



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: 39,5 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] 9/10 marks

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

Question 1.1

Which of the following statements **incorrectly** reflects the main purpose of the Model Law?

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

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.

The correct answer is D

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] 9 marks

Question 2.1 [maximum 3 marks] 3 marks

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

Under the MLCBI, the date for to determine the COMI or establishment was not specifically addressed. The appropriate date is the date of commencement of the foreign proceeding taking into account of the evidences required for applying recognition under article 15. In case, the company ceased to operate after the commencement of proceedings, the COMI is still determinable based on the activities carried out by before the commencement date.

Besides, the date of the application for recognition may also be considered as appropriate date. By using this criterion, the court is not necessarily to study operation history of the company which may easily resulting in different interpretations on COMI in different courts.

The third one is the date the court is called upon to decide the application. Instead of having an arbitrary determination point, the court should be flexible and consider the facts relevant to its determination.

Finally, in case where the debtor has move COMI closely before the appropriate date set out above, the court should consider additional factors and take account of the debtor's situations more broadly. The key is whether the COMI is ascertainable by third parties.

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."*

For statement 1, according to Article 30(c) of MLCBI, it should be noted that the two foreign proceedings are priori should be treated equally. To exercise equality on relief granted, the court must grant, modify or terminate relief to facilitate coordination of the proceedings. The Court shall cooperate and coordinate with foreign courts and their representatives in accordance to articles 25, 26 and 27.

For statement 2, it refers to hotchpot rule in article 32 of MLCBI. Same class of creditors in different jurisdictions should be treated equally for the same payment. This article does not affect the ranking of claims is the enacting states, for example, this rule does not affect secured claims or right in rem.

For statement 3, it refers to article 16 of MLCBI. The undefined key concept is COMI which was interpreted similarly with the concept in EIR. Generally, COMI is presumed to be where the debtor's registered office is located, or habitually resided in case of an individual. However, such presumption can be rebutted by "head office function" test. All in all, COMI should be ascertainable and objective by third parties.

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 crux of the *IBA* case appeal is that whether an English law right can circumvent Gibbs Rule, a universalism principle, by seeking a permanent stay of the English law rights. The English Court of Appeal did not grant the indefinite Moratorium Continuation because it failed to demonstrated the stay is necessary to protect the interests of *IBA*'s creditors and the stay was not the appropriate way to achieve such protection.

For full marks on this question, it should also be mentioned that the English Court of Appeal held that Based on Article 18 of the MLCBI 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] 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**.

The relevant article is article 29(b), the court should review relief granted under either 19 or 21. In case the relief granted is inconsistent with the domestic insolvency proceedings, modification of termination is necessary.

The duty of information is set out in article 18, upon filing recognition application for the foreign proceeding, he is obligated to inform the court for substantial change in status of the recognised foreign proceeding or the status of the foreign representative's appointment. The foreign representative also required to report other foreign proceeding for the same debtor in case he notices one.

QUESTION 3 (essay-type questions) [15 marks in total] 7,5 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] 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?

By making a recognition application in State A, the foreign representative does not need to open a separate local proceeding in State A but still can access to tools and mechanism available to in State A by relief available in the Model Law. These coordination under Model Law significantly reduces time and costs for foreign representative to execute insolvency proceedings.

One of the examples is that the foreign representative can request court of State A to exercise discretionary power to protect the assets of the debtor or the interest of creditors under article 21 the Model Law. This includes but not limited to examining witness, taking evidence or delivery of information regarding the debtor's affairs in State A. The foreign representative can access power to suspended the debtor dealing with the assets to the extent allowed under Article 20(1)(C). These access rights allowed investigation can be conducted in a comprehensive manner and reduced the chance of dissipation of assets.

Tailor made relief may also be given when required, such flexibility to formulate custom-made solutions catering debtors and other interested parties which can lead to optimal results.

The locus standi access rules also signify the co-ordination between foreign representative and court in State A as it allowed directly communication between both parties without the need for separate proceedings.

This question deals with rights *prior* to the recognition, such as rights contained in art. 9, 11 and coordination rights in art. 25-27. For full marks on this question this should be addressed.

Question 3.2 [maximum 5 marks] 3 marks

For a recognition application in State A to be successful, the foreign proceeding opened in State B must qualify as a “foreign proceeding” within the meaning of article 2(a) of the MLCBI and the “foreign representative” must qualify as a foreign representative within the meaning of article 2(d) of the MLCBI. Assuming both qualify as such, list and briefly explain (with reference to the relevant MLCBI articles) any other evidence, restrictions, exclusions and limitations that must be considered, as well as the judicial scrutiny that must be overcome for a recognition application to be successful.

The foreign representative has to apply for the recognition and supply evidence according to Article 15. The foreign representative should submit the required documents as stated in Article 15.2(a) & (b), namely, a certified copy of the decision to commence the foreign proceedings and appointment of the foreign representative or a certificate from the foreign court affirming the same. In case the foreign representative cannot submit the requested documents, other evidence supporting the existence of the foreign proceedings and appointment will also be acceptable. The foreign representative is also obligated to supply a statement including all foreign proceedings in respect of the debtors that are known by him (Article 15.3).

Restrictions were set out in Chapter 17 of the MLCBI regarding the decision of recognition of foreign proceedings. As per paragraph 4 of Chapter 17, the recognition can be revoked if it lacks fully or partially grounds for granting. For example, from the principles established in *Sanko Steamship Co Ltd [2015]*, if the foreign proceedings in State B have terminated, then the court in State A can terminate the recognition process. In other words, for a recognition application to be successful, the proceedings in State B must not be terminated.

Secondly, in case of new facts may also overturn the recognition process. In *Sturgeon Central Asia Balanced Fund Ltd [2020]*, the recognition was rescinded as the Court noted that the objectives of the recognition are for providing returns to the shareholders instead of protecting creditor’s interests. The foreign representative in State B must ensure that the application must be made for the interest of creditors.

The following are some excluded situations in applying article 2(a) of the MLCBI,

According to UNCITRAL Guide to Enactment paragraph 55 and 56 and Paragraph 2 of Article 1, the debtor should be administered under a special regulatory regime in case it is a bank and insurance company, the recognition application will be rejected.

State A may exclude insolvency proceedings if the debtor is a public utilities company for policy reasons from applying the MLCBI. A special resolution may be required in cross-border insolvency cases.

Article 6 of the MLCBI explained judicial scrutiny concerns for recognition applications which are part of the limitations of the MLCBI. The recognition application may be refused if the action would be manifestly contrary to the public policy of State A. However, as indicated in the *Agrokor* case, a mere difference of public policy cannot meet the threshold of manifestly contrary to the public policy. It must affect the fundamental principle of law to qualify as a public policy exception.

In additions, the court of State A can refuse to grant a recognition if the court believed that the court decision in State B was the result of corruption. It also set out a limitation for making recognition application to become successful.

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

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

Question 3.3 [maximum 5 marks] 3 marks

As far as relief is concerned, briefly explain (with reference to the relevant MLCBI articles) what pre- and post-recognition relief can be considered in the context of the MLCBI, as well as any restrictions, limitations or conditions that should be considered in this context. For purposes of this question, it can be assumed that there is no concurrence of proceedings.

Upon recognition application is filed in State A, the Court may grant urgent relief to protect the debtor's assets as well as creditors' interests under article 19 of MLCBI. These reliefs included,

- 1) staying execution against the debtor's assets,
- 2) realising debtor's assets, which are perishable, in jeopardy, susceptible to devaluation, and
- 3) any relief mentioned in paragraph 1 (c), (d) and (g) of article 21.

As these reliefs are provisional nature, it will be terminated when the decision of recognition application is made unless extensions of article 21 paragraph 1(f) is made.

Upon recognition application is decided, the court in State A may grant relief on the basis that is necessary for protecting debtor's assets, creditor's interest and at the request of the foreign representative under article 21 of MLCBI. Some of reliefs include providing examination of witness, taking evidence and handing over debtor's assets in State A to the foreign representative upon his request.

However, as stated in article 21 of paragraph 2, before handing over debtor's assets to the foreign representative, it should be noted that the interests of local creditors in State A should be adequately protected. This restricts the scope of relief that can be granted by State A.

As stated in Article 22, in granting those reliefs, the court has to consider the interests of the persons whom was affected by the relief. Balancing interests of different parties are pre-requisite and guidance for relief granted. Subjects to conditions stated in article 22(2), bespoke relief is encouraged to maximized flexibility and reliability.

The scope of relief is not limited. It is noted the English Court judgements in 3 cases have set certain limits to the scope of relief. While the case Rubin v Eurofinance SA which dealt with individual insolvency may not be relevant in this question. The principle in Fibria Celulose S/A

v Pan Ocean Co Ltd and the IBA case may be applicable to the question. According to paragraph 1 of article 21 that the relief that may be granted under article 21 can only reflect the relief that could be ordered in case of domestic insolvency. In Fibria Celulose S/A v Pan Ocean Co Ltd, article 21 has nothing to say on recognising and enforcing foreign judgements. In IBA case, relief granted should not substantively change a creditor's claim. Recognition of a foreign discharge order was out of scope for relief available under MLCBI.

Great answers. However, for full marks on this question, the following should also be addressed:

1. Existing international obligations of State A: Based on Article 3 of the Model Law, the court in State A should again verify that there are no existing international obligations of State A (under a treaty or otherwise) that may conflict with granting the requested relief under the implemented Model Law in State A.
2. Public policy exception: The court in State A should, based on Article 6 of the Model Law, also again verify that the relief application is not manifestly contrary to public policy of State A.

Question 3.4 [maximum 1 mark] 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?

Court in State A must strike a balance between the relief granting to foreign representative and the interests of the persons may be affected under Article 22 of Model Law. Given a worldwide freezing order will have a broad effect on unrelated individuals that cannot be reasonably justified by the foreign representative. The interim relief grant under article 19 MLCBI may be terminated or modified by article 21 MLCBI.

For full marks, it should be addressed that art. 21 after recognition provide for another form of protection on the debtors asset which mean that the relief in form of a freezing order is no longer 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]

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]; 9 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.

Answer to 4.1.1

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.

In article 2(a) of the MLCBI, foreign proceeding should contain the following elements which:

- 1) a judicial or administrative proceeding (include an interim proceeding),
- 2) collective in nature,
- 3) is authorised or conducted under insolvency law,
- 4) foreign court supervise or control the debtor's affairs and assets, and
- 5) purposely made for reorganisation or liquidation.

Judicial or administrative proceeding

The actions taken by NB and DGF also fell into the definition of "proceeding" that is a statutory framework that constrains the Bank's actions and that regulates the final distribution of the Bank's assets.

The proceeding appeared to be administrative nature as that the proceeding was triggered by the Bank failure to comply with the criteria under LBBA which subsequently leading to insolvent classification by NB. A statutory body, DGF, was appointed as interim liquidator whom delegate a wide range of powers under DGF Law, including sales of the Bank's assets,

to the provisional liquidator, Ms G. All of the actions taken are by government body and within statutory provisions of insolvency law in country A.

Collective in nature

According to UNCITRAL Guide to Enactment, the proceeding is collective if substantially all of the assets and liabilities of the debtors are dealt with, subject to local priorities and statutory exceptions, and to local exclusions regarding the secured creditors' rights.

The Bank was in trouble due to fraudulent behaviour of remitting funds to overseas entity which affecting the interests of creditors which nearly half of the Bank's liabilities related to individual loans. By appointment of liquidator, it was likely that DGF will delegate its power to sell the Bank's assets and to satisfy their claims. The liquidation process was initiated in regulatory purpose and was supervised by competent authority. It also benefits of creditors to prevent further dissipation of assets without favouring particular class of creditors.

Authorised or conducted under insolvency law

MLCBI stated that the proceedings should be pursuant to law relating to insolvency. LBBA and DGF Law are adopted in the proceedings which principally dealt with company in financial distress. This falls into the broad definition of "pursuant to law relating to insolvency" under MLCBI.

Given that the Bank creditor's claims over its assets on hand and was in a deficit position, the actions bought by DEF apparently are not merely for dismissing its legal status but made for liquidating the Bank.

According to the decision for *Standford International Bank* at court of first instance and appellate court, the liquidation commenced in Country A on just and equitable grounds against the Bank based upon regulatory misbehaviour, a fraud, was "pursuant to a law relating to insolvency".

Foreign court supervise or control the debtor's affairs and assets

The proceedings can be viewed as under supervision/control as no distinction is made between judicial or administrative body. MLCBI also covers situation where insolvency representative was appointed. In this case, the power of Ms C and Ms G are delegated from DGF, they are supervised or control by regulatory authority of Country A.

Subparagraph (a) of article 2 stated that both assets and affairs of the debtor should be subject to control or supervision. According to article 34, 35(5) and 36(1) of the DGF Law, it can administrate the Bank's affairs and has all powers of the bank's management upon the commencement of provisional administration. Upon appointment of DGF as liquidator, it will be empowered to find, identify, recover and dispose the Bank's assets. These provisions allowed DGF control assets and affairs of the Bank.

Purposely made for reorganisation or liquidation

The proceeding appeared to be made for liquidation as it was initiated by governmental body due to insolvency of the Bank. Protecting the investors, being Mr Z and other minority shareholders, is not the agenda of the proceeding. The powers conferred to Ms. G and held by DGF is typically associated with liquidation.

Great answer. For full marks on this question, a few more arguments and description on the requirement of the proceeding and DGF as administrative and an administrative body should be made, i.e. reference to the DGF's independence

Answer to 4.1.2

According to article 2(d), the definition of foreign representative is

- 1) a person or body, including one appointed on an interim basis;
- 2) authorised in a foreign proceeding;
- 3) to administrate the reorganisation or liquidation of the debtor's assets or affairs or to act as representative of the foreign proceedings.

A person or body, including one appointed on an interim basis

Both Ms.G, a natural person, and DGF, a governmental body created by legal authority, meet the first criteria. Noted that Ms. G is only appointed in an interim basis, liquidator is yet not appointed, it does not affect the status of being foreign representative.

Authorised in a foreign proceeding

Pursuant to DGF Law and LBBA, DGF has authority to administrate the proceedings in Country A as liquidator after NB revoke the Bank's license which has taken place on 17 December 2015. Meanwhile, Ms.G, being the representative of DGF, was properly appointed in Resolution 1513. Although both of them is not authorised by the court in Country A, it will be sufficient as the Applicant has extensive power to handle the Bank's affairs "in the course of" or "in the context of" the proceedings which is more important than who providing authority.

To administrate the reorganisation or liquidation of the debtor's assets or affairs or to act as representative of the foreign proceedings

Pursuant to Resolution 1513, Ms. G has been delegated liquidation powers as set out in DGF law. Although some of her power, for example, the power to arrange for the sale of the Bank's assets, was curtailed, she stills able administrate the liquidation of the debtor's affairs. Moreover, such curtailed powers are still in DGF hands. The Applicants has administrated the liquidation, it meet this criteria.

*** End of Assessment ***