



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: 26 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]

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]

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.

The appropriate date for determining the COMI of a debtor, or whether an establishment exists is the date of commencement of the foreign proceeding. The reasoning for this date being the appropriate date is because it is assumed that the business activity of the debtor would have ceased upon the commencement of the foreign insolvency proceeding.

It is however possible for the COMI of the debtor to move. That being said, if the move occurs in close proximity to the commencement of the foreign proceedings, then the appropriate evidence for this will be harder to establish due to the fact that the particular requirement for COMFI is that it must be readily ascertainable by third parties.

For full marks, it should be mentioned that the date is not explicitly mentioned in the MLCBI and different jurisdictions have slightly different approaches

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 – Concurrent Non-Main Proceedings – Article 30(c).

Statement 2 – The Hotchpot Rule – Article 31. **This is the hotchpot rule, however regulated in art. 32 -I have considered this a typo**

Statement 3 – Recognition Presumption – Article 16.

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 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 (“IMC”) on the basis that to grant the IMC, would:

- i) Prevent the English Creditors (the Challenging Creditors) from enforcing their English Law Rights under the Gibbs Rule; and/or
- ii) Prolong the stay after the Azeri reconstruction has come to an end.

The English Court held that it will only grant the IMC if two criteria were met. That is, the stay would be necessary to protect *IBA*’s creditors; and the stay would have to be an appropriate way to achieve this protection. It was held that neither of these conditions were met.

A bit more on the second question is required on this question

Question 2.4 [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**.

Where a domestic proceeding has already been opened, and foreign main proceeding is recognized, the court in the enacting State should review any relief granted under

Article 19 (Relief that may be granted upon application for recognition of a foreign proceeding) or Article 21 (Relief that may be granted upon recognition of a foreign proceeding) and modify or terminate this relief if it is inconsistent with the domestic insolvency proceeding, as the domestic insolvency proceeding has supremacy. This also extends to any automatic relief of foreign main proceedings.

The foreign representative in the foreign main proceeding also has an ongoing duty to the court in the enacting state, under Article 25, to communicate directly with the domestic court to provide information or assistance directly to the court.

The correct answers are art. 29 and 18.

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

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] 1 mark

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 in State A can benefit the foreign representative by allowing the foreign representative and creditors with access to the courts in State A and by allowing the courts in the enacting State to determine the level of co-ordination among jurisdictions that are necessary for the insolvency.

Some jurisdictions may lack a legislative framework for co-operation and co-ordination between courts and judges.

Once the foreign representative can have access to the courts, it will benefit the foreign representative to have co-ordination rights where there will now be concurrent insolvency proceedings to reduce cost and encourage efficiency. Similarly, co-ordination rights will aid in achieving consistent treatment of stakeholders over different jurisdictions which will enhance transparency and predictability throughout the concurrent proceedings.

Co-ordination is also important as it can occur even before the application for recognition in State A.

For full marks on this question:

- Legal standing (Article 9 MLCBI): The key access for the foreign representative is set forth in Article 9 MLCBI. In the capacity of foreign representative, the foreign representative has automatically standing before the courts in State A without having to meet any formal requirements such as a license or any consular action. In other words, the “status” in State B of the foreign representative is automatically recognised in State A for the purpose of granting the foreign representative standing before the courts in State A. This allows the foreign representative to safeguard and pursue assets of the debtor estate in State A before its courts.
- Opening domestic insolvency proceedings (Article 11 MLCBI): The foreign representative is further specifically entitled to apply for the opening of domestic insolvency proceedings

in State A, as reflected in Article 11 of the MLCBI. Whether or not the foreign representative would wish to do this will depend on what the requirements are for opening such domestic proceedings. Can these requirements be met? On the other hand, it will depend on what the foreign representative believes he/she can get in terms of (interim) relief for the foreign proceedings in State B. In other words, are domestic insolvency proceedings really needed, or just additional time and costs that should be avoided?

- 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] 2 mark

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.

Assuming that the meaning of foreign proceeding and foreign representative are met; that is, commonly adopted:

- i) Foreign proceeding – a proceeding that is either judicial or administrative; that is collective in nature; that is in a foreign State; that is authorised or conducted under a law relating to insolvency; in which the assets and affairs of the debtor are subject to control or supervision by a foreign court; and which proceeding is for the purpose of reorganisation or liquidation;
- ii) Foreign representative – a person or body, including one appointed on an interim basis; and is authorised in a foreign proceeding to administer the reorganisation or liquidation of the debtor’s assets or affairs or to act as a representative of the foreign proceeding;

Above having been met, additional considerations must be given for the recognition application to be successful.

Firstly, and most importantly is the concept of Centre of Main Interest (“COMI”), which will determine the consequences of a recognition. The location of the COMI determines which proceedings are considered main or non-main proceedings. Should the COMI be in State B, then State B is the jurisdiction of the main insolvency proceedings which will provide for automatic mandatory relief. If the State B proceedings only has an establishment, then it is non-main proceedings with no automatic relief.

For recognition to be successful, there are evidential requirements under Article 15 of the Model Law, namely that the foreign representative, when applying, must provide some evidence of the decision commencing the foreign proceedings and that he is the foreign representative. This evidence can be provided by way of a certified copy of the decision, a certificate from the court, or any other evidence that is appropriate. A statement of all known foreign proceedings must also be provided.

Similarly, under Article 16, presumptions are set forth that the court is entitled to presume that the documents submitted under Article 15 are authentic, and, in the absence of proof to the contrary, the debtor's registered office is presumed to be the COMI.

Following on from Article 16 is Article 17 which indicates that an application for recognition must be decided upon at the earliest possible time, allowing for modification or termination at a later date should it be found that the grounds for granting recognition were fully or partially lacking. If the COMI is in State B, then the foreign proceedings will be recognised as foreign main proceedings.

If State B is not the COMI, then State B proceedings are foreign non-main proceedings.

Article 18 of the Model Law requires the foreign representative to promptly inform the court in State A, from the time of filing the recognition application, of a substantial change in the status of the recognised foreign proceeding or their appointment, and any foreign proceeding regarding the same debtor that becomes known.

For full marks on this question the following should be included:

1. **Exclusions:** If the debtor is an entity that is subject to a special insolvency regime in State B, the foreign representative should first of all check if the foreign proceedings regarding that type of a debtor are excluded in State A based on Article 1(2) of the implemented Model Law in State A.
2. **Restrictions;- Existing international obligations of State A:** Based on Article 3 of the Model Law, the court in State A should also check if there are no existing international obligations of State A (under a treaty or otherwise) that may conflict with granting the recognition application under the implemented Model Law in State A.
3. **Public policy exception:** Finally, the court in State A should also ensure based on Article 6 of the Model Law that the recognition application is not manifestly contrary to public policy of State A.

Question 3.3 [maximum 5 marks]

As far as relief is concerned, briefly explain (with reference to the relevant MLCBI articles) what pre- and post-recognition relief can be considered in the context of the MLCBI, 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.

As far as relief is concerned, Article 19 provides for interim pre-recognition relief, whereby the court in the enacting State is required to grant urgent interim relief. This may be the case where relief is needed to protect the assets of the debtors or the interest of the creditors, the foreign representative can request provisional relief from filing the application until the application is decided on.

Article 20 provides for automatic mandatory relief so long as the proceedings in State B qualify as foreign main proceedings. The automatic relief is intended to allow time for steps to be taken to organize fair and orderly cross-border insolvency proceedings. Under Article 20, there are three automatic effects:

- i) A stay of the commencement or continuation of individuals actions concerning the debtors assets, liabilities, rights or obligations;
- ii) A stay of execution against the assets of the debtors; and
- iii) A suspension of the right to transfer, encumber or dispose of the assets of the debtor.

Article 21 provides the court with discretionary power for post-recognition relief to protect the assets of the debtor or the interest of the creditor. The relief includes but are not limited to:

- i) Extending interim relief granted under Article 19;
- ii) Granting additional relief that may be available to a domestic office holder; and
- iii) Staying execution against the debtor's assets.

Article 22 clarifies that any relief granted under Article 19 or Article 21 must satisfy the court in the Enacting state of the interest of the debtor's creditors and other interested parties are adequately protected. On this basis, the court is granted the power to set conditions it considers appropriate for relief and retain the ability to modify or terminate relief at the request of the foreign representative or an affected person.

Article 23 is also important as it provides the foreign representative with the ability to obtain standing to initiate actions under the enacting State to avoid or render ineffective any legal acts that are detrimental to the creditors of the debtor such as claw-back rights and antecedent transactions.

Finally, Article 24 allows the foreign representative to intervene in any local proceedings in State A in which the debtor is a party, provided the foreign representatives meet local requirements for this.

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 the 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] ½ 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?

A worldwide freezing order granted as a pre-recognition interim relief is unlikely to continue post-recognition as it was granted pre-recognition as a means of securing and protecting the assets of the debtors and the interest of the creditors. However, post recognition, this order is not likely to continue as some assets may be outside the jurisdiction of the court granting the recognition.

Furthermore, pre-recognition relief ceases upon recognition. For example, an interim provisional liquidation appointment ceases upon the appointment of a liquidator.

It should be noted that it is because art 21 provides for other form of protection that the freezing order after recognition is un-warranted.

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

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] 6 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]; 3 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 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.

Based on an overview of the case, and the application submitted by Ms. G and the DGF before the English court based on Cross-Border Insolvency Regulation 2006 (CBIR), the issue arising is whether the Bank's liquidation falls within the meaning of foreign proceeding, and whether the applicants fall within the description of foreign representative under the MLCBI. An analysis of these queries are discussed below.

Foreign Proceeding

Under MLCBI, in order for recognition application to be approved, the application must be applied for by a foreign representative and must include documentation which indicates that the foreign proceedings exist, and that the foreign representative was appointed.

Under Article 2 of the MLCBI, the definition of foreign proceedings has certain key elements, namely:

- i) It relates to a proceeding that is either judicial or administrative; and
- ii) That is collective in nature; and
- iii) That is in a foreign State; and
- iv) That is authorised or conducted under a law relating to insolvency; and
- v) In which the assets and affairs of the debtor are subject to control or supervision by a foreign court; and
- vi) Which proceeding is for the purpose of reorganisation or liquidation.

Based on a review of the case, the proceedings commences in Country A, where the Bank's registered office is situated, and where it appears that the Bank conducted majority of its operations. That is, Country A can be considered as the Bank's Centre of Main Interest ("COMI").

Under legislation of Country A, specifically the Law of Country A on Bank and Banking Activity ("LBBA"), initial input is required from the National Bank ("NB") to determine if the Bank is troubled. If it is determined that the Bank is troubled, it will have 180 days to rectify the issue, failure of which, the Bank is recognised as insolvent.

The criteria for recognizing the bank as insolvent are:

- i) The bank's regulatory capital amount or standard capital ratios have reduced to one third of the minimum level specified by law; or
- ii) Within 5 consecutive working days, the bank has failed to meet 2% or more of its obligations to depositors or creditors; or
- iii) The Bank, having been declared as troubled, then fails to comply with an order of the NB and/or a request by the NB to remedy the violations of the banking law.

Based on the case, the Bank was declared as insolvent by the NB pursuant to the LBBA on 19 January 2015.

Following being declared as insolvent, the Deposit Guarantee Fund (DGF), a governmental body of Country A, is responsible for the process of withdrawing the banks from the market and winding down operations via liquidation, under the DGF Law.

From the above facts of the case, the key elements of the definition of Foreign Proceedings are met. That is,

Foreign law: the proceedings are judicial or administrative in nature, under the LBBA and is located in Country A. **Are they judicial or administrative and what does that entail?**

Collective in nature: it is collective in nature as the process is to withdraw the bank from the market by settling its assets and liabilities, of which an aim is to gain foreign recognition to pursue assets outside of Country A. Similarly, being a bank with deposit accounts, there will be many creditors. **What does collective in nature mean according to i.e. the Guide to Enactment?**

Law relating to insolvency: the law of which the proceedings are brought are under the LBBA and the DGF Law which are for the purposes of insolvency.

Court supervision: the DGF becomes in control of the assets, liabilities and operations of the Bank – that is, being duly appointed under the law and therefore by the supervision of the court. Nonetheless, under CBIR, the level of court supervision required under Model Law can be relatively low as court supervision can be potential, rather than be actual and it can also be indirect rather than direct.

For the purpose of reorganization or liquidation: The purpose of the LBBA and the DGF Law is to protect the bank's depositors in Country A and to ensure proper operation of the banks in the market. The proceedings referenced under these laws are for the purpose of maintaining stability in the market and therefore are intended for reorganization or liquidation as seen with the phases that the Banks go through such as being 'troubled' and having the NB step in as a first instance.

This answer does not explain the meaning of the requirements of art. 2(a). The answer should include the following discussions:

Recognition of the Bank's liquidation under the CBIR

1. In order to be recognised, the Bank's liquidation must meet the definition of "*foreign proceeding*" set out in article 2(a) of the MCBI.
2. Here reference can also be made to paragraphs 6.4.1 and 6.4.2 of the Guidance Text and in particular the *Agrokor* case discussed there.

"Collective proceeding"

3. UNCITRAL's guide for judiciary, "The Model Law on Insolvency: The Judicial Perspective" (2013) explains the requirement for proceedings to be "*collective*":

"The UNCITRAL Model Law was intended to apply only to particular types of insolvency proceedings. The Guide to Enactment and Interpretation indicates that the notion of a "collective" insolvency proceeding is based on the desirability of achieving a coordinated, global solution for all stakeholders of an insolvency proceeding. It is not intended that the Model Law be used merely as a collection device for a particular creditor or group of creditors who might have initiated a collection proceeding in another State, or as a tool for gathering up assets in a winding up or conservation proceeding that does not also include provision for addressing the claims of creditors. The Model Law may be an appropriate tool for certain kinds of actions that serve a regulatory purpose, such as receiverships for such publicly regulated entities as insurance companies or brokerage firms, provided the proceeding is collective as that term is used in the Model Law."

4. The Guide to Enactment and Interpretation of the UNCITRAL Model Law (2014) explains that when:

“evaluating whether a given proceeding is *collective* for the purpose of the Model Law, a key consideration is whether substantially all of the assets and liabilities of the debtor are dealt with in the proceeding, subject to local priorities and statutory exceptions, and to local exclusions relating to the rights of secured creditors. A proceeding should not be considered to fail the test of collectivity purely because a class of creditors’ rights is unaffected by it.”

5. Based on the facts provided the understanding is that *all* of the Bank’s creditors are entitled to claim in the liquidation and that their claims are met from available assets, according to the statutory order of priorities. Consequently, the conclusion can be reached that the Bank’s liquidation is a “*collective proceeding*”.

“Judicial or administrative” and “subject to the control or supervision by a foreign court”

6. The collective proceeding, must be “*judicial or administrative*” where “*the assets and affairs of the debtor are subject to control or supervision by a foreign court*”.
7. The term “*foreign court*” is defined at article 2(e) of the MLCBI and means: “*a judicial or other authority competent to control or supervise a foreign proceeding*”.
8. The Guide to Enactment notes: “87) *A foreign proceeding that meets the requisites of article 2, subparagraph (a), should receive the same treatment irrespective of whether it has been commenced and supervised by a judicial body or an administrative body. Therefore, in order to obviate the need to refer to a foreign non-judicial authority whenever reference is made to a foreign court, the definition of “foreign court” in subparagraph (e) includes also non-judicial authorities.*”
9. In ***Re Sanko Steamship Co Ltd*** [2015] EWHC 1031 (Ch) Simon Barker QC, noted that a foreign proceeding may be recognised where the control or supervision of the proceeding is undertaken by a non-judicial administrative body.
10. The Guide to Enactment states: “74) *The Model Law specifies neither the level of control or supervision required to satisfy this aspect of the definition nor the time at which that control or supervision should arise. Although it is intended that the control or supervision required under subparagraph (a) should be formal in nature, it may be potential rather than actual. As noted in paragraph 71, a proceeding in which the debtor retains some measure of control over its assets, albeit under court supervision, such as a debtor-in-possession would satisfy this requirement. Control or supervision may be exercised not only directly by the court but also by an insolvency representative where, for example, the insolvency representative is subject to control or supervision by the court. Mere supervision of an insolvency representative by a licensing authority would not be sufficient.*”
11. In this case the DGF has control of all of the Bank’s assets and overall control of the liquidation.
12. 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.
13. 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.
14. Taking these factors into account, the Bank’s liquidation is *administrative*. The assets and affairs of the Bank are subject to the control of the DGF, an official body which exercises its powers in the liquidation free from intervention by government or the NB and which should be considered, for the purposes of the definition set out in article 2(e) of the MLCBI, as a “*foreign court*”.

“Pursuant to a law relating to insolvency”

15. The Guide to Enactment provides at paragraph 48:

“Acknowledging that different jurisdictions might have different notions of what falls within the term “insolvency proceedings”, the Model Law does not define the term “insolvency”. However, as used in the Model Law, the word “insolvency” refers to various types of collective proceedings commenced with respect to debtors that are in severe financial distress or insolvent.”

Further explanation is provided at paragraph 73:

“This formulation is used in the Model Law to acknowledge the fact that liquidation and reorganization might be conducted under law that is not labelled as insolvency law (e.g. company law), but which nevertheless deals with or addresses insolvency or severe financial distress. The purpose was to find a description that was sufficiently broad to encompass a range of insolvency rules irrespective of the type of statute or law in which they might be contained and irrespective of whether the law that contained the rules related exclusively to insolvency.”

16. Article 76 of the LBBA clearly set out Country A’s specific insolvency procedures for insolvent banks. The Bank’s liquidation was commenced pursuant to those provisions and in my judgment should be considered by this Court as being *“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”

17. Having determined that the DGF falls within the definition of *“foreign court”*, I am satisfied, that by virtue of the legislative provisions set out above, it has control of all of the Bank’s assets and affairs for the purposes of administering the Bank’s liquidation.

Foreign Representative

As the proceedings have passed the test of being foreign proceedings, the next criteria to be met for a recognition application to be approved is whether it is being applied for by a foreign representative.

Under the MLCBI, there are specific key elements to be considered as a foreign representative; namely:

- i) A person or body; including one appointed on an interim basis;
- ii) Authorised in a foreign proceeding;
- iii) To administer the reorganisation or liquidation of the debtor’s assets or affairs or to act as representative of the foreign proceeding;

Prior to exploring whether the criteria are met, it is assumed that the DGF, as applicant, is the foreign representative, and any authorised representative appointed by the DGF such as the former Ms. C and the current Ms. G are extended the privileges of the DGF, excluding specific powers such as the power to claim damaged 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. These powers remain vested with the DGF.

Person or body: This criteria is met as the DGF is a governmental body that is tasked under the DGF Law to withdraw the bank from the market by liquidation. Similarly, Ms. G is an individual authorised by the DGF.

Authorised in a foreign proceeding: Following on from the first aspect of this analysis under sub-heading Foreign Proceedings above, these proceedings are classified as foreign proceedings, and the DGF is authorised under the LBBA and the DGF Law.

To administer the reorganisation or liquidation: This criteria is also met, as explored above, the purpose of the LBBA is, in the first instance, attempt to turn around the operations of the Bank, failing which is to withdraw the Bank from the market. Once the Bank is classified as insolvent, the DGF is authorised under the DGF law to being the process of removing the Bank from the market by first initiating provision administration, which commenced on 17 September 2015. Following provisional administration, the DGF became appointed as liquidator on 17 December 2015.

As the DGF and its representative have passed the criteria above, they are classified as foreign representative.

Again, the answer lacks an explanation of the meaning of the requirements. The facts should be considered more carefully, Does DGF and Ms G have powers and which ones to administer? And does the spilt in power mean anything in this regard?

*** End of Assessment ***