commented [SL5]: 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 relates to Art 14 of the MLCBI and the equal treatment principle. Art 14(1) provides that whenever domestic creditors are to be notified under the insolvency laws of the enacting State, notification shall also be given to foreign creditors. Further, Art 14(2) provides that foreign creditors are entitled to individual notifications, though the court still has the discretion to order otherwise in a particular case. Art 14(2) provides that no letters rogatory or similar formalities are required, which ensures timely notice as diplomatic channels may be too time-consuming. Art 14(3) sets out what the notification of commencement of a proceeding must contain. This should address any conflict with treaty obligations of the enacting State and should provide guidance on what creditors (especially secured creditors) need to do.**

**Statement 2 relates to Art 10 of the MLCBI, which provides that the sole fact that an application is made under the MLCBI does not subject the foreign representative or the foreign assets and affairs of the debtor to the jurisdiction of the courts of the enacting State for any purpose other than the application. The safe conduct rule addresses concerns of foreign representatives and creditors that they may be exposed to the all-embracing jurisdiction of courts in the enacting State, simply by virtue of an application made under the MLCBI.**

**Statement 3 relates to Art 16(3) of the MLCBI, which provides that a corporate debtor's Centre of Main Interest ("COMI") is rebuttably presumed to be its registered office, or in the case of an individual, the individual's habitual residence. COMI is an undefined concept in the MLCBI, but is a key concept as it determines whether a foreign proceeding will be recognised as a foreign main or non-main proceeding. Pursuant to Art 17(2) MLCBI, a foreign proceeding commenced in the location of the debtor's COMI will be**

*recognised as a foreign main proceeding, but a foreign proceeding commenced in a jurisdiction where a debtor only has an establishment will be recognised as a foreign non-main proceeding. This in turn determines whether automatic relief will be granted under Art 20 MLCBI.*

Question 2.3 [2 marks]

Commented [SL6]: 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 IBA case concerned an application by an Azeri foreign representative under Art 21 MLCBI for an indefinite continuation of an automatic moratorium, which had resulted from an earlier recognition order (the "Moratorium Continuation Application"). IBA had undergone a restructuring in Azerbaijan and a restructuring plan had been approved, that was binding on all of IBA's creditors. However, the concern was that after the Azeri restructuring proceedings had ended, two of IBA's creditors (the "Challenging Creditors") would nonetheless enforce their English law claims against IBA in an English court, based on the *Gibbs* rule. The *Gibbs* rule provides that a debt governed by English law generally cannot be discharged or compromised by a foreign insolvency proceeding (such as the Azeri restructuring plan). The Moratorium Continuation would therefore prevent the Challenging Creditors from exercising their English law rights, without disapplying the *Gibbs* rule.*

*In the High Court, Mr Justice Hildyard refused to grant the Moratorium Continuation. This decision was upheld on appeal by the Court of Appeal. The Court of Appeal held that a court could only properly grant the Moratorium Continuation if doing so was (a) necessary to protect the interests of IBA's creditors, and (b) the stay was an appropriate way of achieving such protection. This was not satisfied on the facts. While IBA's other creditors might theoretically be prejudiced if the Challenging Creditors subsequently successfully enforced their claims, this was "far too indirect and imponderable" a consideration to satisfy the test of necessity. The IBA could also have sought a parallel scheme of arrangement in the UK, but had chosen not to do so. There was also nothing explicit in the Model Law to suggest that the power to grant a stay under Art 21 of the MLCBI could override the substantive rights of creditors under the proper law governing their debts.*

*Further, the continuing information obligation under Art 18 MLCBI required the foreign proceeding to still be in existence and the foreign representative to still be in office. This implied that once the foreign proceeding had come to an end, there was no further scope to make further orders in support of the foreign proceeding and any previously granted relief should terminate. There was therefore no scope for the court to grant a stay that extended beyond the lifespan of the Azeri foreign proceedings.*

**Question 2.4 [2 marks]**

Commented [SL7]: 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.***

***If there is an existing domestic insolvency proceeding, then upon recognition of a foreign main proceeding, Art 29 MLCBI provides that the court shall seek cooperation and coordination under Arts 25, 26 and 27. Further, pursuant to Art 29(a) MLCBI, the court should not apply the automatic reliefs found in Art 20 MLCBI, and should ensure that any relief granted under Arts 19 and 21 are consistent with those granted in the domestic insolvency proceeding.***

***The foreign representative has an ongoing duty to update the court in the enacting State of developments in foreign proceedings. The relevant article is Art 18 of the MLCBI, which provides that from the time of the filing of the application for recognition, the foreign representative has to promptly inform the court of (a) any substantial change in the status of the recognized foreign proceeding or the status of the foreign representative's appointment; and (b) any other foreign proceeding regarding the same debtor that becomes known to the foreign representative.***

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

Commented [BB8]: SUB TOTAL = 15 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] [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.***

***The first benefit is that the foreign representative is able to apply for reliefs that secure the value of the debtor's assets in State A, without the need to***

commence domestic proceedings. Art 9 MLCBI gives the foreign representative the right of direct access to courts in the enacting State. [1] The right of direct access helps the foreign representative to save on time and costs [1] associated with commencing domestic insolvency proceedings, and may allow the foreign representative to seek relief that secures the value of the debtor's assets in State A more speedily. The foreign representative can apply for recognition of the foreign proceeding (Art 15 MLCBI), and for interim relief before the application for recognition is decided (Art 19 MLCBI). Interim relief that may be granted under Art 19 MLCBI includes a stay of execution against the debtor's assets, which would prevent the dissipation of the debtor's assets in State A. If the foreign proceeding is recognised as a main proceeding, then a stay of execution against the debtor's assets would also be automatically granted, and actions against and transfers of the debtor's assets would also be stayed: Art 20(1) MLCBI. If the foreign proceeding is recognised as a non-main proceeding, then the court in the enacting State also has the discretion to grant similar reliefs under Art 21 MLCBI. The suspension of transfers prevents the debtor from moving property across jurisdictions and is therefore essential to prevent fraud. The ability to apply for discretionary relief under Art 21 MLCBI also means that the foreign representative can ask for bespoke solutions, which are better suited to securing the value of the debtor's assets.

Second, the rights under the MLCBI also give the foreign representative the right to commence or participate in domestic insolvency proceedings. Art 11 MLCBI provides that the foreign representative has standing to commence domestic insolvency proceedings (provided that the conditions for doing so are met). [1] Upon recognition of the foreign proceeding, Art 12 MLCBI provides that the foreign representative is also entitled to participate in domestic proceedings in respect of the debtor. These provisions give the foreign representative a say in how the debtor's assets should be secured or dealt with, and help to save time and costs as a local representative does not need to be appointed.

Third, Art 23 MLCBI provides that upon recognition of the foreign proceeding, the foreign representative has standing to initiate actions to avoid antecedent transactions, which would be available to a domestic insolvency representative. This potentially gives the foreign representative the power to "claw-back" assets belonging to the debtor, without the need to spend the time and costs associated with commencing domestic insolvency proceedings. In a similar vein, upon recognition of the foreign proceeding, Art 24 MLCBI gives the foreign representative standing to intervene in any proceedings to which the debtor is party (provided that the requirements in the law of the enacting State are complied with). This ensures that the foreign representative is able to act to preserve the debtor's assets.

**Finally, the provisions on cooperation in the MLCBI support the foreign representative's efforts to coordinate cross-border insolvency proceedings. Art 25 MLCBI provides that courts shall "cooperate to the maximum extent possible" with foreign courts and foreign representatives, and are entitled to communicate directly with foreign courts and foreign representatives. Art 26 contains similar provisions in respect of domestic insolvency officeholders. Under Art 27 MLCBI, the means of cooperation include the communication of information, the coordination of concurrent proceedings regarding the same debtor, and the approval of agreements concerning the coordination of proceedings. The coordination of proceedings would likely benefit the foreign representative in terms of reduced time and costs, that may otherwise be spent on overlapping proceedings. Given that cooperation is not based on the recognition of foreign proceedings, the court may also be able to ask for information or assistance from other jurisdictions on the basis of presence of assets, without the need to commence proceedings in those jurisdictions. This would help the foreign representative to gather more information or possibly secure the debtor's assets in those jurisdictions. [1]**

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

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

**Art 17(1) of the MLCBI provides that subject to Art 6, a foreign proceeding shall be recognised if:**

- (a) the foreign proceeding qualifies as a "foreign proceeding" within the meaning of Art 2(a) MLCBI;**
- (b) the foreign representative applying for recognition is a person or body within the meaning of Art 2(d) MLCBI;**
- (c) the requirements of Art 15(2) MLCBI are met; and**
- (d) the application has been made to a court referred to in Art 4 MLCBI.**

**A court therefore also has to ensure that the requirements of Art 15(2) MLCBI are met. Art 15(2) MLCBI provides that an application for recognition must be accompanied by (a) a certified copy of the decision commencing the foreign proceeding and appointing the foreign representative; (b) a certificate from the foreign court affirming the existence of the foreign proceeding and the appointment of the foreign representative; or (c) in the absence of evidence referred to in (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. [1] If a decision or certificate (as referred to in (a) and (b)) indicates that the foreign proceeding is a proceeding within the meaning of Art 2(a) MLCBI and that the foreign representative is a person or body within the meaning of Art 2(d) MLCBI, the court of the enacting State is entitled to so presume: Art 16(1) MLCBI.

Next, the court must also ensure that it has jurisdiction to hear the recognition application. As Art 4 of the MLCBI leaves it to the enacting State to specify the appropriate court that the recognition application should be made to, this should be determined with reference to the domestic legislation that gives effect to the MLCBI.

A court also has to ensure that the recognition application is not manifestly contrary to the public policy of the enacting State, pursuant to Art 6 MLCBI. [1] The word "manifestly" underscores that this exception should be interpreted restrictively and should only apply in exceptional circumstances concerning matters of fundamental importance to the enacting State: UNCITRAL Guide to Enactment, p 52 para 104.

The court should also ensure that the foreign proceeding is not exempt from application of the MLCBI, pursuant to Art 1(2) of the MLCBI. Art 1(2) permits the enacting State to exclude certain proceedings from application of the MLCBI. Enacting States may therefore choose to exclude proceedings that are subject to a special regulatory regime (eg, public utilities companies). [1]

The court should also consider if the enacting State is party to any treaty or agreement that contains conflicting provisions, since Art 3 MLCBI provides that the requirements of a treaty/agreement will prevail over the MLCBI. [1]

Finally, for the recognition application to be successful, the court must consider if the foreign proceeding is commenced in a place where the debtor has its Centre of Main Interests, or an establishment (being any place of operations where the debtor carries out a non-transitory economic activity with human means and goods or services, see Art 2(f) MLCBI). If a foreign proceeding is commenced in a place where the debtor neither has its COMI or an establishment, then recognition under the MLCBI is not possible: Art 17(2) MLCBI. [1]

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

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

Pre-recognition relief

**Art 19 governs the provision of interim relief from the time of filing an application for recognition to the time the application is decided upon. Under Art 19, the court may, at the request of the foreign representative, grant interim relief where relief is urgently needed to protect the assets of the debtor or the interests of the creditors. Such interim relief may include:**

- (a) staying execution against the debtor's assets;**
- (b) entrusting the administration or realisation of the debtor's assets located in the enacting State to the foreign representative, 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 Art 21(c), (d) and (g) of the MLCBI.**

Restrictions, limitations or conditions of relief under Art 19

**Art 22(1) provides that in granting or denying relief under Art 19, the court must be satisfied that the interests of the creditors and other interested persons, including the debtor, are adequately protected. Further, Art 19(4) provides that the court may refuse to grant interim relief if doing so would interfere with the administration of a foreign main proceeding.**

Post-recognition relief - Art 20 MLCBI

**Upon recognition of a foreign main proceeding, Art 20 MLCBI provides for automatic mandatory relief, namely (a) a stay against commencement or continuation of individual actions or individual proceedings concerning the debtor's assets, rights, obligations or liabilities; (b) a stay against execution against the debtor's assets; and (c) suspension of the right to transfer, encumber or otherwise dispose of any of the debtor's assets.**

Restrictions, limitations or conditions of relief under Art 20

**Art 20(2) MLCBI allows for States to impose exceptions, limitations and modifications to the automatic reliefs under Art 20(1) MLCBI. Examples of such restrictions may include provisions that allow secured creditors to enforce their claims, the initiation of court action for claims that arise after the commencement of insolvency proceedings, or the completion of open-market financial transactions.**

**Art 20(3) MLCBI also provides that the relief in Art 20(1)(a) does not affect the right to commence individual actions or proceedings to the extent necessary to preserve a claim against a debtor.**

Post-recognition relief - Art 21

**Upon recognition of a proceeding (whether main or non-main), the court may grant discretionary relief under Art 21 MLCBI. Such relief may include:**



- (a) *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 Art 20(1)(a);*
- (b) *staying execution against the debtor's assets to the extent it has not been stayed under Art 20(1)(b);*
- (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 Art 20(1)(c);*
- (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 the enacting State to the foreign representative or another person designated by the court; and*
- (f) *extending interim relief granted under Art 19.*

*Under Art 21(2), the court may also, at the request of the foreign representative, entrust the distribution of all or part of the debtor's assets located in the enacting State to the foreign representative or another person designated by the court.*

Restrictions, limitations or conditions of relief under Art 21

**Art 21(3) provides that where a non-main proceeding is concerned, a court granting relief under Art 21 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. Further, Art 22 MLCBI provides that in granting or denying relief under Art 21, the court must be satisfied that the interests of the creditors and other interested persons, including the debtor, are adequately protected.**

**Other limitations on relief under Art 21 that can be discerned from English case law are listed below. Whether these limitations also apply in other jurisdictions will depend on the jurisprudence in those States:**

- (a) **Freezing orders are unlikely to be granted under Art 21:** In *Re Khadzi-Murat Derev Protasov v Derev* [2021] EWHC 392 (Ch), the High Court held that a freezing or similar order will generally not be granted as post-recognition relief under Art 21 MLCBI, save in special or exceptional cases. This is because the foreign representative will usually have other forms of protection available under the domestic English bankruptcy regime.
- (b) **No enforcement of insolvency-related *in personam* judgment:** In *Rubin v Eurofinance SA* [2012] UKSC 46, the UK Supreme Court held that a US insolvency-related default judgment could not be recognised and enforced, as the defendant was not present and had not submitted to the jurisdiction of the foreign court. Under English common law principles of private international law, a judgment of a foreign court will only be recognised and enforced if the judgment debtor (a) was present in the

foreign jurisdiction when the proceedings commenced; (b) made a claim or counterclaim in the foreign proceedings; (c) submitted to the jurisdiction of the foreign court by voluntarily appearing in the proceedings; or (d) agreed to submit to the jurisdiction.

- (c) Court will not grant relief that goes beyond the relief it would grant in a domestic insolvency: In *Fibría Celulose S/A v Pan Ocean Co Ltd and another* [2014] EWHC 2124 (Ch), the English High Court declined to grant relief that would give effect to a provision in Korean insolvency law that provided that *ipso facto* clauses were null and void. The court reasoned that the intention of Art 21(1)(a) MLCBI was not to allow the recognising court to go beyond the relief it would grant in a domestic insolvency, and that the parties would not have expected Korean law to displace their choice of English law. The enforceability of *ipso facto* clauses was a policy decision and there was no reason for the English court to prefer the policy decision made in Korea over that in the UK.
- (d) No granting of a moratorium that would prevent creditors from exercising their right under the proper law governing their debts, unless necessary and appropriate to do so: The *IBA* case concerned the application for the continuation of a moratorium (the "Moratorium Continuation"), that would prevent IBA's creditors from suing on their debts (which were governed by English law) once the foreign proceedings in Azerbaijan had concluded. On appeal, the English Court of Appeal held that the Moratorium Continuation would be granted only if it were necessary to protect the interests of IBA's creditors and an appropriate means of achieving such protection. The court found that this was not made out on the facts.
- (e) No granting of relief once the foreign proceeding has concluded: In the *IBA* appeal, the Court of Appeal also observed that there is no scope to grant further relief in support of the foreign proceeding, once the foreign proceeding has concluded and the foreign representative is no longer in office. All relief previously granted in support of the foreign proceeding should also terminate.

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 interim relief is unlikely to continue post-recognition, as the foreign representative would likely have other forms of protection available. In *Re Khadzi-Murat Derev Protasov v Derev* [2021] EWHC 392 (Ch), the English High Court reasoned that while it technically had the jurisdiction to grant a worldwide freezing order as post-recognition discretionary relief, the English bankruptcy regime offered other forms of protection which meant that a worldwide freezing order was not warranted. The purpose of the MLCBI was to put a foreign representative in the same

*position as an officeholder appointed under domestic insolvency law; the effect of recognition of a foreign main proceeding was therefore to bring the infrastructure of the domestic insolvency regime into play. A freezing order or similar order would therefore not be required or justified, save in special or exceptional cases.*

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

Commented [BB9]: SUB TOTAL = 14.5 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] [14.5 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 [10 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 10]**

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.**

Question 4.1.1 - whether the Bank’s liquidation is a foreign proceeding

**Art 2(a) of the MLCBI provides that a “foreign proceeding” refers to “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 reorganisation or liquidation” [element 7]. In the present case, it is clear that there is an ongoing proceeding in a foreign state (namely, the liquidation of the Bank in Country A). I address each of the remaining elements in turn below.**

*Whether the proceeding is collective*

**The UNCITRAL Guide to Enactment and Interpretation of the MLCBI (2014) (the “Guide to Enactment”) states that a proceeding must be collective because the MLCBI “is intended to provide a tool for achieving a coordinated, global solution for all stakeholders”, and is not merely to be used as “a collection device for a particular creditor or group of creditors who might have initiated a collection proceeding in another State” (at para 69). In determining whether a proceeding is collective, “a key consideration is whether substantially all of the assets and liabilities of the debtor are dealt with in the proceeding, subject to local priorities and statutory exceptions, and to local exclusions relating to the rights of secured creditors” (at para 70).**

**In *Re Agrokor DD and in the matter of the Cross-Border Insolvency Regulations 2006* [2017] EWHC 2791 (Ch) (“*Agrokor*”), the learned Judge observed (citing *Re Stanford International Bank Ltd & Ors* [2009] EWHC 1441 (Ch)) that “[a] collective proceeding is one that considers the rights and obligations of all creditors. This is in contrast to a receivership remedy instigated at the request and for the benefit of a single secured creditor.”**

**In the present case, the liquidation of the Bank appears to deal with all the rights and obligations of the Bank’s creditors. In particular, the commencement of liquidation has the effect of deeming “all money liabilities due to the bank” as becoming due, and DGF (as liquidator) is given powers to compile a register of creditor claims and to seek to satisfy those claims. The liquidation of the Bank thus qualifies as a collective proceeding.**

*Whether the proceeding is either judicial or administrative*



***In Re NMC Healthcare Ltd (in administration) and the companies listed in the application schedule [2021] EWHC 1806 (Ch), the learned Judge reasoned that an administration of a company under the Abu Dhabi Global Market Insolvency Regulations 2015 was judicial in nature, because the joint administrators were officers of the Court which appointed them (at [9]). Reasoning by analogy, the liquidation of the Bank is arguably an administrative proceeding, as its formally appointed liquidator is DGF, which is a governmental body.***

*Whether the proceeding is authorised or conducted under a law relating to insolvency*

***The Guide to Enactment states that the purpose of this formulation was to “find a description that was sufficiently broad to encompass a range of insolvency rules irrespective of the type of statute or law in which they might be contained and irrespective of whether the law that contained the rules related exclusively to insolvency”. However, the Guide to Enactment seems to suggest that the minimum requirement is that the law in question “deals with or addresses insolvency or severe financial distress” (at para 73) - accordingly, a proceeding for a solvent legal entity that does not seek to restructure its affairs is unlikely to fulfil this requirement.***

***This approach appears to have been followed by English courts. In Agrokor, the Judge observed that the case law demonstrated that “the requirement that the law under which the proceeding is brought be ‘an insolvency law’ is satisfied if insolvency is one of the grounds on which the proceeding can be commenced, even if ... insolvency could not actually be demonstrated, and there was another basis for commencing the proceeding” (at [63]). On the other hand, in Re Sturgeon Central Asia Balanced Fund Ltd (in liquidation) Carter v Bailey and another (as foreign representatives of Sturgeon Central Asia Balanced Fund Ltd) [2020] EWHC 123 (Ch), the court overturned a decision to recognise a Bermuda liquidation of a solvent company, as it “would be contrary to the stated purpose and object of the Model Law to interpret ‘foreign proceedings’ to include solvent debtors and more particularly include actions that are subject to a law relating to insolvency which have the purpose of producing a return to members not creditors” (at [5]).***

***In the present case, the Bank’s liquidation was commenced pursuant to Art 77 of the LBBA, which provides that the DGF is obliged to commence liquidation upon the NB’s decision to revoke a bank’s licence. It is not entirely clear from the given facts the circumstances under which the NB will revoke a bank’s licence (eg, it is not stated if the NB will always revoke a bank’s licence once it is classified as insolvent). In any case, it appears that the revocation of a bank’s licence is at least a usual consequence of a bank being classified as insolvent, since the responsibility of the DGF is “withdrawing insolvent banks from the market and winding down their operations via liquidation”. Assuming the revocation of the Bank’s licence was a consequence of it being classified as insolvent, Art 76 of the LBBA provides that a bank may be classified as insolvent if (i) its 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; or (iii) having been declared as troubled, the bank fails to comply with an order or decision of the NB, or request of the NB to remedy violations of banking law.*

*While criteria (i) and (ii) pertain to the bank's financial situation, it may be observed that the criteria do not necessarily require the bank to be "insolvent" in the sense of being unable to pay its debts as they fall due - for instance, in relation to criterion (ii), even if a bank is unable to meet 2% of its obligations for five consecutive days, this would mean that the bank is still be able to meet 98% of its obligations during that period. As for criterion (iii), it may also be said that this criterion does not relate strictly to insolvency or severe financial distress - instead, the basis of classifying the bank as "insolvent" is simply the bank's non-compliance with an order, decision or request of the NB.*

*Nevertheless, following the observation in *Agrokor* that it suffices that "insolvency is one of the grounds on which the proceeding can be commenced", Art 76 of the LBBA arguably qualifies as a law relating to insolvency for the purposes of the MLCBI. This is because a bank that is actually insolvent or in severe financial distress would likely fulfil criterion (ii) of being unable to satisfy at least 2% of its obligations for five consecutive days. Insolvency is thus arguably a basis for classifying a bank as "insolvent" under Art 76 of the LBBA, and thus for triggering the liquidation of the bank under Art 77 of the LBBA. In any event, it is arguable that the Bank was actually insolvent on the present facts, and as observed in *Agrokor* at [63], "[t]he matter is obviously all the clearer if insolvency can indeed be demonstrated". As of January 2015, the Bank had 10 months of loss-making activities and a "critically low balance" of funds held with the NB; by September 2015 when it was classified as "insolvent", the Bank's financial position had deteriorated further. The liquidation of the Bank is thus arguably a proceeding conducted under a law relating to insolvency.*

*For completeness, I note that the classification of a bank as "insolvent" may be preceded as the bank being classified as "troubled" under Art 75 of the LBBA. It is not stated what are the specified reasons for which a bank may be classified as "troubled", and so the possibility exists that a bank may be classified as "troubled" for reasons unrelated to insolvency and financial distress. That being said, as the NB can classify a bank as insolvent without needing to go through the troubled stage, I suggest that the existence of Art 75 does not change the characterisation of Arts 76-77 as laws relating to insolvency.*

*Whether the proceeding is one in which the debtor's assets and affairs are subject to control or supervision by a foreign court*

*The Guide to Enactment states that while the control or supervision required should be formal in nature, it may be potential rather than actual. Control or supervision may be exercised not only directly by the court but also by an insolvency representative who is subject to control or supervision by the court. However, mere supervision of an insolvency representative by a licensing authority would be insufficient (at para*

**74). Further, both the assets and affairs of the debtor must be subject to supervision; it does not suffice if only one or the other is supervised (at para 76).**

**In addition, I suggest that Art 2(a) should be read in conjunction with Art 2(e) of the MLCBI, which defines "foreign court" to refer to a judicial or other authority competent to control or supervise a foreign proceeding. Supervision can thus be exercised by a non-judicial authority, as long as this authority is competent to control/supervise the foreign proceeding. In my view, this is consistent with the discussion in the Guide to Enactment. Paragraph 87 of the Guide to Enactment states that since a foreign proceeding that meets the requirements of Art 2(a) should "receive the same treatment irrespective of whether it has been commenced and supervised by a judicial body or an administrative body" (emphasis added), Art 2(e) obviates the need to refer to a foreign non-judicial authority whenever reference is made to a foreign court.**

**In *Re Sanko Steamship Co Ltd* [2015] EWHC 1031 (Ch), Simon Barker QC also noted that a foreign proceeding may be recognised where the control or supervision of the proceeding is undertaken by a non-judicial administrative body (see also *Re PJSC Bank Finance and Credit (in liquidation) Groshova (in her capacity as authorised officer of the Deposit Guarantee Fund of Ukraine in respect of the liquidation of PJSC Bank Finance and Credit) v Deposit Guarantee Fund of Ukraine* [2021] EWHC 1100 (Ch) at [50]).**

**In the present case, the judicial authorities of Country A do not seem to be involved in the Bank's liquidation, whether potentially or actually. The Bank's formally appointed liquidator is DGF, which is a governmental body. The DGF controls the Bank's assets and affairs, given that it has the power to dispose of the Bank's assets, exercise management powers, seek to satisfy creditors' claims, etc. While the DGF may delegate its powers to an authorized officer or person under Art 48(3) of the DGF Law, the authorized person is "an employee of the Fund" under Art 2(1)(17) of the DGF Law. Further, it appears that the "authorized person" is appointed by the Executive Board of Directors of DGF (as was the case in Ms G's appointment), without the involvement of judicial authorities.**

**There is also no mention of the need for a judicial authority to approve any repayment plan to creditors - while the DGF may bring claims for compensation for harm inflicted on the bank, or file property and non-property claims with a court (under Art 37 of the DGF Law), these provisions appear to relate to claims brought on behalf of the company, and do not concern the court supervising the assets and affairs of the Bank *per se*.**

**Neither do the judicial authorities seem to be actually or potentially involved in the commencement of the liquidation proceeding, or in the stages preceding it - the classification of a bank as troubled or insolvent, and the revocation of bank's license are completely under the purview of the National Bank.**

***That said, as stated above, I suggest that control/supervision may also be exercised by a non-judicial body, if Art 2(a) is read together with Art 2(e) MLCBI. The control of the Bank's liquidation is clearly in the hands of the DGF, and the DGF is competent to oversee the liquidation of the Bank under Art 77 of the LBBA. In my view, the fact that the Bank's liquidation is subject to DGF's control is sufficient for the purposes of Art 2(a) MLCBI.***

*Whether the proceeding is for the purpose of reorganization or liquidation*

***The Guide to Enactment states that certain proceedings may not be eligible for recognition if they are for purposes such as the prevention of dissipation or waste, or the prevention of detriment to investors rather than to all creditors (at para 77). In any case, it is clear on the present facts that the proceeding in question is for the purpose of liquidation, since that is expressly the stated purpose of the proceeding.***

*Conclusion - whether the liquidation of the Bank will be recognized as a foreign proceeding*

***In conclusion, the liquidation of the Bank fulfils all the requirements of a foreign proceeding under Art 2(a) MLCBI, and is thus likely to qualify as a foreign proceeding.***

***Excellent response! Very well-reasoned.***

Question 4.1.2 - whether the Applicants are foreign representatives

***Article 2(d) of the MLCBI states that a "foreign representative" means "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 proceeding".***

***The Guide to Enactment notes (at para 86) that a foreign representative may be a person authorised in the foreign proceedings to administer those proceedings, or may simply be a person authorised specifically for the purposes of representing those proceedings. The foreign representative does not need to be authorised by the foreign court (defined in Art 2(e) MLCBI as a judicial or other authority competent to control or supervise the foreign proceeding), and so a foreign representative could include appointments made by a special agency rather than the court, as well as interim appointments. The UNCITRAL Judicial Perspective observes that whether the foreign representative is "authorised" to act as a representative of the debtor's liquidation is determined by the applicable law of the State where the insolvency proceedings are commenced.***

***In the present case, the applicants are the DGF and Ms G. The DGF is expressly authorised by Art 77 of the LBBA to administer the Bank's liquidation. The fact that the DGF has delegated the majority of its powers to Ms G should not affect the DGF's standing, since the DGF remains as the Bank's formally appointed liquidator, and the powers of liquidator ultimately vest in the DGF. The DGF is therefore likely to qualify as a "foreign representative".***

***As for Ms G, whether she is authorised to administer the Bank's liquidation, or to act as a representative of the Bank's liquidation, depends on whether the relevant DGF Laws have been complied with. Art 48(3) of the DGF Law states that the DGF may delegate its powers to an "authorised person", which is defined under Art 2(1)(17) of the DGF Law to mean "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".***

***Further, Art 35(1) of the DGF Law provides 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 also cannot 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.***

***On the present facts, it is unclear if Ms G is an employee of DGF; it is only stated that she is a "leading bank liquidation professional". Whether Ms G is authorised to administer the Bank's liquidation thus depends on whether the remaining conditions under the DGF law are complied with.***

***That said, assuming that Ms G complies with these conditions, she would arguably qualify as a foreign representative under Art 2(a) MLCBI. Despite the fact that some of the excluded powers remain vested with the DGF, Ms G is arguably authorised to administer the Bank's liquidation, since the majority of the powers of liquidation have been delegated to her. In any event, the scope of Ms G's powers arguably includes the authority to act as a representative of the Bank's liquidation, since she can exercise managerial powers, and as the power to exercise "such other powers as are necessary to complete the liquidation of the bank".***

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

***\* End of Assessment \****