



SUMMATIVE (FORMAL) ASSESSMENT: MODULE 2A

THE UNCITRAL MODEL LAWS RELATING TO INSOLVENCY

Commented [BB1]: TOTAL = 39 MARKS

78% - great effort!

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

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

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

## INSTRUCTIONS FOR COMPLETION AND SUBMISSION OF ASSESSMENT

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

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

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

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

**ANSWER ALL THE QUESTIONS**

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

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

Commented [SL2]: SUBTOTAL = 9 MARKS

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

Question 1.1

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

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

Question 1.2

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

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

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

Question 1.3

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

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

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

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

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

Question 1.4

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

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

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

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

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

Question 1.5

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

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

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

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

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

Question 1.6

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

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

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

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

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

Question 1.7

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

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

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

**(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 [SL4]: SUBTOTAL = 9 MARKS



**Question 2.1 [maximum 3 marks]**

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

The appropriate date for determining the COMI of a debtor is the date of commencement of the foreign proceeding.

In ascertaining the COMI, there are two key factors taken into account under the MLCBI: a) the location where the central administration of the debtor takes place which is b) readily ascertainable by creditors of the debtor. This is a holistic analysis to determine that the foreign main proceeding corresponds to the actual location of the debtor's COMI, as ascertainable by its creditors. Other factors which can be considered in determining COMI include, *inter alia*, the location in which the debtor's principal assets or operations are found.

The appropriate date for determining the COMI of a debtor is important because the COMI of a debtor can shift. A shift in the COMI close to the date of the commencement of foreign proceedings makes it harder to determine the COMI of a debtor.

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

**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."*

This is Art 14 of the MLCBI. This ensures that foreign creditors are not discriminated against by requiring that foreign creditors be notified whenever notification is required for local creditors in the enacting State – it embodies the equal treatment principle.

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

This is Art 10 of the MLCBI. This article provides that the enacting State does not assume jurisdiction over all assets of the debtor on the sole basis that the foreign representative has applied for the foreign proceeding to be recognised. This article was developed to address concerns of foreign representatives and creditors about an all-embracing jurisdiction which may be triggered by an application under the Model Law.

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

This is Art 16(3) of the MLCBI. It sets out the rebuttable presumption that the debtor's registered office, or habitual residence in the case of an individual, is presumed to be the centre of the debtor's main interests. The concept of the "center of main interests" or COMI is undefined in the MLCBI. COMI is a key concept because it guides the determination of whether a foreign proceeding is a foreign main proceeding, or a foreign non-main proceeding. This affects the nature of the reliefs which may be granted under the MLCBI – specifically the reliefs which may be granted to assist the foreign proceeding. For example,

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automatic reliefs are only granted upon recognition of a foreign main proceeding (Art 21).

**Question 2.3 [2 marks]**

Commented [SL7]: 2 marks

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

The English Court of Appeal ("CA") was of the view that the main question was whether the court should exercise its power to grant the indefinite Moratorium Continuation if doing so would a) effectively prevent English creditors from enforcing their rights under English law in accordance with the Gibbs Rule and b) whether the stay should be prolonged after the Azeri reconstruction had come to an end.

In relation to (a), the English CA was of the view that the indefinite Moratorium Continuation could only be properly granted if it was necessary to protect the interests of the creditors, and if such a stay was an appropriate way of achieving such protection. The English CA found that, on the evidence, the creditors needed no further protection.

As for (b), the English CA found that the Model Law did not contemplate continuing relief after the end of the relevant foreign proceeding – if so, provisions would have been provided for this. But there were none. For example, referring to Art 18, which stipulates that the foreign representative shall inform the court of subsequent changes to the status of the recognised foreign proceeding, or the status of the foreign representative's appointment – this suggested that the foreign proceeding still had to be in existence, and the foreign representative still had to be in office.

**Question 2.4 [2 marks]**

Commented [SL8]: 2 marks

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

This is a situation where there is already a domestic proceeding involving the debtor. The court then subsequently recognises a foreign main proceeding involving the same debtor. Art 29(a) sets out what must be done – specifically, any relief granted post-recognition (Art 21) must be consistent with the domestic insolvency proceedings). In this case, the automatic relief under Art 20 does not apply.

The duties of the foreign representative can be found in Art 18. They must promptly inform the court in the enacting State of: a) any substantial change in the status of the recognised foreign proceeding or the status of their appointment as the foreign representative 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]**

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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] [3.5 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**

These provisions under the MLCBI provide that the foreign representative has standing before courts in State A and that they will have the same rights as local creditors and will have timely notice of events taking place in State A.

Art 9 contains the principle of direct access by a foreign representative to the courts of the enacting State (ie, State A). [1] The foreign proceeding in the foreign State (ie, State B), does not have to be recognised before the foreign representative has standing in the courts of State A. Such access, however, does not automatically give the foreign representative any other rights or powers.

Art 11 provides the foreign representative standing in State A to request the commencement of a domestic insolvency proceeding in State A without modifying the conditions for opening such a proceeding. [1]

Once the foreign proceeding has been recognised by the courts of State A, under Art 12, the foreign representative will have the standing to make applications, requests or submissions concerning the protection, realisation or distribution of assets, or co-operation with the foreign proceeding. Art 12 does not vest the foreign representative with any powers or rights.

The effect of these provisions is that the foreign representative will have standing before the courts of State A to, for example, apply for recognition of the proceedings in State B and once recognition is granted, make the requisite applications for co-operation with the foreign proceeding in State B.

Apart from these provisions, there is also the "safe-conduct" rule in Art 10. Its effect: State A does not assume jurisdiction over all the debtor's assets on the sole ground of the fact that the foreign representative has applied for recognition of a foreign proceeding. This addresses fears about exposure to an all-embracing jurisdiction triggered by an application under the Model Law.

The foreign representative will have the same rights as creditors domiciled in State A in relation to the commencement of, and participation in, local proceedings regarding the debtor under State A's insolvency laws. This is provided for in Art 13 MLCBI which also clarifies that this access does not affect the ranking of claims – a foreign creditor's claim should not be ranked lower than a local creditor on the sole basis that the holder of such a claim is a foreign creditor. The foreign representative will also have access to the same information available to local creditors in State A. That is provided for in Art 14 MLCBI.

### Co-Operation

Under Art 25 MLCBI, the courts in State A must co-operate to the maximum extent possible with the foreign representative. Because co-operation is not limited to foreign proceedings which qualify for recognition under Art 17, this is useful in the event that the court in State A finds that the foreign proceedings in State B are neither foreign main nor non-main proceedings.

Then there is Art 26 which stipulates that the insolvency office-holder (in exercising its functions and subject to the supervision of the courts in State A), must co-operate to the maximum extent possible with the foreign courts (ie, courts in State B) or the foreign representative and is entitled to directly communicate with them.

The means of co-operation are set out in Art 27 – it is an illustrative, and not an exhaustive list.

The effect of these provisions is that the foreign representative does not have to resort to time-consuming measures [½] to seek such assistance. If there are concurrent insolvency proceedings involving the same debtor in both States A and B, the courts in both States can directly communicate and co-ordinate. [1]

**For full marks you could have expanded on the key benefits of the access provisions and the cooperation provisions as they save time and therefore also costs, as a result of which value destruction can be avoided and value enhancement be promoted.**

Question 3.2 [maximum 5 marks] [2.5 out of 5 marks]

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

Art 15(2) sets out the necessary documentation which has to accompany the application for recognition – this includes, for example, a certified copy of the decision commencing the foreign proceeding and appointing the foreign representative. If the decision or certificate indicates that the foreign proceeding is one within the meaning of Art 2(a) and the foreign representative is one within the meaning of Art 2(d), the court is entitled to presume this: Art 16(1). [1]

Art 15(3) provides that that an application for recognition must be accompanied by a statement identifying all foreign proceedings in respect of the debtor that are known to the foreign representative.

The court in the enacting State is entitled to presume that the documents submitted in support of the application for recognition are authentic regardless of whether they have been legalised: Art 16(2).

One restriction on recognition of foreign proceedings is the public policy exception in Art 6: [1] Art 17(1). That said, generally, the public policy exception should rarely be the basis for refusing an application for recognition. One situation where this exception

may be invoked is where the foreign representative has breached the obligation of full and frank disclosure towards the court in applying for recognition – this may amount to an abuse of process justifying the denial of recognition based on the public policy exception: *Nordic Trustee A.S.A & anr v OGX Petroleo e Gas SA* [2016] EWHC 25 (Ch).

In this case, assuming that the foreign proceeding is one within Art 2(a) and the foreign representative is one within Art 2(d), that the application meets the requirements of Art 15(2), that the application has been submitted to the court referred to in Art 4, and the public policy exception is not invoked, the foreign proceeding will be recognised: Art 17(1).

Then there is a question of whether the foreign proceeding is a foreign main or non-main proceeding. Here, there is a presumption in Art 16(3) that the debtor's registered office, or the habitual residence (in the case of an individual), is the center of the debtor's main interests. [½] - also discuss Article 17

***With reference to the question, 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.***
- 3. Judicial scrutiny: While the court in State A is able to rely on the rebuttable presumptions set forth in Article 16 of the Model Law, in the context of Article 17 of the Model Law the court will have to assess whether either the COMI or at least an establishment of the debtor is located in State B where the foreign proceedings were opened. If the COMI of the debtor is in State B the foreign proceedings should be recognised as foreign main proceedings and if only an establishment of the debtor is in State B the foreign proceedings should be recognised as foreign non-main proceedings. Without a COMI or at least an establishment of the debtor in State B, recognition cannot be granted by the court in State A.***

Question 3.3 [maximum 5 marks] [3 out of 5 marks]

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

Pre-recognition relief is provided for by Art 19 MLCBI. The court of the enacting State may refuse to grant such interim relief if doing so would interfere with the administration

of a foreign main proceeding: Art 19(4). Relief granted under Art 19 terminates unless extended under Art 21(1)(f) when the application for recognition is decided upon: Art 19(3).

If the foreign proceeding is a foreign main proceeding, there is automatic relief: Art 20. This includes: a) a stay against commencement or continuation of individual actions or proceedings concerning the debtor's assets, rights, obligations and liabilities, b) stay of execution against the debtor's assets and c) suspension of the right to transfer, encumber or otherwise dispose of any assets of the debtor.

Art 21 provides for the reliefs necessary to protect the debtor's assets or creditor's interests which may be granted upon recognition of a foreign proceeding (whether main or non-main). While Art 21 is worded broadly, there are limits to the reliefs which the court can grant.

In granting relief under Arts 19 – 21, the court must be satisfied that the interests of the creditors and other interested persons including the debtor are adequately protected: Art 22(1). The court can subject relief granted to conditions: Art 22(2). The court can also modify or terminate such relief: Art 22(3).

Further, Art 23, a form of post recognition relief, provides that the foreign representative has the standing to initiate actions to avoid acts detrimental to creditors (ie, avoiding antecedent transactions). Art 23 is narrowly drafted, and only gives the foreign representative standing to initiate action to avoid antecedent transactions. Also Art 23(2) draws a distinction between foreign main, and foreign non-main proceedings. In the case of the latter, the court must also be satisfied that the action to avoid antecedent transactions relates to assets that, under the law of the enacting State, should be administered in the foreign non-main proceeding.

Art 24 is another example of post recognition relief – a foreign representative may, provided the enacting State's laws are met, intervene in any proceedings in which the debtor is a party.

**Your answer should also include a brief discussion on the following:**

- 1. Existing international obligations of State A: Based on Article 3 of the Model Law, the court in State A should again verify that there are no existing international obligations of State A (under a treaty or otherwise) that may conflict with granting the requested relief under the implemented Model Law in State A.**
- 2. Public policy exception: The court in State A should, based on Article 6 of the Model Law, also again verify that the relief application is not manifestly contrary to public policy of State A.**

Question 3.4 [maximum 1 mark] [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?**

This was dealt with in the English case of *Igor Vitalievich Protasov v Khadzhi-Murat Derev* [2021] EWHC 392 (Ch). The court reasoned that the MLCBI was intended to

put the foreign trustee or bankruptcy manager in the same position, as far as practicable, as one appointed under domestic law – the recognition of a foreign main proceeding was to invoke the infrastructure of domestic insolvency legislation in support of the foreign proceeding. Because the English bankruptcy regime offered other forms of protection, relief in the form of a freezing order was not warranted.

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

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**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 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 [7.5 out of 10]**

I note that a foreign proceeding as defined under Art 2(a) of the MLCBI has the following elements:

- a. A proceeding (this includes an interim proceeding);
- b. That is either judicial or administrative;
- c. That is collective in nature;
- d. That is in a foreign State;
- e. That is authorised or conducted under a law relating to insolvency;
- f. In which the assets and affairs of the debtor are subject to control or supervision by the foreign Court; and
- g. The proceeding is for the purpose of reorganisation or liquidation.

I am aware of the case of *In the matter of Agrokor DD* [2017] EWHC 2791 (Ch). I find that the facts in that case are on all fours with the facts of the present case. I explain.

As to whether DGF Law and the LBBA is a law relating to insolvency, insofar as English law is concerned, questions of foreign law are facts which must be decided on the basis of expert evidence. On the assumption that the affidavit which sets out a detailed summary of the legislation of Country A's specific insolvency procedure for Banks is that provided by an expert (presumably a law professor who is well versed in the laws of Country A), the DGF Law and the LBBA is indeed a law relating to insolvency. Insofar as the Model Law is concerned, it is sufficient if the law deals with or addresses insolvency or financial distress – it suffices that insolvency is one of the grounds on which proceedings could be commenced.

In the present case, it is clear that the LBBA as well as the DGF law both deal with the insolvency of banks. It provides a mechanism for designating banks as being insolvent, as well as the consequences that follow.

As for court supervision – the level of such supervision demanded by the Model Law is relatively low. This supervision can be potential rather than actual, and indirect rather than direct. In this case, the UK court is likely to find that there is court supervision. For instance, Article 37 establishes that the DGF (or its authorised person, insofar as such powers are delegated) may file property and non-property claims with a court.

Here the English court is also likely to find that the nature of the proceedings are more collective than not. The collective nature of the proceedings is clear from the fact that on 7 September 2020, the DGF resolved to approve an amended list of creditors' claims totalling approximately USD 1.113 billion.

Finally, it is clear that the requirement "for the purpose of reorganisation or liquidation" is met. Similar to the *Agrokor* case where the English court found that the *Lex Agrokor* was intended to ensure economic stability by allowing economically important companies to attempt restructuring before entering bankruptcy proceedings, this is exactly the situation here. The NB first has the option to classify the bank as troubled. Once this is done, the bank has 180 days to extricate itself. If the bank does not, NB can then label the bank as insolvent which kickstarts the bankruptcy process. This suggests that the LBBA and DGF Law provides a mechanism to allow economically important companies to restructure, and in the worst case scenario, be declared bankrupt.

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. Not all elements are

discussed in your response with the level of detail, the supporting guidance and the application of the facts that are sufficient for full marks.

For example, in respect of element 6 we are looking for a response along the following lines:

1. The term “foreign court” is defined at article 2(e) of the MLCBI and means: “a judicial or other authority competent to control or supervise a foreign proceeding”.
2. The Guide to Enactment notes: “87) A foreign proceeding that meets the requisites of article 2, subparagraph (a), should receive the same treatment irrespective of whether it has been commenced and supervised by a judicial body or an administrative body. Therefore, in order to obviate the need to refer to a foreign non-judicial authority whenever reference is made to a foreign court, the definition of “foreign court” in subparagraph (e) includes also non-judicial authorities.”
3. In *Re Sanko Steamship Co Ltd* [2015] EWHC 1031 (Ch) Simon Barker QC, noted that a foreign proceeding may be recognised where the control or supervision of the proceeding is undertaken by a non-judicial administrative body.
4. The Guide to Enactment states: “74) The Model Law specifies neither the level of control or supervision required to satisfy this aspect of the definition nor the time at which that control or supervision should arise. Although it is intended that the control or supervision required under subparagraph (a) should be formal in nature, it may be potential rather than actual. As noted in paragraph 71, a proceeding in which the debtor retains some measure of control over its assets, albeit under court supervision, such as a debtor-in-possession would satisfy this requirement. Control or supervision may be exercised not only directly by the court but also by an insolvency representative where, for example, the insolvency representative is subject to control or supervision by the court. Mere supervision of an insolvency representative by a licensing authority would not be sufficient.”
5. In this case the DGF has control of all of the Bank’s assets and overall control of the liquidation.
6. The DGF’s independence is addressed at articles 3(3) and 3(7) of the DGF Law which confirm that it is an economically independent institution with separate balance sheet and accounts from the NB and that neither public authorities nor the NB have any right to interfere in the exercise of its functions and powers.
7. Article 37 establishes that the DGF (or its authorised person, insofar as such powers are delegated) has extensive powers, including powers to exercise managerial and supervisory powers, to enter into contracts, to restrict or terminate the bank’s transactions, and to file property and non-property claims with a court.
8. The assets and affairs of the Bank are subject to the control of the DGF, an official body which exercises its powers in the liquidation free from intervention by government or the NB and which should be considered, for the purposes of the definition set out in article 2(e) of the MLCBI, as a “foreign court”.

**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]. [3.5 out of 5]**

A foreign representative as defined under Art 2(d) of the MLCBI is:

- a. A person or body (including one that is appointed on an interim basis);
- b. Authorised in a foreign proceeding;
- c. To administer the reorganisation or liquidation of the debtor’s assets or affairs or to act as representative of the foreign proceeding.

The Model Law does not specify that the foreign representative has to be authorised by the foreign court.

In this case, I think that DGF does fall within the definition of a foreign representative under Art 2(d) MLCBI. The Bank’s license was revoked by NB on 17 December 2015. Pursuant to Article 77 of the LBBA (which 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), DGF became the Bank's liquidator.

The position in relation to Ms G, however, is different. I do not think that she falls within the definition of a foreign representative under Art 2(d) MLCBI. Pursuant to Resolution 1513, she was delegated all liquidation powers of the Bank. Crucially, Resolution 1513 excludes from Mrs 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. This means that Ms G cannot be considered as a person authorised in a foreign proceeding to administer the liquidation of a debtor's assets – Resolution 1513 makes it clear that Ms G has no such power here.

For full marks we are looking for a response along the following lines:

1. "Foreign representative" is defined by article 2(d) of the MLCBI to mean:

'a person or body, including one appointed on an interim basis, authorised in a foreign proceeding to administer the reorganisation or the liquidation of the debtor's assets or affairs or to act as a representative of the foreign proceeding'

2. Article 16(1) of the MLCBI provides:

'If the decision or certificate referred to in paragraph 2 of article 15 indicates that the foreign proceeding is a proceeding within the meaning of sub-paragraph (i) of article 2 and that the foreign representative is a body or person within the meaning of sub-paragraph (j) of article 2, the court is entitled to so presume.'

3. This application is brought jointly by the DGF and Ms G. The DGF's role as liquidator arises under statute and article 77 of the LBBA provides that the DGF is automatically appointed as liquidator on the day it receives the NB's decision pursuant to article 77 revoking a bank's licence and commencing its liquidation.

4. 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"*.

5. 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.

6. 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.

7. As a result of the sharing of some, but not all of the liquidator's powers and the division of responsibility between Ms G and the DGF, it seems likely that depending on the nature and timing of relief sought from this Court pursuant to the CBIR (if any), the appropriate applicant may, in the future, be either or both of Ms G and the DGF. We are satisfied that subject to the express limitations on Ms G's powers, they are both authorised to administer the liquidation and as such both meet the definition of "*foreign representative*". In our judgment they both had the necessary standing to apply in that capacity, for recognition of the Bank's liquidation.

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 \*