



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).
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- 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 2022**. The assessment submission portal will close at 23:00 (11 pm) GMT on 1 March 2022. 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 2022** or by **23:00 (11 pm) BST (GMT +1) on 31 July 2022**. If you elect to submit by 1 March 2022, you **may not** submit the assessment again by 31 July 2022 (for example, in order to achieve a higher mark).
7. Prior to being populated with your answers, this assessment consists of **12 pages**.

ANSWER ALL THE QUESTIONS

Total marks. 35 out of 50 marks received

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] 8/10 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 **incorrectly** reflects the main purpose of the Model Law?

- (a) The Model Law provides effective mechanisms for dealing with cases of cross-border insolvency so as to promote a number of objectives, including the protection and maximisation of trade and investment.
- (b) The Model Law provides effective mechanisms for dealing with cases of cross-border insolvency so as to promote a number of objectives, including the fair and efficient administration of cross-border insolvencies that protects the interests of all creditors and other interested persons, not including the debtor.**
- (c) The Model Law is a substantive unification of insolvency law so as to promote co-operation between courts of the enacting State and foreign States and facilitation of the rescue of financially troubled businesses.
- (d) All of the above.

The correct answer is D

Question 1.2

Which of the following statements is **unlikely** to be a reason for the development of the Model Law?

- (a) The existence of a statutory basis in national (insolvency) laws for co-operation and co-ordination of domestic courts with foreign courts or foreign representatives.
- (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) None 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

“Cross-border insolvencies are inherently chaotic and value evaporates quickly with the passage of time”. Which of the following rules or concepts set forth in the Model Law **best addresses** this feature of cross-border insolvencies?

- (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 Brazil, foreign main proceedings are opened in South Africa and foreign non-main proceedings are opened in Brazil. Both the South African foreign representative and the Brazilian 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), Brazil 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 Brazil will be recognised in the UK despite Brazil not having implemented the Model Law.
- (b) Both the foreign main proceedings in South Africa and the foreign non-main proceedings in Brazil will not be recognised in the UK because the UK has no principle of reciprocity and Brazil has not implemented the Model Law.

(c) Both the foreign main proceedings in South Africa and the foreign non-main proceedings in Brazil 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 consider both (a) and (b).

(d) Neither (a) nor (b) must be considered by the court.

Question 1.8

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

(a) COMI is 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) While (for purposes of the Model Law) the COMI of a debtor can move, the closer such COMI shift is to the commencement of foreign proceedings, the harder it will be to establish that the move was "ascertainable by third parties".

(d) None of the above.

The correct answer is A

Question 1.9

Which of the following types of relief have, prior to the adoption of the Model Law on Recognition and Enforcement of Insolvency-Related Judgments, been declared beyond the limits of the Model Law?

- (a) Enforcement of insolvency-related judgments.
- (b) An indefinite moratorium continuation.

(c) Both (a) and (b).

(d) Neither (a) nor (b).

Question 1.10

When for the interpretation of the Model Law “its original origin” is to be considered in accordance with article 8 of the Model Law, which of the following texts is likely to be of relevance?

- (a) The UNCITRAL Guide of Enactment and the Practice Guide.
- (b) The UNCITRAL Guide of Enactment and the Legislative Guide – Parts One, Two, Three and Four.
- (c) The UNCITRAL Guide of Enactment and the Judicial Perspective.
- (d) All of the above.

QUESTION 2 (direct questions) [10 marks in total] 8,5/10

Question 2.1 [maximum 3 marks] 2 marks

Under the MLCBI, explain what the appropriate date is for determining the COMI of a debtor, or whether an establishment exists.

According to GEI, the appropriate date for determining whether COMI or establishment is the date of commencement of the foreign proceeding. Where the business activity of the debtor ceases after the commencement of the proceeding, this rule may produce a clearer result. When it comes to reorganization, the recognizing entity, not the debtor, should be tested under the rule above, leading to more certainty as well.

However, the court in enacting state needs to examine whether there is abuse of process. For example, whether the insolvency company changed its registration state or headquarter short before entering the insolvency proceeding and made not commercial reasons.

For full marks on this question it should be noted, that the appropriate date for determining COMI is not explicitly mentioned in the MLCBI and some jurisdictions have a slightly different take on this.

Question 2.2 [maximum 3 marks] 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 provides guidance in case of concurrence of two foreign non-main proceedings.”*

Statement 2 *“The rule in this Article does not affect secured claims.”*

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

Statement 1: Article 30(C) provides guidance of concurrence of two foreign non-main proceedings. The court must grant, modify, or terminate relief to facilitate co-ordination of the proceedings. But there is no rule of preference between these proceedings.

Statement 2: Article 32 is called “hotchpot rule” which provides a safeguard to provide creditors within same class of no favourable treatment. But the secured creditors will not be affected. The concept behind the article is to protect local secured creditors and avoid uncertainty to local credit market, making the Model Law more acceptable by each country.

Statement 3: Article 16(3) refers to COMI concept. COMI is an undefined key concept. MLCBI makes the presumption that the registered office or habitual residence place is the COMI, but it is rebuttable if there are evidence to the contrary. It gives the concept of COMI as much certainty as possible and at the same time obeys Essence Greater than Form principle.

Question 2.3 [2 marks] 1,5 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.**

In *IBA* case, the debtor seeks an indefinite Moratorium Continuation to stop some creditors claiming rights out of insolvency proceeding commenced out of UK. In the first instance, the court quoted “Gibbs Rule”, that the debt governed by English law cannot be discharged by a foreign proceeding and supported the creditors.

The appeal court maintained the decision based on the following reasons:

1. The indefinite Moratorium Continuation can only be granted when it is necessary to protect the creditors and debtors’ estate. The stay is not an appreciate way to protect the creditor, the “super scheme” may become a more attractive option.
2. If the foreign proceeding no longer stays in existence, there will not be support to foreign insolvency representative.

For full marks it should be noted regarding 2) that the court mentioned that if such a possibility was to be interpreted it should have been specifically mentioned in art. 18.

Question 2.4 [2 marks] 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**.

According to Article 29(a), any relief granted either based on Article 19 (interim) or Article 21 (post- recognition) must be consistent with the domestic insolvency proceeding. In the case of a foreign main proceeding, the automatic relief of Article 20 does not apply.

About duty of information, the Article 18 states that the foreign representative shall inform the court any substantial change in status of recognised foreign proceeding and any other foreign proceeding regarding the same debtor.

QUESTION 3 (essay-type questions) [15 marks in total] 10,5/15 marks

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

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

Question 3.1 [maximum 4 marks] 3 marks

Prior to making a recognition application in State A, explain how access and co-ordination rights in State A can benefit the foreign representative?

According to Article 9 of Model Law, the foreign representative has direct access to the court of State A, so the representative could talk directly with the court what is its opinion on certain issues. Article 11 gives the foreign representative the rights to open an insolvency proceeding under law of State A. Article 13 gives the foreign creditors the same rights as creditors as the domestic creditors in State A.

These rights ensure local tools are available to foreign representative without need for separate proceedings in State A, which save the money and time.

For full marks the following should also be addressed:

- **Cooperation:** Similar to access rights, the cooperation provisions in the MLCBI (articles 25-27) also operate independently of recognition and it is not a prerequisite to the use of the cooperation provisions that recognition of the foreign proceedings is obtained in advance. Courts in State A can freely cooperate with the foreign representative without having to worry whether the status in State B of the foreign representative can be recognised in State A.

Question 3.2 [maximum 5 marks] 3,5 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 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.

Besides satisfying article 2(a) and 2(b), there are other rules that need to be followed to make a successful application.

First, according to Article 15, there are some documents that should be accompanied

- Evidence of the existence of the foreign proceeding and appointing the foreign representative.
- A Statement identifying all foreign proceedings in respect of the debtor known to the foreign representative.
- A translation of all documents.

Second, if the foreign representative wants to claim the COMI of the debtor is not in the registration country, it must give extra evidence to prove where it locates the COMI of the debtor. Third, it should be studied whether State A has included provision of Reciprocity. If it does, whether courts in State B have recognized insolvency judgment before.

Fourth, there are some industries that may be excluded. For example, banks and insurance companies can be excluded from the Model Law, as they need a special regulatory regime. Public utility or consumers/non-traders may also require special solutions.

Fifth, the foreign representative should examine the compliance of Article 6 of Model Law in State A, whether the application is against the public policy of State A.

According to JP, the court of State A shall not examine whether the proceeding is properly commenced in State B.

For full marks the following should also – or in more detail be addressed:

1. Restrictions;- Existing international obligations of State A: Based on Article 3 of the Model Law, the court in State A should also check if there are no existing international obligations of State A (under a treaty or otherwise) that may conflict with granting the recognition application under the implemented Model Law in State A.
2. Judicial scrutiny: While the court in State A is able to rely on the rebuttable presumptions set forth in Article 16 of the Model Law, in the context of Article 17 of the Model Law the court will have to assess whether either the COMI or at least an establishment of the debtor is located in State B where the foreign proceedings were opened. If the COMI of the debtor is in State B the foreign proceedings should be recognised as foreign main proceedings and if only an establishment of the debtor is in State B the foreign proceedings should be recognised as foreign non-main proceedings. Without a COMI or at least an establishment of the debtor in State B, recognition cannot be granted by the court in State A.

Question 3.3 [maximum 5 marks] 3 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, as well as any restrictions, limitations or conditions that should be considered in this context. For purposes of this question, it can be assumed that there is no concurrence of proceedings.

Pre-recognition:

According to Article 19 of MLCBI, the representative could apply to court interim relief to protect the assets of the debtor and rights of creditors at the time of application.

1. A stay of execution against the debtor's assets.
2. Entrusting the realization of debtor's assets to the representative or other parties to preserve the value.
3. Any relief mentioned in paragraph 1(c),(d) and (g) of article 21.

Conditions:

1. the Court needs to give notice to stakeholders.
2. the relief cannot interfere with the administration of a foreign main proceeding.
3. the relief can only be given on interim and urgent basis.

Post-recognition:

If the proceeding in State B is recognized as a foreign main proceeding, Article 20 could be applied. There are 3 effects automatically apply: stay of action against the debtor; stay of execution against assets of the debtor and suspension of disposal of the assets of the debtor.

Whether the proceeding in State B is recognized as main proceeding or not, Article 21 apply. The court in State A could use the discretionary power, at the request of the foreign representative, to grant appropriate relief.

Conditions:

1. The creditors could still go on with the litigation to preserve the claim.
2. Insolvency proceeding in State A could still be opened under these relief.
3. According to Article 22, the interests of the creditors and other interested persons are adequately protected under the relief mentioned in Article 19 and 21.

For full marks on this question this should also be addressed:

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 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?

Article 19 only offers an interim relief. It is granted since before the proceeding is recognised by the enacting state, the foreign insolvency representative lacks tools to protect the estate of the debtor and interests of creditors. Worldwide freezing order is necessary to reach the goal in some circumstance. After the recognition, the main proceeding is settled and the application of law is clear as well, continuing of the order lacks necessity.

QUESTION 4 (fact-based application-type question) [15 marks in total] 8/15 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 issued 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 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 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]**; **5/10 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]**. **3/5 marks**

While not all facts provided in the fact pattern for this question (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.

4.1.1

First, according to MLCBI and relevant references like GEI, the following points makes it complies with the definition of "foreign proceeding":

- The liquidation is an administrative proceeding: The Deposit Guarantee Fund (DGF) is a governmental body of Country A and its power is given by LBBA and DGF Law. So the proceeding is an administrative proceeding.
- The liquidation is governed by a law relating to insolvency: the liquidation of the bank is governed by LBBA and DGF law, which state the standard of “troubled” and “insolvent” bank. There are also the proceedings of provisional administration and liquidation proceedings. They deal with severe financial distress of the banks.
- The proceeding is for the purposes of liquidation or reorganization: DGF exists to give compensation for the persons who deposit money in the bank in financial failure. It has the power to exercise powers as are necessary to complete the liquidation of a bank.

Second, there are some facts may play negative roles in having the proceeding recognized. The proceeding seems not to be a collective proceeding:

- According to the current information available, DGF has extensive powers over the proceeding, including receiving creditor claims and disposal of the assets of the bank. However, “collective” insolvency proceeding is based on the desirability of achieving a coordinated, global solution for all stakeholders of an insolvency proceeding. It seems there is a lack of content of participation of creditors, the stakeholders do not have access to protect their rights through a court proceeding. And there are no clear rules of distribution of assets of the debtor.
- The asset and affairs of the debtor is not under control or supervision of the court. It seems the whole proceeding is under the control the National Bank. The DGF could bring a claim to court, but the there is no evidence the proceeding is under the supervision of the court. There is also no mechanism for stakeholders to seek review from the court.

In general this question should be addressed much more thoroughly and with more details and argumentation, i.e. what is according to the MLCBI and the interpretation tools understood as “collective”, “insolvency”, “judicial or administrative body”, “control by af foreign court” and does the fact - and which ones - of the case fall under these interpretations.

4.1.2

The power of Ms G comes from and is limited by DGF, the first question is whether DGF is a qualified insolvency representative.

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. If the DFG has independent decision-making power and accounting, with no adverse evidence, I think DFG can constitute a “body” of 2(d) of MLCBI.

According to LBBA and DGF Law, DGF has the power to administer the reorganization or liquidation of the debtor’s assets and affairs at the time of the application.

Even though DGF has interest in the proceeding, but it has been observed, there is no requirement for free of conflict of interest.

Based on above, I think DGF is a qualified insolvency representative under English Law.

Ms G is authorized to exercise the power of DGF and has 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 are kept by DGF. Besides, 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 are

excluded from the authority of Ms G. The power of Ms G is from DGF, not from the “a foreign proceeding”. So, I think the status of “foreign representative” should not be granted to Ms G.

For full marks on this question the issue of delegation should be addressed more. In that regard it should be noted DGF is 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*”. Therefore through delegation it could be possible to consider Ms G a foreign representative.

*** End of Assessment ***