



SUMMATIVE (FORMAL) ASSESSMENT: MODULE 2A

THE UNCITRAL MODEL LAWS RELATING TO INSOLVENCY

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

Commented [DDB1]: 42.5/50 = 85%. Excellent, well done!

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 [BB2]: Sub Total = 10 marks

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

Question 1.1

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

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

Question 1.2

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

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

(d) All of the above.

Question 1.3

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

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

Question 1.4

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

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

Question 1.5

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

- (a) The foreign main proceedings in South Africa will not be recognised in the UK because the UK is not a designated country under South Africa's principle of reciprocity, but the

foreign non-main proceedings in Argentina will be recognised in the UK despite Argentina not having implemented the Model Law.

- (b) Both the foreign main proceedings in South Africa and the foreign non-main proceedings in Argentina will not be recognised in the UK because the UK has no principle of reciprocity and Argentina has not implemented the Model Law.
- (c) Both the foreign main proceedings in South Africa and the foreign non-main proceedings in Argentina will be recognised in the UK.
- (d) None of the statements in (a), (b) or (c) are correct.

Question 1.6

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

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

Question 1.7

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

- (a) The court must be satisfied that the interests of the creditors and other interested parties, excluding the debtor, are adequately protected.
- (b) The court should consider whether the relief requested is necessary for the protection of the assets of the debtor or the interests of the creditors and strike an appropriate balance between the relief that may be granted and the persons that may be affected.

- (c) The court should be satisfied that the foreign proceeding is a main proceeding.
- (d) All of the above.

Question 1.8

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

- (a) COMI is not a defined term in the Model Law.
- (b) For a corporate debtor, the Model Law does contain a rebuttable presumption that the debtor's registered office is its COMI.
- (c) For an individual debtor, the Model Law does contain a rebuttable presumption that the debtor's habitual residence is its COMI.

(d) All of the above.

Question 1.9

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

- (a) Court proceedings.
- (b) Arbitral Tribunals.
- (c) Both (a) and (b).**
- (d) Neither (a) nor (b).

Question 1.10

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

- (a) A foreign creditor has the same rights regarding the commencement of, and participation in, a proceeding as creditors in this State.**
- (b) A foreign creditor has the same rights as it has in its home state.
- (c) All foreign creditors' claims are, as a minimum, considered to be unsecured claims.
- (d) Article 13 contains a uniform ranking system to avoid discrimination.

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

Commented [BB3]: Sub-total = 7.5 marks

Question 2.1 [maximum 3 marks] [1.5]

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

The Model law does not provide for an express date for determining the debtor's centre of main interests. Footnote 34 to paragraph 159 of the Model Law Guide to Enactment and Interpretation states that, notwithstanding the absence of an express statement to that effect, the appropriate date is the date of commencement of foreign proceedings. [1] This is because the Model Law is concerned only with existing foreign proceedings and when they commenced. This follows the approach in the important COMI case of *Interdil Srl* Case C-369/09, [2011] ECR I-9939.

It is possible that the enacting State's courts may apply a different test, as seen in the US judgment in *Morning Mist Holdings v Kryz* (2nd Cir Appeals Apr.16, 2013.) [½] In that case, the US Second Circuit of Appeals held that "the relevant time period is the time of the Chapter 15 petition, subject to an inquiry into whether the process has been manipulated." The Court held that, for the process of considering whether such manipulation has occurred, a court was able to "consider the period between the commencement of the foreign insolvency proceeding and the filing of the Chapter 15 petition."

A further approach can be seen in the Australian position, where the relevant point to determine COMI is the time of the Court's decision on the recognition application (see the commentary in 'Timing is Everything', Dentons, Fox, McIntosh and Young, August 2019, <https://dentons.rodyk.com/en/pdf-pages/-/media/037d2db06c144aee89c071e7c9d33da7.ashx> accessed July 2023.

It is submitted that the correct approach under the Model Law is that set out in the Guide to Enactment, namely the date of the commencement, notwithstanding the differing approaches, particularly in the US and Australia.

In your answer you must discuss the following:

The UNCITRAL Guide to Enactment explains (see paragraphs 159 and 160) that the date of commencement of the foreign proceeding is the appropriate date for determining the existence of the COMI of the debtor as well as an establishment of the debtor. Where the business activity of the debtor ceases after the commencement of the foreign proceeding, all that may exist at the time of the application for recognition to indicate the debtor's COMI or establishment is that foreign proceeding and the activity of the foreign representative in administering the insolvency estate. In such a case, determination of the COMI or an establishment by reference to the date of the commencement of those proceedings would produce a clear result. The same reasoning may also apply in the case of reorganisation where, under some laws, it is not the debtor that continues to have a COMI, but rather the

reorganised entity. In such a case, the requirement for a foreign proceeding that is taking place in accordance with article 17(2)(a) is clearly satisfied and the foreign proceeding should be entitled to recognition. Moreover, taking the date of commencement to determine COMI provides a test that can be applied with certainty to all insolvency proceedings. [see also pages 28/29 of the Guidance Text]

However, US courts may take a slightly different approach based on the *Morning Mist Holdings Ltd v. Krys (Matter of Fairfield Sentry Ltd)* (2nd Cir Appeals April 16, 2013) (which was recently followed in the UK in *Re Toisa Limited* – see footnote 94 on page 28 of the Guidance Text). The US court will most likely consider the date of the recognition application pursuant to the US Chapter 15 as the appropriate date for determining the COMI or the existence of an establishment.

Question 2.2 [maximum 3 marks] [2]

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: This is a reference to Article 14 [1] as the notification to foreign creditors of proceedings. This concept is known as “Timely Notification”.

Statement 2: The safe conduct rule is provided for in Article 10 of the Model Law. [1] It protects foreign representatives and creditors from exposure to an all-embracing jurisdiction triggered by an application under the model law. It therefore limits the jurisdiction of the courts of the enacting state for the sole purpose of the application.

Statement 3: This is a reference to Article 31, which provides for a rebuttable presumption of insolvency. Article 31 provides that, in the absence of evidence to the contrary, recognition of foreign *main* proceedings is proof of insolvency. The term insolvency is not defined in the Model law, even though it is obviously a key concept. The term is purposefully undefined, in recognition that different jurisdictions have “different notions of what falls within the term “insolvency proceedings” (Guide to Enactment, para.48).

Correct answer: Article 16(3) MLCBI (key concept is COMI and this provision contains a rebuttable presumption that the registered office or habitual residence of the debtor is also its COMI).

Question 2.3 [2 marks] [2]

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

In *IBA*, the foreign representative's application for a continuation of the automatic moratorium under Article 21 of the model law was opposed by two creditors known as the Challenging Creditors.

Mr Justice Hildyard applied the Gibbs Rule, namely the principle that a debt governed by English law cannot be discharged or compromised by a foreign insolvency proceeding. Further, that the recognition of foreign insolvency proceedings was not a "gateway for the application of foreign insolvency laws or rules or give them 'overriding effect' over ordinary principles of English contract law."

Mr Justice Hildyard had consider whether the Gibbs Rule could be observed by accepting the continuation of the rights of the Challenging Creditors under a restructuring plan whilst also applying the principles of modified universalism, the effect of which would be to prevent the exercise of those rights by the indefinite stay or moratorium.

Mr Justice Hildyard found that imposing the indefinite moratorium would have the substantive effect of subjecting the Challenging Creditors to the rights they would have under the Azeri law, rather than English contract law. This would have the effect of discharging or varying substantive rights under English law, which was at odds with the Gibbs rule.

Question 2.4 [2 marks] [2]

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

Article 21 deals with the court's power to grant discretionary post-recognition relief where necessary to protect the debtor's assets or the interest of creditors. By Article 22, the Court in the enacting state must be satisfied that the interests of the debtor's creditors and other interested parties are suitably protected. In accordance with Article 21(4), the relief must not interfere with the administration of another insolvency proceeding, in particular the main proceedings.

Article 18 deals with the obligation on the foreign representative to update the Court from the time of filing the application for recognition onwards. The obligation relates to

- (a) any substantial change in the status of the recognized foreign proceeding or the status of the foreign representative's appointment; and
- (b) any other foreign proceeding regarding the same debtor that becomes known to the foreign representative.

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

Commented [BB4]: Sub-total = 13 marks

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

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

Question 3.1 [maximum 4 marks] [4]

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.

Regardless of whether the foreign representative has applied for recognition, Article 9 of the Model Law provides the representative with standing before the courts in the enacting states and the ability to access and communicate with the courts without the need to open proceedings or to obtain a licence or satisfy any other consular requirement (para.108, Guide to Enactment).

Article 11 provides standing to the representative to commence domestic insolvency proceedings in State A without the need for recognition of the foreign proceedings.

Article 12 provides the foreign representative with standing, but they will need to apply for recognition of the foreign proceedings under Article 15. Once domestic insolvency proceedings have been opened in respect of the debtor and after the foreign proceedings have been recognised, the foreign representative will have standing to make requests or applications for the protection, realisation or distribution of assets.

Article 23 enables the foreign representative to initiate an action to avoid or render ineffective an act detrimental to the debtor's creditors and article 24 entitles the foreign representative to intervene in local proceedings in which the debtor is a party.

Article 27 provides examples of types of co-operation the courts of State A may provide to the foreign representative under the principles of access and co-operation. The list

in Article 27 is not exhaustive but proposes the following:

- (a) Appointment of a person or body to act at the direction of the court;
- (b) Communication of information by any means considered appropriate by the court
- (c) Coordination of the administration and supervision of the debtor's assets and affairs;
- (d) Approval or implementation by courts of agreements concerning the coordination of proceedings; and,
- (e) Coordination of concurrent proceedings regarding the same debtor.

The foreign representative could, for example, obtain a breathing space in State A respect of the assets in State A in order to ensure that the debtor's assets are maximised for the benefit of its creditors as a whole. This would prevent creditors in State A from, for example, opening proceedings in respect of those assets, otherwise obtaining the benefit of the assets or securing those assets without consideration of the rights of debtor's body of creditors. Even without the need for a recognition application, the access provisions allow the foreign representative to maximise assets by examining witnesses and amassing evidence in respect of the debtor's assets and liabilities.

Question 3.2 [maximum 5 marks] [5]

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.

By Article 17(d), an application for recognition must be submitted to a competent court as referred to in Article 4. [1] By Article 15, para.2, an application for recognition must 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) (c) In the absence of evidence referred to in subparagraphs (a) and (b), any other evidence acceptable to the court of the existence of the foreign proceeding and of the appointment of the foreign representative. [1]

By paragraphs 3 of Article 15, the representative must also provide a statement identifying all foreign proceedings in respect of the debtor that are known to the representative. By

paragraph 4 of Article 15, the Court may require a translation of the relevant documents in support of the application into an official language of the state. By Article 16, the Court may presume that the documents provided in support of the application are authentic.

In deciding whether to recognise the proceedings as main or non-main proceedings, the court will scrutinise whether the foreign proceedings are taking place in the state where the debtor has its COMI or whether the debtor merely has an establishment in the foreign state (Article 17 para.3). [1]

The Court will need to decide whether there are public policy reasons to deny the request to recognise the foreign proceedings (Article 6) on the ground that the action would be manifestly contrary to the public policy of the enacting State. If not, and the requirements of Article 15(2) are satisfied, recognition will be satisfied as a matter of course. [1]

The Court may consider whether any other exclusions apply from the application of the Model Law pursuant to Article 1 paragraph 2, for example in respect of debtors who are public utility companies, banks or insurance companies. [1]

Question 3.3 [maximum 5 marks] [3]

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.

Article 19 provides for the enacting court's power to grant interim pre-recognition relief. The powers include (but are not limited to) [1]

- (a) Staying execution against the debtor's assets;
- (b) Entrusting the administration or realization of all or part of the debtor's assets located in this State to the foreign representative or another person designated by the court, in order to protect and preserve the value of assets that, by their nature or because of other circumstances, are perishable, susceptible to devaluation or otherwise in jeopardy;
- (c) Any relief mentioned in paragraph 1 (c), (d) and (g) of Article 21

Importantly, Article 19 paragraph 3 provides that the interim relief granted under Article 19 terminates upon the application for recognition being decided upon. At that point, an application would need to be made for post-recognition relief.

The relief granted under Article 19 may not interfere with a foreign main proceeding, highlighting the respect for the sovereignty of those proceedings under the Model law.

Article 20 deals with the automatic relief that takes effect upon the recognition of foreign main proceedings. However, this does not apply to foreign main proceedings, only to non-main proceedings.

Article 21 provides for discretionary post-recognition relief. This must also be consistent with domestic insolvency proceedings and the court must be satisfied (as with Article 19) that the interests of the debtor's creditors and other interested parties are adequately protected. The purpose of Article 21 is the power to grant relief to protect the debtor's assets or the interests of the creditors by granting appropriate relief. The relief set out in Article 21(1) includes, but is not limited to: [1]

- (a) Staying the commencement or continuation of individual actions or individual proceedings concerning the debtor's assets, rights, obligations or liabilities, to the extent they have not been stayed under paragraph 1 (a) of article 20
- (b) Staying execution against the debtor's assets to the extent it has not been stayed under paragraph 1 (b) of article 20
- (c) Suspending the right to transfer, encumber or otherwise dispose of any assets of the debtor to the extent this right has not been suspended under paragraph 1 (c) of article 20;
- (d) Providing for the examination of witnesses, the taking of evidence or the delivery of information concerning the debtor's assets, affairs, rights, obligations or liabilities;
- (e) Entrusting the administration or realization of all or part of the debtor's assets located in this State to the foreign representative or another person designated by the court;
- (f) Extending relief granted under paragraph 1 of article 19;

Article 21 paragraph 1(g) provides for the enacting State to enact specific additional relief.

Article 21(2) provides that, upon recognising a foreign proceeding, the court may entrust the distribution of all or part of the debtor's assets located in the enacting State to the foreign representative or another designated person provided that the court is satisfied that the interests of creditors in this State are adequately protected. Article 21(3) provides that the Court must be satisfied when granting relief under Article 21 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.

Your answer should have also included the following:

1. 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]

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 situation was considered in *Igor Vitalievich Protasov and Khadzi-Murat Derev* [2021] EWHC 392 (Ch). Whilst the English Court *prima facie* had jurisdiction to grant post-recognition discretionary relief of the type sought by the applicant, it refused to continue the freezing injunction post-recognition. The reason was that the English bankruptcy regime offered other types of protection which meant that the continuation of the freezing injunction was not warranted. The Court held that the purpose of the Model law was to put the foreign representative in the same position as an officeholder appointed under the laws of England and Wales, which meant that a wide range of tools would be available to the representative. On that basis, the freezing order was not “required or justified.”

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

Commented [DDB5]: 12/15

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]

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

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**].

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.

Foreign proceedings

The definition of a "Foreign proceeding" is set out in Article 2(a) of the Model Law and means: "a collective judicial or administrative proceeding in a foreign State, including an interim proceeding, pursuant to a law relating to insolvency in which proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganization or liquidation." These elements are considered below by reference to the Guide to Enactment, the Judicial Perspective and the relevant case law.

Collective

A foreign proceeding must be a "collective proceeding" - this is to prevent the Model Law being used as a tool for recovery by creditors in a particular group or to prevent the gathering or conservation of assets without addressing creditors' claims.

A key consideration is whether "substantially all of the assets and liabilities of the debtor are dealt with in the proceedings" subject to local priorities, exceptions and exclusions relating to the rights of the secured creditors. The mere fact that a class of creditors' rights is unaffected by the proceedings does not mean that the proceedings are not "collective" (Guide to Enactment, para.70).

Ms G and DGF have applied for recognition in England and Wales of the liquidation of the Bank in Country A. Various aspects of DGF's powers (many of which are delegated to Ms G and the remainder of which remain vested in DGF) in the Bank's liquidation should be taken into account when considering whether this is a collective proceeding. The DGF has the power to compile a register of creditor claims and to seek to satisfy those claims. In doing so, it has the power to find, identify and recover the Bank's property, dispose of its assets and take over the management of the Bank.

Upon liquidation, public encumbrances and restrictions on disposal of bank property are terminated and offsetting of counter-claims is prohibited, which speaks to the desire to protect the bank's property from individual creditors. The main aim of the liquidation is to

collect the Bank's assets as to satisfy creditors claims; it is when that is no longer possible that the liquidation is extended to an indefinite date. The DGF's powers include approving an "amended" creditors' list; although it is not clear from the facts whether any particular creditors are prohibited from claiming in the liquidation, which would speak against the liquidation being a collective process. The facts do not suggest that the amended creditors' list only approves a particular class of creditors; it is the consideration and eventual treatment of various types of creditors that speaks to a collective process (***British American Ins Co Ltd***, referred to in the Judicial Perspective at paragraph 78). Therefore, on balance, the process appears to be a collective one.

Law relating to insolvency

In this case, the ground for the liquidation is that the Bank has been classified as 'troubled' by the NB as a result of "risky operations" in consideration of the Bank's compliance with Banking law requirements. On the face of it, the designation as troubled is therefore a breach of regulatory (or banking law) requirements and not insolvency. However, the NB has the ability to classify a bank as insolvent without 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.

These facts are similar to ***Stanford International Bank*** (referred to in paragraph 83 of the Judicial Perspective), where the ground for liquidation was confined to a regulatory misbehaviour. The Court held that the law also provided for liquidation on grounds including insolvency as well as infringements of regulatory requirements. Accordingly, the liquidation could be characterised as being "pursuant to a law relating to insolvency". As such, the liquidation is under a law relating to insolvency.

Control or supervision

The assets and affairs of the Bank must be subject to control or supervision by a foreign court. The level of control or supervision required to satisfy the definition is not specified in the Model Law and Control or supervision may be exercised by an insolvency representative who is in turn subject to control or supervision by the court.

DGF is not subject to control by the Court or even NB as a non-judicial authority; neither public authorities nor the NB have any right to interfere in the exercise of its functions and powers. The authorised officer of DGF is accountable only to the DGF for their actions. There is no evidence in the facts of Court supervision, even low level, over the Debtor's assets and affairs in these proceedings. There is no indication that the DGF may approach the Courts of County A with questions or guidance, or that a person aggrieved by the decisions of DGF could seek a remedy in the Courts of Country A or that the Courts of Country A have any power to reverse the decisions made by DGF and/or the authorised officer in the course of the liquidation (see e.g. ***Betcorp***, referred to at paragraph 92 of the Judicial Perspective). This speaks against the test being satisfied, as it would appear that the foreign court does not exercise control or supervision over the Bank's affairs in the liquidation, even though the level of court supervision required by the Model Law is low and even though the control may be indirect rather than direct and potential rather than actual.

Purpose of liquidation or reorganisation

The purpose of the Bank's liquidation is to liquidate its assets and satisfy its creditor claims. It is submitted that this aspect of the test is satisfied.

Conclusion on foreign proceedings

It is a requirement of the definition of foreign proceedings that the foreign court exercise a degree of control, even at a low level, over the assets and affairs of the Bank. In the absence of the same, the liquidation is not a "foreign proceeding", even though the other aspects of the test are satisfied (Guide to Enactment, paragraph 63).

Good answer dealing with all the important elements, but what about the two most relevant cases, namely Agrokor and Sanko Steamship? (7 out of 10)

Foreign representatives

A "Foreign representative" is a person or body, including one appointed on an interim basis, authorized in a foreign proceeding to administer the reorganization or the liquidation of the debtor's assets or affairs or to act as a representative of the foreign proceeding (Article 2 paragraph (d) Model Law). This test is considered below by reference to the Guide to Enactment, the Digest of Case Law on the Model Law, the Judicial Perspective and the relevant case law.

The foreign representative does not need to have been authorised by the court but can be authorised by a "special agency other than the Court" (Guide to Enactment, paragraph 86).

Ms G

In this case, Ms G has been authorised by the board of directors of the joint Applicant, DGF. The focus in respect of the test for a foreign representative is not on the body who authorises the representative (which can even be the debtor itself) but upon the authorisation having been provided "in the context of" or "in the course of" the proceeding (para.38, Digest of Case Law on the Model Law). Ms G was appointed in the context of the liquidation proceedings.

The test is a two-limb test - the foreign representative can be authorised to "administer the reorganisation or liquidation of the debtor's assets or affairs" or "to act as a representative of the foreign proceedings". The test is determined by the law of Court A (Judicial Perspective, paragraph 35). If the Applicants are relying on the first limb of the test, Ms G would have to demonstrate that she has the power to administer the reorganisation or liquidation of the Bank's assets (Digest of Case Law, paragraph 40). Ms G's powers do not include 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, or the power to arrange for the sale of the Bank's assets. As such, she can only satisfy the latter limb of the test, namely acting as a representative of the foreign proceeding. That test is not fully explained but is expanded upon in paragraph 86 of the Guide to Enactment; "they may simply be a person authorised specifically for the purposes of representing those proceedings." It would seem that, as long as the appointment is

certified in accordance with the requirements of Article 15, the Court will may rely on the presumption in Article 16, paragraph 1 that this appointment satisfied the latter limb of the test (paragraph 86, Guide to Enactment).

DGF

The DGF is not appointed but automatically becomes liquidator of a bank on the date it receives confirmation of the NB's decision to revoke the bank's licence. The DGF is a governmental body. Its power is statutory, arising from the LBBA. Given that, under the Laws of England and Wales, the Official Receiver would be classified as a foreign representative, it seems likely that the Courts of England and Wales would accept that a body, which has been appointed automatically pursuant to a statutory power under the laws of Country A, would be a "foreign representative". As for the two-limb test, The DGF does have the power to administer the reorganisation or liquidation of the debtor's assets or affairs; it retains the powers which are excluded from Ms G's powers, which include powers of sale and distribution.

Conclusion on foreign representative

Both Ms G and the DGF would be "foreign representatives".

Good answer. 5 out of 5.

*** End of Assessment ***