



SUMMATIVE (FORMAL) ASSESSMENT: MODULE 2A

THE UNCITRAL MODEL LAWS RELATING TO INSOLVENCY

Commented [BB1]: TOTAL = 45 MARKS

90% - Well done!

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

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

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

## INSTRUCTIONS FOR COMPLETION AND SUBMISSION OF ASSESSMENT

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

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

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

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

**ANSWER ALL THE QUESTIONS**

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

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

Commented [SL2]: SUBTOTAL = 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]

**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 COMI of a debtor, while not expressly defined under the MLCBI, may be determined having regard to the following factors: (1) the location where the central administration of the debtor takes place; and (2) it must be readily ascertainable as such by creditors of the debtor (UNCITRAL Guide to Enforcement at page 44, para 82). According to the Guide to Enactment and Interpretation of the UNCITRAL Model Law on Cross-Border Insolvency (the "GEI"), the suggested appropriate date for determining the COMI of a debtor is the date of commencement of the foreign proceeding in which the debtor is involved.*

*In considering the debtor's COMI, courts have relied on several possible dates as being the most relevant to that determination, including: (a) the date of commencement of the foreign proceeding for which recognition is sought; (b) the date of the application for recognition; (c) the date the court is called upon to decide the application; and (d) a date determined by reference to the operational history of the debtor (UNCITRAL Digest on Caselaw under the MLCBI (the "UNCITRAL Digest") at page 49).*

*As stated in the GEI at para 159, having regard to the evidence required to accompany an application for recognition under Article 15 of the MLCBI and the relevance accorded to the decision commencing the foreign proceeding and appointing the foreign representative, the date of commencement of that proceeding would be the appropriate date for determining the COMI of the debtor. To elaborate, in determining the COMI of the debtor, relevant considerations include the location: (a) of the debtor's books and records; (b) where financing was organised and authorised; (c) from where the cash management system was run; (d) in which the debtor's principal assets or operations are found; (e) of the debtor's employees; and (f) where commercial policy was determined. Furthermore, the COMI must be readily ascertainable by third parties, such as creditors of the debtor. However, where the business activity of the debtor ceases after the commencement of the foreign proceeding, the complexion of such factors relating to the debtor may change substantially. All that may remain at the time of the application for recognition to ascertain the debtor's*



COMI is the foreign proceeding and the activity of the foreign representative in administering the estate of the insolvent debtor. In such cases, determining the debtor's COMI by reference to the date of the commencement of the foreign proceeding would produce a clear result where, for instance, the location of the debtor's principal assets, operations and employees may be easily determined. That would also make it straightforward for third parties to ascertain the COMI of the debtor.

It bears noting, however, that the Second Circuit of Appeals in the United States of America ("US") took a different approach in the US judgment of *Morning Mist Holdings Ltd v Krys (Matter of Fairfield Sentry Ltd)* (2<sup>nd</sup> Cir Appeals Apr. 16, 2013) ("*Morning Mist*"). In that case, the US court held that a debtor's COMI should be determined based on its activities at or around the time the Chapter 15 petition (*ie*, the US implementation of the Model Law) is filed, as the statutory text suggests. However, in light of the focus on the regularity and ascertainability of the debtor's COMI found in the European Insolvency Regulation and other international interpretations, a court may consider the period between the commencement of the foreign insolvency proceeding and the filing of the Chapter 15 petition to ensure that a debtor has not manipulated its COMI in bad faith.

With respect, it is submitted that the date of commencement of the foreign proceeding should be used to enhance certainty in determining the COMI of a debtor. As noted in the UNCITRAL Digest at page 50, the date of application for recognition may be seen as an arbitrary or random matter, and the proceeding for recognition is ancillary or secondary to the foreign proceeding. Moreover, using the date of commencement of the foreign proceeding would prevent different outcomes in different jurisdictions where applications for recognition are made at different times and the debtor may have moved around between those times. This would go against the principle of international comity and against the rule that the COMI of a debtor must be readily ascertainable by third parties and creditors. Furthermore, the date of taking out the application for recognition may differ vastly from case to case depending on the circumstances and the diligence of the foreign representative, whereas the date of commencement of the foreign proceeding is fixed and easily ascertainable.

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 addresses the notification to foreign creditors of proceedings giving rise to the insolvency-related judgment and may be found under Article 14 of the Model Law (*"Notification to foreign creditors of a proceeding under [identify laws of the enacting State relating to insolvency]"*).

Statement 2 addresses the Safe Conduct Rule, which is found in Article 10 of the Model Law (*"Limited jurisdiction"*).

Statement 3 addresses an article containing a rebuttable presumption in respect of the COMI, which is an undefined key concept in the MLCBI. This rebuttable presumption may be found in Article 16(3) of the Model Law (*"Presumptions concerning recognition"*), whereby there is a rebuttable presumption that the place of the registered office of the debtor is the place of its COMI (or in the case of an individual, the individual's habitual residence).

**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 Gibbs Rule (originating from the case of *Antony Gibbs & Sons v La Societe Industrielle et Commerciale des Metaux* (1890) LR 25 QBD 399) stands for the general proposition that a debt governed by English law cannot be discharged or compromised by a foreign insolvency proceeding, and discharge of a debt under the insolvency law of a foreign country is only treated as a discharge therefrom in England if it is a discharge under the law applicable to the contract, unless the relevant creditor had submitted to the foreign insolvency proceeding.

In the case of *In the Matter of the OJSC International Bank of Azerbaijan and CBIR 2006 - Bakshiyeva v Sberbank of Russia, et al.* [2018] EWHC 59 (Ch) (the "IBA case"), a restructuring of the OJSC International Bank of Azerbaijan ("IBA") had taken place in Azerbaijan and a restructuring plan was approved which was binding on all creditors of IBA under Azeri Law.

An Azeri foreign representative, following an earlier recognition order under the Cross-Border Insolvency Regulations 2006 (the "CBIR"), requested appropriate relief under Article 21 of the Model Law in the form of an indefinite continuation of the automatic moratorium resulting from the earlier recognition order. This application was challenged by two creditors of IBA, who had unpaid claims

against IBA under debt instruments governed by English law. As the two creditors had not submitted to the foreign insolvency proceedings in Azerbaijan which IBA was subject to, the Gibbs Rule applied and the concern that arose was that the two creditors would go to the UK to enforce their English law claims against IBA before an English Court once the Azeri restructuring proceedings for IBA had ended. Mr Justice Hildyard denied the relief requested by the Azeri foreign representative, finding that a permanent stay could not be deployed as the way around the Gibbs Rule. Moreover, the relief sought by the Azeri foreign representative could not exist if there were no foreign proceeding and/or foreign representative as defined in the CBIR any longer.

On appeal, the English Court of Appeal in *Re OJSC International Bank of Azerbaijan* [2018] EWCA Civ 2802 (the “IBA case appeal”) upheld the decision of the English High Court in the IBA case. The focus of the English Court of Appeal was on whether the English court had the jurisdiction to grant the indefinite moratorium sought by the Azeri foreign representative. The English Court of Appeal observed that the real issue was whether as a matter of settled practice the court should not exercise its powers to grant the indefinite moratorium sought by the Azeri foreign representative where to do so would: (a) prevent the English creditors from enforcing their English law rights in accordance with the Gibbs rule; and/or (b) prolong the stay after the Azeri reconstruction had come to an end.

The English Court of Appeal held that it could only grant relief extending the moratorium (thus preventing the two creditors from enforcing their English law rights indefinitely) if this was necessary to protect the interests of the IBA’s creditors, and was an appropriate way of achieving such protection. The English Court of Appeal found that neither of those conditions had been satisfied. That was because the creditors bound by the Azeri restructuring plan had received everything to which they were entitled, and the IBA had resumed trading and the reconstruction was at an end. Consequently, no further protection was required for the Azeri restructuring to attain its purpose. Moreover, it was significant that the IBA could have promoted a parallel scheme of arrangement in England to deal with the issue presented by the Gibbs Rule but chose not to do so.

Moreover, the Court of Appeal held that a stay could not, in principle prolong the moratorium after the end of the Azeri reconstruction. Article 18 of the CBIR, which required the foreign representative to promptly inform the English court of any substantial change in the status of the recognised foreign insolvency proceeding or the status of the foreign representative’s appointment, strongly implied that once the foreign proceeding has come to an end and the foreign representative no longer held office, there was no scope for further orders under the CBIR to be made and any relief previously granted should be terminated.

**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.***

*In terms of relief, pursuant to Article 29 of the MLCBI, where a foreign proceeding and a domestic proceeding are taking place concurrently regarding the same debtor, the court shall seek cooperation and coordination under articles 25, 26 and 27 of the MLCBI. More specifically, pursuant to Article 29(a)(i) of the MLCBI, where the domestic proceeding is taking place at the time the application for recognition of the foreign proceeding is filed (i.e. a domestic proceeding has already been opened in respect of the debtor), any relief granted under Articles 19 or 21 must be consistent with the proceeding in the enacting state (where such relief includes: (a) a stay of execution against the debtor's assets; entrusting the administration or realisation of all or parts of the debtor's assets located in the enacting state to the foreign representative or another person designated by the court; (c) staying the commencement or continuation of individual actions or proceedings concerning the debtor's assets, rights, obligations or liabilities). Pursuant to Article 29(a)(ii), if the foreign proceeding is recognised as a foreign main proceeding, Article 20 does not apply. Thus, the court should not order any relief stated under Article 20, which pertains to relief that is mandatorily granted upon recognition of a foreign proceeding as a foreign main proceeding.*

*Pursuant to Article 18 of the MLCBI, the foreign representative in the foreign main proceeding has an ongoing duty of information towards the court in the enacting state to promptly inform the court of: (a) any substantial change in the status of the recognised 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]: SUBTOTAL = 11 MARKS

Commented [BB9]: SUB TOTAL = 11 MARKS

***A foreign representative of a foreign proceeding opened in State B in respect of a corporate debtor (the Debtor) is considering whether or not to make a recognition application under the implemented Model Law of State A (which does not contain any reciprocity provision). In addition, the foreign representative is also considering what (if any) relief may be appropriate to request from the court in State A.***

***Write a brief essay in which you address the three questions below.***

Question 3.1 [maximum 4 marks] [3 out of 4 marks]

**The foreign representative is considering his options to secure the value of the debtor's assets located in State A. With reference to the Model Law's provisions on access and co-operation, explain how these rights in State A can benefit the foreign representative.**

*The Model Law's provisions on access grant foreign representatives and creditors access to the courts of an enacting state, without the need to meet formal requirements. This allows the foreign representative to seek temporary "breathing space" and allows the court in the enacting state to determine what coordination among the jurisdictions or relief is warranted for the optimal disposition of the insolvency.*

*To that end, Article 9 of the Model Law provides that a foreign representative is entitled to apply directly to a court in the enacting state. No recognition of the foreign proceeding opened in the foreign state is required in the enacting state to provide the foreign representative with standing in the courts of the enacting state. [1] However, such access would not automatically vest the foreign representative with any other rights or powers. Article 11 of the Model Law provides that a foreign representative is entitled to apply to commence a proceeding under the relevant laws of the enacting state relating to insolvency if the conditions for commencing such a proceeding are otherwise met. [1] No prior recognition of the foreign proceeding is required for this type of access. Article 12 provides that upon recognition of a foreign proceeding, the foreign representative is entitled to participate in a proceeding regarding the debtor under the relevant laws of the enacting state relating to insolvency. This allows the foreign representative standing to make petitions, requests or submissions concerning issues such as the protection, realisation or distribution of assets or cooperation with the foreign proceeding. However, Article 12 does not vest the foreign representative with any specific powers or rights.*

*These are complemented by Article 10 which enshrines the Safe Conduct Rule, ensuring that the court in the enacting state does not assume jurisdiction over all the assets of the debtor on the sole ground of the fact that the foreign representative has made an application for the recognition of a foreign proceeding.*

*The Model Law's provisions on cooperation permits courts in the enacting state to cooperate more effectively with foreign courts and foreign representatives involved in an insolvency to achieve optimal results. This also helps to promote consistency of treatment of stakeholders across different jurisdictions, which in turn enhances transparency and predictability in cross-border insolvency cases. This also avoids time-consuming and cost-inefficient procedures such as letters rogatory and requests for consular assistance. Cooperation is not dependent*

*upon recognition and can thus occur at an early stage before an application for recognition.*

*To that end, Article 25(1) provides that in matters referred to in Article 1, the court shall cooperate to the maximum extent possible with foreign courts or foreign representatives, either directly or through an individual or body administering a reorganisation or liquidation under the law of the enacting state. Further, Article 25(2) provides that the court is entitled to communicate directly with, or to request information or assistance directly from, foreign courts or foreign representatives. As cooperation is not limited to foreign proceedings qualifying for recognition under Article 17, cooperation would also be available in respect of proceedings that are neither foreign main proceedings nor foreign non-main proceedings on the basis of presence of assets. Article 26(1) provides that in matters referred to in Article 1, the relevant person or body administering the reorganisation or liquidation under the law of the enacting state shall, in the exercise of its functions and subject to the supervision of the court, cooperate to the maximum extent possible with foreign courts or foreign representatives. That person or body is also entitled under Article 26(2) to communicate directly with foreign courts or foreign representatives in the exercise of its functions and subject to the supervision of the court.*

*Finally, Article 27 provides the means by which the cooperation in Articles 25 and 26 may be implemented, including by: (a) the appointment of a person or body to act at the direction of the court; (b) the communication of information by any means considered appropriate by the court; (c) the coordination of the administration and supervision of the debtor's assets and affairs; (d) the approval or implementation by courts of agreements concerning the coordination of proceedings; and (e) the coordination of concurrent proceedings regarding the same debtor. [1]*

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

Question 3.2 [maximum 5 marks] **[4 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.***

*Aside from the foreign proceeding and the foreign representative qualifying as such under Article 2(a) and Article 2(d) of the MLCBI respectively, the following provisions are relevant for a recognition application to be successful.*

*First, with respect to evidential requirements, Article 15(2) provides that an application for recognition shall be accompanied by: (a) a certified copy of the decision commencing the foreign proceeding and appointing the foreign representative; or (b) a certificate from the foreign court affirming the existence of the foreign proceeding and of the appointment of the foreign representative; or (c) in the absence of evidence referred to in Articles 15(2)(a) and 15(2)(b), any other evidence acceptable to the court of the existence of the foreign proceeding and of the appointment of the foreign representative. [1] Article 15(3) further provides that an application for recognition shall also be accompanied by a statement identifying all foreign proceedings in respect of the debtor that are known to the foreign representative. It bears noting that under Article 15(4), the court may require a translation of documents supplied in support of the application for recognition into an official language of the enacting state. In this regard, Article 16 contains presumptions concerning recognition relevant to Article 15.*

*Next, Article 17 provides that subject to Article 6, a foreign proceeding shall be recognised if: (1) the application meets the requirements of Article 15(2); and (2) the application has been submitted to the court referred to in Article 4. Article 17(3) mandates that an application for recognition of a foreign proceeding must be decided upon at the earliest possible time. Article 17(4) provides that the provisions of Articles 15, 16 17 and 18 do not prevent modification or termination of recognition if it is shown that the grounds for granting it were fully or partially lacking or have ceased to exist. [1]*

*Article 17(2) determines whether the foreign proceeding would be recognised as a foreign main proceeding or a foreign non-main proceeding. In particular, the foreign proceeding shall be recognised as a foreign main proceeding if it is taking place in the state where the debtor has its COMI (Article 17(2)(a)) and will be recognised as a foreign non-main proceeding if the debtor has an establishment within the meaning of Article 2(f) in the foreign state (Article 17(2)(b)). In this regard, Article 2(f) defines "establishment" as any place of operations where the debtor carries out a non-transitory economic activity with human means and goods or services. [1] Where recognised as a foreign main proceeding, certain reliefs would mandatorily follow under Article 20, such as the stay of commencement or continuation of individual actions or proceedings concerning the debtor's assets, rights, obligations or liabilities. Conversely, where recognised as a foreign non-main proceeding, reliefs under Article 21 are granted at the discretion of the court in the enacting state. Article 19 also provides for interim collective relief prior to the recognition of a foreign proceeding.*

Relatedly, under Article 18, from the time of filing the application for recognition of the foreign proceeding, the foreign representative must inform the court promptly of: (a) any substantial change in the status of the recognised 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.

In terms of limitations and exclusions, recognition of foreign proceedings under Article 17 must be subject to the public policy exception enshrined in Article 6, which provides that nothing in the Model Law prevents the court from refusing to take an action governed by the Model Law if the action would be manifestly contrary to the public policy of the enacting state. [1] The use of the word "manifestly" suggests that Article 6 should only be invoked in exceptional circumstances concerning matters of fundamental importance for the enacting state, and that the public policy exception should be construed narrowly or restrictively, consistent with international standards (UNCITRAL Digest on Caselaw under the MLCBI (the "UNCITRAL Digest") at page 20). The word "manifestly" has been interpreted as meaning something more than mere contrariness or incompatibility. Thus, where there is doubt as to whether something is contrary to or incompatible with public policy, Article 6 would not be invoked (UNCITRAL Digest at page 20).

Three principles may be distilled from case law in this regard to guide courts in analysing whether an action taken in a recognition proceeding is manifestly contrary to the public policy of the enacting state. First, the mere fact of a conflict between foreign law and local law, without more, does not suffice to invoke Article 6. Second, deference to a foreign proceeding should not be afforded in a recognition proceeding where the procedural fairness of the foreign proceeding is in doubt and cannot be cured by the adoption of additional protections. Third, an action should not be taken in a recognition proceeding where taking that action would frustrate the ability of the courts to administer the recognition proceeding, or if that action would severely infringe a local constitutional or statutory right (UNCITRAL Digest at pages 20-21. Examples in which the public policy exception has been found to apply include: (a) where the relief sought *ex parte* was contrary to the law of the receiving state; and (b) where the relief sought resulted in creditors in the receiving state being insufficiently protected (UNCITRAL Digest at page 21).

However, it has been held that a finding of bad faith on the part of the debtors was insufficient to warrant the invocation of Article 6, as the question of recognition turned on compliance with the requirements of Article 17 (UNCITRAL Digest at page 21). In another case, where the applicant for recognition failed to disclose facts relating to the decision by the government of the receiving state not to assist in criminal proceedings in the originating state against certain parties on the basis that doing so would likely prejudice the sovereignty, security and



other essential interests of the receiving state, the court dismissed the recognition order (UNCITRAL Digest at page 22).

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

**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.**

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.**

*The pre-recognition relief that may be granted under the MLCBI is governed by Article 19. In particular, Article 19 provides that from the time of filing an application for recognition until the application is decided upon, the court may, at the request of the foreign representative, where relief is urgently needed to protect the assets of the debtor or the interests of the creditors, grant relief of a provisional nature, including: (a) staying execution against the debtor's assets; and (b) entrusting the administration or realisation 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, 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. It bears noting that unless extended under Article 21(f), relief granted under Article 19 terminates when the application for recognition is decided upon (Article 19(3)). Further, the court may refuse to grant relief under Article 19 if such relief would interfere with the administration of a foreign main proceeding (Article 19(4)). Article 9(2) of the Model Law also allows the enacting state to include an appropriate notice of the interim relief granted.*

*As for post-recognition relief, Article 20 provides for automatic mandatory relief in situations where the recognised foreign proceeding qualifies as a foreign main proceeding. Under Article 20, the relief the court may grant includes: (a) stay of commencement or continuation of individual actions or proceedings concerning the debtor's assets, rights, obligations or 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. Pursuant to Article 20(2), the scope, and the modification or termination, of the stay and suspension referred to in Article 20(1) are subject to provisions of law of the*

enacting state relating to insolvency that apply to exceptions, limitations, modifications or termination in respect of the stay and suspension referred to in Article 20(1). Moreover, Article 20(1)(a) does not affect the right to commence individual actions or proceedings to the extent necessary to preserve a claim against the debtor. Furthermore, Article 20(1) does not affect the right to request the commencement of a proceeding under the laws of the enacting state relating to insolvency, or the right to file claims in such a proceeding.

Also in relation to post-recognition relief, Article 21 provides for the court's discretionary power to provide post-recognition relief in situations where the recognised foreign proceeding qualifies as either a foreign main or foreign non-main proceeding. Beyond those reliefs mentioned in Article 20, relief that the court may grant under Article 21 includes: (d) providing for the examination of witnesses, the taking of evidence or the delivery of information concerning the debtor's assets, affairs, rights obligations or liabilities; and (e) entrusting the administration or realisation 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. Pursuant to Article 21(3), in granting relief under Article 21, the court must be satisfied that the relief relates to assets that, under the law of the enacting state, should be administered in the foreign non-main proceeding or concerns information required in that proceeding.

Nevertheless, the relief that the court may grant under Article 21 is not unlimited. It appears that the relief granted may be subject to the common law rules of the enacting country or private international law rules. For instance, in *Rubin v Eurofinance SA* [2010] UKSC 46, the UK Supreme Court refused to recognise and enforce in the UK a US judgment based on insolvency avoidance powers obtained in default of the appearance of the defendants. That was because under English common law and principles of private international law, a foreign court outside the UK has jurisdiction to deliver a judgment capable of enforcement or recognition in the UK only if the following are satisfied: (a) the judgment debtor must have been present in the foreign jurisdiction when the proceedings commenced; (b) the judgment debtor must have made a claim or counterclaim in the foreign proceedings; (c) the foreign debtor must have submitted to the jurisdiction by voluntarily appearing in the proceedings; or (d) the foreign debtor must have agreed to submit to the jurisdiction of the foreign court.

Finally, Article 22(1) mandates that in granting or denying relief under Articles 19 or 21, or in modifying or terminating relief under Article 22(3), the court must be satisfied that the interests of the creditors and other interested persons, including the debtor, are adequately protected.

**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?**

*Under Article 19(3), unless extended under Article 21(f), the relief granted under Article 19 terminates when the application for recognition is decided upon. In the English High Court case of *Igor Vitalievich Protasov v Khadzhi-Murat Derev* [2021] EWHC 392 (Ch), the court had to consider whether it should extend a worldwide freezing order granted under Article 19 post-recognition under Article 21. The court answered the question in the negative, holding that although it had jurisdiction in the strict sense to grant a worldwide freezing order as post-recognition discretionary relief, the relevant restrictions and limitations in existence inhibited the proper exercise of that jurisdiction.*

*The English court observed that the scheme of the Model Law was intended to put the foreign trustee or bankruptcy manager in the same position, as far as practicable, as an officeholder appointed under domestic law, and consistent with that, the effect of recognition of a foreign main proceeding is to bring into play the same wide infrastructure of the insolvency legislation. The court found that the English bankruptcy regime offered other forms of protection which rendered relief in the form of a freezing order unwarranted. For instance, Article 20(1)(c) provides that upon recognition of a foreign proceeding that is a foreign main proceeding, the right to transfer, encumber or otherwise dispose of any assets of the debtor is suspended. On that view, a freezing order granted under Article 19 as interim relief would not be necessary or justified, as appropriate relief would be granted under Article 21 instead*

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

Commented [BB10]: SUBTOTAL = 14 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 out of 15]

**Prior to any determination made in the English Proceedings, Ms G, in her capacity as authorised officer of the Deposit Guarantee Fund (or DGF) of Country A in respect of the liquidation of the Commercial Bank for Business Corporation (the Bank), together with the DGF (the Applicants), applied for recognition of the liquidation of the Bank before the English court based on the Cross-Border Insolvency Regulations 2006 (CBIR), the English adopted version of the MLCBI.**

**Assuming you are the judge in the English court considering this recognition application, you are required to discuss:**

**4.1.1 whether the Bank's liquidation comprises a "foreign proceeding" within the meaning of article 2(a) of the MLCBI [maximum 10 marks]; and [9.5 out of 10]**

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

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

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

[Question 4.1.1](#)



Article 2(a) of the MLCBI defines a “foreign proceeding” as: (1) a collective [element 1] judicial or administrative [element 2] proceeding [element 3] in a foreign state [element 4], including an interim proceeding, (2) pursuant to a law relating to insolvency [element 5] (3) in which proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign court, [element 6] (4) for the purposes of reorganisation or liquidation. [element 7] [There are 7 separate elements your response should address] For a foreign proceeding to be eligible for recognition under the MLCBI, it must fulfil all the elements of the definition under Article 2(a); the elements must be considered cumulatively and the inquiry is factual in nature (UNCITRAL Digest on Caselaw under the MLCBI (the “UNCITRAL Digest”) at page 5). In the present case, it is submitted that all of the aforementioned elements are cumulatively satisfied, and the Bank’s liquidation qualifies as a “foreign proceeding” within the meaning of Article 2(a) of the MLCBI.

Whether the Bank’s liquidation is a judicial or administrative proceeding that is collective in nature

The first issue is whether the Bank’s liquidation comprises a judicial or administrative proceeding in a foreign state that is collective in nature. One court has suggested that in the context of corporate insolvency, the hallmark of a “proceeding” is “a statutory framework that constrains a company’s actions and that regulates the final distribution of a company’s assets” (UNCITRAL Digest at page 6).

In the present case, it is submitted that the Bank’s liquidation is a judicial or administrative proceeding. The proceedings are commenced by the DGF, which is a governmental body of Country A. The proceedings are also governed by provisions of the LBAA, which is a statutory law of Country A. Further, the liquidation is administered by the DGF pursuant to Article 77 of the LBAA which provides that the DGF automatically becomes liquidator of the Bank on the date it receives confirmation of the NB’s decision to revoke the bank’s licence. Here, the DGF had first appointed Ms C and subsequently Ms G as authorised persons to whom powers of the liquidator were delegated, pursuant to Article 48(3) of the DGF Law.

It is further submitted that the Bank’s liquidation is a collective proceeding. The Guide to Enactment and Interpretation of the UNCITRAL Model Law on Cross-Border Insolvency (“GEI”) states at para 70 that a key consideration in determining whether a proceeding is collective is whether substantially all of the assets and liabilities of the debtor are dealt with in the proceeding, subject to local priorities and statutory exceptions, and to local exclusions relating to the rights of secured creditors. However, a proceeding would not fail the test of collectivity simply because a particular class of creditors’ rights are unaffected by it. As stated in the UNCITRAL Digest at page 6, courts have identified “collective” proceedings as having, among other things, the following characteristics: (a) imposition of an orderly regime affecting the rights and obligations of all creditors and all of the assets of the debtor; (b) though not all creditors need to receive a share of the distribution, assets should be distributed in accordance with statutory priorities; (c) interested parties should not be able to

*individually enhance their position by exploiting some fortuitous circumstance; and (d) creditor participation must be a reality.*

*Under the law of Country A, when the bank enters liquidation, the DGF alienates the bank's property and funds. Public encumbrances and restrictions on disposal of bank property are terminated and offsetting of counterclaims is prohibited. Furthermore, the DGF has powers to take steps to find, identify and recover property belonging to the bank. Thus, substantially all of the bank's assets would be dealt with in the Bank's liquidation. Furthermore, in accordance with the guidance provides by courts, an orderly regime affecting the rights and obligations of all creditors and all of the assets of the Bank would be affected. Further, as the DGF is granted broad powers to "exercise such powers as are necessary to complete the liquidation of the bank", the DGF could arguably prevent interested parties from individually enhancing their position. However, to be certain, more information is required to ascertain whether Bank A's liquidation as administered by DGF is subject to local priorities and statutory exceptions, and to local exclusions pertaining to the rights of secured creditors.*

**Whether the Bank's liquidation is pursuant to a law relating to insolvency**

*As stated in the GEI at para 73, the requirement that the foreign proceeding be "pursuant to a law relating to insolvency" might be conducted under law that is not labelled as insolvency law but nevertheless deals with or addresses insolvency or severe financial distress. However, a foreign proceeding would not relate to insolvency unless and until they are activated for that purpose (UNCITRAL Digest at page 7).*

*In the present case, it is submitted that the Bank's liquidation is a proceeding pursuant to a law relating to insolvency. The Bank's liquidation appears to be commenced pursuant to the DGF Law, which contains provisions dealing with insolvency or financial distress. For instance, pursuant to Article 34 of the DGF Law, the DGF will begin the process of removing the Bank from the market once the Bank has been classified as *insolvent*. Similarly, the DGF is automatically appointed as liquidator pursuant to Article 77 of the LBAA. Finally, the Bank's liquidation has commenced since the Bank was formally classified by the NB as "troubled" on 19 January 2015, and NB formally revoked the Bank's licence on 17 December 2015 and resolved that the Bank be liquidated. The liquidation procedure was initiated the following day by DGF.*

**Whether the assets and affairs of the Bank are subject to control or supervision by a foreign court in the Bank's liquidation**

*Although the MLCBI does not specify the level of control or supervision necessary to satisfy this element of the definition in Article 2(a) of the MLCBI, the GEI indicates (at para 84-90) that while it is intended that the control or supervision should be formal, it may be potential rather than actual. However, both the assets and the affairs of the debtor must be subject to control to satisfy this requirement (UNCITRAL Digest at page 7).*

*Courts have also held that control or supervision may be exercised indirectly by an insolvency representative where the representative itself is subject to control or supervision by the court or other regulatory authority (UNCITRAL Digest at page 7). The requirement of control or supervision can also be met in situations where the court does not direct the day-to-day operations of the debtor, including where liquidators can proceed with their duties largely without court intervention (UNCITRAL Digest at page 7). If it can be concluded that a proceeding was, overall, subject to the control and supervision of the court, it was irrelevant that the government also had control of the proceeding.*

*In the present case, the powers of the liquidator were delegated by DGF first to Ms C then to Ms G. It is given that Ms G has 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, which includes the authority to sign all agreements related to the sale of the bank's assets in the manner prescribed by DGF Law. In particular, under Article 37, Ms G has the power 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. As noted above, control or supervision may be exercised by a representative where the representative is subject to control or supervision by the court or other regulatory authority. Under Articles 35(1) of the DGF Law, representatives such as Ms G remain accountable to the DGF for their actions, and it is presumable that DGF retains control or supervision over its representatives.*

*Additionally, DGF retains the power to claim damages from a related party to 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. Upon liquidation, the DGF also alienates the bank's property and funds, and has powers of sale, distribution and the power to bring claims for compensation against persons for harm inflicted on the insolvent bank. On the facts, it is clear that DGF and/or its representatives have control and supervision over the assets and affairs of the Bank.*

*As noted in the UNCITRAL Digest at page 7, in a case concerning the insolvency of an insurance company, the recognising court found that the body with oversight of the insurance industry was a body competent to control or supervise the assets and affairs of the debtor. It may be argued that in the present case, the DGF, which is tasked with acting as the liquidator of insolvent banks in Country A, stands in an analogous position as that body which oversees the insurance industry.*

*Moreover, as noted above, if it can be concluded that a proceeding was overall subject to the control and supervision of the court, it was irrelevant that the government, or a governmental organisation such as the DGF, also had control of the proceeding. In the present case, it is stated that the DGF's independence is protected by Articles 3(3) and 3(7) of the DGF Law. However, it is submitted that more information is required to determine whether the DGF operates under the control and supervision of the courts in Country A.*

Whether the proceedings were for the purposes of liquidation or reorganisation

Finally, it must be considered whether the Bank's liquidation was for the purposes of liquidation or reorganisation. As stated in the UNCITRAL Digest at page 8, courts have confirmed that proceedings designed to prevent dissipation and waste, or to prevent detriment to investors, rather than to liquidate or reorganise the insolvency estate, and proceedings designed to allow a certain party to collect its debts, do not satisfy this requirement.

In the present case, the purpose of the liquidation of the Bank commenced by DGF is not expressly stated. However, the scope of the powers given to the DGF (or its representatives) suggests that the purpose of such liquidation proceedings is not simply to prevent dissipation and waste or to prevent detriment to investors. Instead, the DGF is granted powers under the DGF Law which allow it to liquidate or reorganise the Bank's insolvency estate. For instance, the DGF has the power to exercise management powers and take over management of the property and money of the Bank. The DGF also has the power to dismiss employees and withdraw from or terminate contracts, and to dispose of the Bank's assets. More fundamentally, the DGF is granted broad powers that "are necessary to complete the liquidation of" the Bank. Arguably, the existence of these powers which allow the DGF to deal with the Bank's assets and to restructure the Bank's dealings and contracts, suggests that the purpose of the proceedings (*ie*, the Bank's liquidation) is precisely to liquidate or reorganise the bank.

Conclusion

On the whole, it is submitted that the Bank's liquidation arguable qualifies as a foreign proceeding because (a) it is a judicial or administrative proceeding that is collective in nature; (b) the Bank's liquidation is commenced pursuant to a law relating to insolvency; (c) the Bank's assets and affairs are subject to the control or supervision of the DGF, and (d) the Bank's liquidation, as the name suggests is for the purposes of liquidation or reorganisation. However, more information is required to determine whether the DGF may qualify as a "court" within the meaning of Article 2(a) of the MLCBI and/or whether the DGF operates under the control and supervision of Country A's courts.

**A very well-reasoned response. In respect of element 6, based on the following reasons, we believe that it can be argued this element is met as well:**

- 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".***

#### Question 4.1.2

***A "foreign representative" is defined under Article 2(d) of the MLCBI as a person or body, including one appointed on an interim basis, authorised in a foreign proceeding to administer the reorganisation or liquidation of the debtor's assets or affairs or to act as a representative of a foreign proceeding.***

***The issue here is whether Ms G, DGF's representative, is a foreign representative within the meaning of Article 2(d) of the MLCBI.***

***As stated in the UNCITRAL Digest at page 10, since the MLCBI does not specify that the foreign representative must be authorised by the foreign court, the GEI at para 86 notes that the definition is sufficiently broad to include appointments that might be made by a special agency other than the court. Thus, it is not a bar in the present case that Ms G was appointed by the DGF of Country A as opposed to the Court of Country***

*A. Instead, it should suffice that Ms G was appointed by the DGF, a governmental body responsible for the process of withdrawing insolvent banks from the market and winding down their operations via liquidation.*

*Moreover, the foreign representative must be authorised to administer the reorganisation or liquidation of the debtor's assets or affairs. In this regard, it bears noting that Resolution 1513 excludes from Ms G's authority the power to claim damages from a related party to 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 those powers remain vested in the DGF as the Bank's formally appointed liquidator. On that view, it may be argued that as Ms G is not authorised to administer the Bank's reorganisation or the liquidation of the Bank's assets or affairs, she cannot be considered a foreign representative under Article 2(d) of the MLCBI. As stated in the UNCITRAL Digest at page 10, a receiver in one case was found not to qualify as a foreign representative because no authorisation had been provided, at that stage of the receiver's appointment, to administer a liquidation or reorganisation of the debtor company.*

*However, it also merits noting that the applicants for recognition of the liquidation of the Bank before the English court includes both Ms G and the DGF. It is submitted that DGF, together with Ms G, would fall within the description of a "foreign representative". As a collective whole, they would have the authority to administer the reorganisation or the liquidation of the Bank's assets or affairs. Collectively, Ms G and DGF would have the power to, among other things:*

- (a) exercise management powers and take over management of the property of the Bank;*
- (b) take steps to find, identify and recover property belonging to the bank;*
- (c) dispose of the Bank's assets;*
- (d) sell and distribute the Bank's assets;*
- (e) enter into contracts;*
- (f) restrict or terminate the bank's transactions; and*
- (g) file property and non-property claims with a court.*

*Equipped with these powers, Ms G and DGF would be able to effectively administer the liquidation and/or reorganization of the Bank. It would therefore appear likely that the applicants comprising both Ms G and DGF collectively, would qualify as a foreign representative for the purposes of Article 2(d) of the MLCBI.*

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

**\* End of Assessment \***