



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: 202122-336.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 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: 32 out of 50

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] 6

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.**

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.

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] 6,5 marks

Question 2.1 [maximum 3 marks] 1 mark

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

The appropriate date used in determining the COMI of a debtor or whether an establishment exists is the date on which the foreign proceeding commenced. In circumstances where a debtor moves its COMI at a time that is within close proximity to the time when the foreign proceedings commenced, it will be more difficult for the debtor to be able to establish the new jurisdiction is its COMI. This is particularly difficult since one of the requirements necessary to establish COMI is to show that the location is one that third parties can readily ascertain.

For full mark on this question it should be noted that it is not explicitly mentioned in the MLCBI and different jurisdictions treat this slightly different.

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.”*

Article 30 (c) applies to cases of two foreign non-main proceedings and requires that the court grant, modify or terminate relief for the purpose of facilitating co-ordination of the proceedings.

The hotchpot Rule in Article 32 does not affect secured claims and is designed to avoid situations where creditors obtain more favourable treatment than the other creditors in the same class by obtaining payment in two different jurisdictions.

There is no definition under Article 6 for the term COMI. However there is a rebuttable presumption that the place of the registered office of the debtor is the place of its COMI.

Article 16

Question 2.3 [2 marks] 1 mark

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

The rule in *Gibbs* is, in essence, that the proper law of a debt governs how it may be extinguished and, accordingly, that English law debt may only be discharged under English law (*Anthony Gibbs and Sons v La Société Industrielle et Commerciale des Métaux* (1890) 25 QBD 399) The English Court of Appeal in *IBA* [2018]EWCA Civ 2802) addressed the *Gibbs* Rule and established that the court could only properly grant an indefinite Moratorium if satisfied that a stay was necessary to protect the interest of creditors and the stay is appropriate for achieving that protection.

Issue 2 of the following should also be addressed for full marks on this question: According to the English Court of Appeal, the real issue was whether as a matter of settled practice the UK court should not exercise its power to grant the indefinite moratorium where to do so would (i) in substance prevent the English creditors (that is the Challenging Creditors) from enforcing their English law rights in accordance with the *Gibbs* Rule (“Issue 1”) and / or (ii) prolong the stay after the Azeri reconstruction has come to an end (“Issue 2”).

- In respect of each issue, the English Court of Appeal held that:
 1. **Issue 1:** The UK court would need to be convinced that (a) the indefinite stay is necessary to protect the interests of *IBA*’s creditors and (b) an indefinite stay is the appropriate way of achieving such protection. The factual evidence that can be brought before the court will ultimately decide Issue 1.
 2. **Issue 2:** Based on Article 18 of the MLCBI, the English Court of Appeal in the *IBA* case appeal held that had the MLCBI ever contemplated the continuance of relief after the end of the relevant foreign proceeding, it would have addressed the question explicitly and provided appropriate machinery for that purpose.

Question 2.4 [2 marks] 1,5 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**.

Where there is a domestic proceeding and a foreign main proceeding has been recognised subsequently, the court must review any relief which was granted under either Article 19 or 21 and modify or terminate any relief if such relief is inconsistent with the domestic insolvency proceedings. Under Article 18, foreign representatives have an ongoing duty to keep the court on the enacting State updated in relation to (a) any substantial change in the status of the recognised foreign proceeding or the status of the foreign representative's appointment and (b) any other foreign proceeding regarding the same debtors that becomes known to the foreign representative.

For full marks, reference should be made to art. 29 on concurrent proceedings.

QUESTION 3 (essay-type questions) [15 marks in total] 7 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 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?

Access and co-ordination rights under the Model law is designed to help promote efficiency. Article 27 of the Model Law (as expanded by the Practice Guide), articulates the means of co-operation between foreign representatives and enacting states and which the foreign representative can benefit from prior to the making of an application. They include for example, communicating of information as appropriate and co-ordination of concurrent proceedings which concern the same debtor. Such co-ordination helps to save time and minimises cost which, in turn minimises decreases in value.

Access rights (including principles of non-discrimination) serves to provide a foreign representative with comfort and promote transparency thereby facilitating a smooth process for commencing proceedings. Access rights under Article 9 of the Model Law gives the foreign representative standing in the enacting State without the need for the foreign representative to take steps to have the foreign proceedings recognised. Under Article 11, a foreign representative can open domestic insolvency proceedings in the enacting States.

Access rights under Article 19 enable the court in the enacting State to grant urgent relief upon application by the foreign representative for recognition and prior to a decision on the recognition application.

Question 3.2 [maximum 5 marks] 0

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.

Once the court has made its determination that [Type your answer here]

Question 3.3 [maximum 5 marks] 2 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.

Article 20 of the Model Law operates to automatically (a) stay the commencement or continuation of individual actions or individual proceedings concerning the debtor’s assets, rights, obligation or liabilities; (b) stay the execution against the debtor’s assets and (c) suspend the right to deal with the debtor’s assets.

Limitations and exceptions

Arbitral Proceedings - Although the automatic stay also applies to arbitral proceedings but is difficult to enforce if the arbitration is not taking place in either the enacting State or the State where the foreign main proceedings were opened. Given that Article 20 authorises the enacting State to modify or terminate the stay or suspension on the basis that such modification would be in the interest of the parties, the continuance of an automatic stay in respect of arbitral proceedings is not guaranteed.

Other Exceptions – Other exception to the automatic stay that may exist in the law of the enacting State include,

1. Enforcement of claims made by secured parties,
2. Commencement of claims arising after insolvency proceedings have commenced (or following recognition of foreign main proceedings or having completed an opening financial market transaction,

Individual Actions – Paragraph 3 of Article 20 makes clear that the moratorium does not apply to individual actions or claims necessary to preserve an existing claim against a debtor.

Commencement of Insolvency Proceedings – Under paragraph 4, the right to request the commencement of certain domestic insolvency proceedings or file claims in those proceedings are not affected by Article 20.

Article 21 of the Model Law, gives the court of the enacting state a discretionary power to grant post-recognition relief in circumstances where such relief is necessary for the protection of the assets of the debtor or the interest of the creditors. Such relief powers include,

1. staying the commencement or continuation of individual actions or proceedings related to the debtor's assets, rights, obligations or liabilities (as long as they are not subject to an automatic stay under Article 20(1)(a))
2. Staying the execution against the debtor's assets again, with the proviso that it is not already the subject of an automatic stay;
3. Suspending any dealings with the debtor's assets;
4. Providing for examining witnesses, taking evidence, giving of information on the debtor's assets, affairs, rights, obligations or liabilities.
5. Entrusting the administration or realising all or part of the debtor's assets in the enacting state to the foreign representative or another person designated by the court
6. Extending any interim relief granted under Article 19(1) and
7. Granting any additional available relief to a domestic liquidator or office holder under the laws of the enacting State.

It should be noted that there exists a discretionary power under paragraph 2 of the Article to hand over all or part of the debtor's assets located in the enacting State to the foreign representative at their request. The court would however need to be satisfied that such relieve would not interfere with the administration of another insolvency proceeding.

Pre-Recognition

Pre-recognition relief is provided for under Article 19 of the Model Law and applies to both foreign main and non-main proceedings including

1. A stay of execution against the debtor's assets
2. Protecting or preserving the value of the assets by placing he administrating or realisation of said assets to the foreign representative or another designated person,
3. Suspending any dealings with the debtor's assets e.g. the right to transfer the assets;
4. Providing for examining witnesses, taking evidence, giving of information on the debtor's assets, affairs, rights, obligations or liabilities.
5. Granting any additional available relief to a domestic liquidator or office holder under the laws of the enacting State.

Limitations

The court could refuse to grant such relief if it believes it would interfere with the administration of the foreign main proceeding.

Other limitations have been established by the English Court as follows:

1. The enforcement of an in personam default judgment is not covered by the Model Law (*Rubin v Eurofinance SA* [2012] UKSC 46);
2. Applying foreign insolvency law to an English law governed contract is not within the scope of appropriate relieve that the English court can grant (*Fibra Celulose S/A v Pan Ocean Company Ltd and Another* [2014] EWHC);
3. No jurisdiction to grant the Azeri foreign representative of a foreign main proceedings opened in Azerbaijan an indefinite continuation of the automatic stay resulting from an earlier recognition order .

For full marks on this question, the following should also be addressed:

1. **Adequate protection:** Pursuant to Article 22 of the Model Law any interim relief under Article 19 of he Model Law or any post-recognition relief under Article 21 of the Model Law require the court in State A to be satisfied that the interests of the creditors and the other interested persons, including the debtor, are adequately protected and any relief may be subject to conditions as the court considers appropriate.

2. 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.
3. 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?

In granting relief to a foreign representative, the court (under paragraph 4 of Article 21) must be satisfied that such relief relates to assets subject to the law of the enacting state. Therefore, any relief that may have been granted pre-application which relate to assets not subject to the law of the enacting State (such as a worldwide freezing injunction) would be automatically invalidated once there is an application at the post-recognition stage under Article 21.

QUESTION 4 (fact-based application-type question) [15 marks in total] 12,5 marks

Read the following facts very carefully before answering the questions that follow.

(1) Background

The Commercial Bank for Business Corporation (the Bank) has operated since 1991. The Bank's registered office is situated in Country A, which **has not** adopted the MLCBI. As of 13 August 2015, the Bank's majority ultimate beneficial owner was Mr Z, who held approximately 95% of the Bank's shares through various corporate entities (including some registered in England).

The Bank entered provisional administration on 17 September 2015 and liquidation on 17 December 2015. Investigations into the Bank have revealed that it appears to have been potentially involved in a multi-million dollar fraud resulting in monies being sent to many overseas companies, including entities incorporated and registered in England.

Proceedings were 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 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]**; 7, 5 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]**. 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.

Does the Bank's liquidation comprise a Foreign Proceeding?

The MLCBI provisions

Before considering whether the foreign proceedings should be recognised, the court must make a determination on whether the Bank's liquidation comprises a "foreign proceeding" within the meaning Article 2(a) of the MLCBI.

Article 2(a) defines a foreign proceeding as "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 reorganisation or liquidation."

The court will have to consider each of the elements which comprise the definition by reference to the facts and the approach of the English Courts as well as the Guide to Enactment.

1. Is the liquidation a proceeding?
2. Is the proceeding judicial or administrative?
3. Is the proceeding collective in nature?
4. Is the proceeding occurring in a foreign State?
5. Is it authorised or conducted under a law relating to insolvency?
6. Is the law one in which the assets and affairs of the debtor are made subject to the control or supervision of the foreign court?
7. Is the proceeding for the purpose of reorganisation or liquidation.

A. *Is the liquidation a proceeding?*

On the question of whether the liquidation is a proceeding, the UNCITRAL Guide to Enactment provides useful guidance. Paragraph 79 of the Guide confirms that paragraphs (a) and (d) also covers an “interim proceeding” and a representative “appointed on an interim basis”.

The Guide further stipulates that in the absence of any clear guidance on what the interim procedures are for any state, it is advisable that, irrespective of the way interim proceedings are treated in the enacting State, the reference to “interim proceeding” in subparagraph (a) and to a foreign representative appointed “on an interim basis” in subparagraph (d) be maintained. The rationale for maintaining that definition is that in the practice of many countries insolvency proceedings are often, or even usually, commenced on an “interim” or “provisional” basis. Except for being labelled as interim, those proceedings meet all the other requisites of the definition in article 2, subparagraph (a). Such proceedings are often conducted for weeks or months as “interim” proceedings under the administration of persons appointed on an “interim” basis, and only some time later would the court issue an order confirming the continuation of the proceedings on a non-interim basis. The objectives of the Model Law apply fully to such “interim proceedings” (provided the requisites of subparagraphs (a) and (d) are met); therefore, these proceedings should not be distinguished from other insolvency proceedings merely because they are described as being of an interim nature.

The point that an interim proceeding and the foreign representative must meet all the requirements of article 2 is emphasized in article 17, paragraph 1, according to which a foreign proceeding may be recognized only if it is “a proceeding within the meaning of subparagraph (a) of article 2” and “the foreign representative applying for recognition is a person or body within the meaning of subparagraph (d) of article 2”.

The factual considerations which I believe are relevant and why I have referred to the guidance as it relates to interim procedures is due to the provenance of the liquidation itself set out in the above fact pattern. The procedure by which the liquidation commenced raises a fundamental question over whether what is deemed to be a liquidation in Country A bears the hallmarks of an interim procedure.

One factor which I believe was directly relevant to this question over whether this is in fact a liquidation or interim proceeding is the limitation that has been placed on Ms G’s powers. As “liquidator” i.e. she has no authority to claim damages from related parties in circumstances where (1) liquidators ought to be given such powers and (2) liquidators (in acting independently as an officer of the court) can bring an action against a party as appropriate regardless of the third party’s connection to the company in liquidation.

According to the Guidance, such proceedings will still fall within the definition of proceedings, therefore satisfying the first of 7 components of Article 2(a), regardless of whether they are in fact interim proceedings.

B. Is the proceeding judicial or administrative?

There is a question over whether the proceeding is administrative or judicial in nature particularly given that there is no indication from the facts that the liquidation has come under the supervision of the court but rather the regulatory authority. Either way, the liquidation would satisfy this element of the definition.

C. Is the proceeding collective in nature?

Whether the LBBA qualifies as collective proceedings is a question considered in the recent English court decision in *Agrokor DD* [2017] EWHC 2791 (Ch). The Court ruled that the LDA was more collective than not. In applying the Court’s approach in *Agrokor*, the court should consider the nature of the powers afforded to the DGF which were delegated to Mrs G. Those powers include, in particular,

- (i) the power to take steps to find, identify and recover property belonging to the bank;
- (ii) the power to dispose of the bank's assets; and
- (iii) the power to exercise "such other powers as are necessary to complete the liquidation of a bank".

D. Is the proceeding occurring in a foreign State?

There are no factors which I can identify from the background which would indicate that the proceeding is not occurring in a foreign state and for this reason, this aspect of the definition is met.

E. Is it authorised or conducted under a law relating to insolvency?

Following the reasoning in *Agrokor*, the Model Law does not require insolvency law as a label so it is sufficient that the relevant legislative regime addresses insolvency or severe financial distress. In any event it is clear on the facts that the situation is one which squarely falls within this aspect of the definition. We know this because,

1. 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.
2. 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.

F. *Is the law one in which the assets and affairs of the debtor are made subject to the control or supervision of the foreign court?*

We know from the facts that the liquidation is not being overseen by the Court. However, following the reasoning in *Agrokor*, the Model Law requires a relatively low level of court supervision. Under the CBIR it can be potential, rather than actual and indirect rather than the direct. The fact that the English Proceedings are before the court and that there may be some scope for more direct supervision by the court would, in my estimation, mean that this aspect of the definition is also satisfied.

G. Is the proceeding for the purpose of reorganisation or liquidation.

There are no factors which I can identify from the background which would indicate that the proceeding is not commenced for the purpose of reorganisation or liquidation. In fact, all factual circumstances would indicate that the procedure is specifically intended to enable the liquidation of the company.

For full mark, more attention should be given to what is meant by "collectivity" and not just a reference to *Agrokor* and a discussion that this is an administrative proceeding.

Do the Applicants fall within the description of "foreign representatives" as defined by article 2(d) of the MLCBI?

The definition of "foreign representative" has the following elements:

1. A person or body, including one appointed on an interim basis;
2. Authorised in foreign proceedings;

3. To administer the reorganisation or liquidation of the debtor's assets or affairs or to act as a representative of the foreign proceeding.

Ms G's application is made 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).

Given that the enabling provisions of the LBBA confers certain powers to the DGF who has, in turn, delegated their powers in accordance with the relevant provisions, Ms G has been appointed on an interim basis and, for the purpose of the definition, authorised in foreign proceedings. Although Ms G's powers to bring claims against parties has been curtailed, she retains power to sign agreements related to the sale of the bank's assets which satisfied the third element of the definition of foreign representative.

The DGF's appointment as liquidator is automatic. They qualify as a body appointed on an interim basis who is authorised in foreign proceeding to administer the reorganisation or liquidation of the debtor's assets or affairs or to act as a representative of the foreign proceeding. It is irrelevant to the application that they have delegated their powers.

*** End of Assessment ***