



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: 37,5 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] 6 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.**

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.

The appropriate date for determining a debtor's COMI, or whether an establishment exists, is the date of commencement of the foreign proceeding. It should be noted that the court in the USA took a slightly different approach towards the date for determination of the debtor's COMI, holding that a court may consider the period between the commencement of the foreign insolvency proceeding and the filing of the Chapter 15 petition to ensure that a debtor has not manipulated its COMI in bad faith. As far as COMI factors are concerned, the US court further held that any relevant activities, including liquidation activities and administrative functions, may be considered in the COMI analysis. This US approach has now been followed in the UK.

Question 2.2 [maximum 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 refers to Article 30(c), "Coordination of more than one foreign proceeding".

Statement 2 refers to Article 32, "Rule of payment in concurrent proceedings" (also known as the "hotchpot rule").

Statement 3 refers to Article 16(3), "Presumptions concerning recognition" (relating to where a debtor's COMI is taken to be).

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 *IBA* case involved a foreign representative (following an earlier recognition order under the UK Cross Border Insolvency Regulations 2006 ("**CBIR**")) requesting relief under Article 21 of the Model Law in the form of an indefinite continuation of the automatic moratorium that resulted from the earlier recognition order.

The application for such relief was contested by two creditors. At first instance, the key question was whether the principles of modified universalism as expressed in the common law and the Model Law enabled the court to grant relief aiming to advance those principles without upsetting the Gibbs Rule – i.e. that a debt governed by English law cannot be discharged or compromised by a foreign insolvency proceeding. In particular the question was whether the Gibbs Rule can formally be observed by accepting the continuation of rights which English law confers, while at the same time giving effect to the Model Law and modified universalism by preventing the exercise of those rights by a stay or moratorium.

The relief sought was denied at first instance, the judge holding that a permanent stay cannot be deployed as a way round the Gibbs rule. The Court of Appeal upheld this decision and held that an English Court could only properly grant the indefinite moratorium continuation if it were satisfied that (1) the stay was necessary to protect the interests of the creditors, and (2) the stay would have been an appropriate way of achieving such protection. The Court of Appeal held that neither of these conditions had been satisfied.

For full marks, issue 2 of the following should also be addressed:

ANSWER

- According to the English Court of Appeal, the real issue was whether as a matter of settled practice the UK court should not exercise its power to grant the indefinite moratorium where to do so would (i) in substance prevent the English creditors (that is the Challenging Creditors) from enforcing their English law rights in accordance with the Gibbs Rule

("Issue 1") and / or (ii) prolong the stay after the Azeri reconstruction has come to an end ("Issue 2").

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

Question 2.4 [2 marks] 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**.

Pursuant to Article 29(a) of the Model Law, where a domestic proceeding is already taking place and an application for recognition of the foreign proceeding is filed, any relief granted under articles 19 or 21 of the Model Law must be consistent with the domestic proceedings.

Pursuant to Article 18 of the Model Law, the foreign representative has an ongoing obligation, from the time of filing the recognition application, to update the court in the enacting State promptly on developments relating to (1) any substantial change in the status of the foreign proceeding or the status of the foreign representative's appointment, and (2) any other foreign proceeding regarding the same debtor that becomes known to the foreign representative.

QUESTION 3 (essay-type questions) [15 marks in total] 10,5 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] 4 marks

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

Articles 9-14 of the Model Law provide for standing before the courts in the enacting State (State A) for both the foreign representative and creditors, as well as non-discrimination principles ensuring that foreign creditors have the same rights as local creditors.

The access granted to a foreign representative under the Model Law is primarily standing in the courts of the enacting State (State A) without the need to meet formal requirements such as licenses or consular action. Article 9 expresses this principle of direct access.

Helpfully, no recognition of the foreign proceeding opened in State B is required in State A to provide the foreign representative with standing in the courts of State A (although it should be noted that such access does not automatically vest the foreign representative with any other rights and powers).

Article 11 also gives the foreign representative standing to open domestic insolvency proceedings in State A, provided all the necessary requirements are met.

These access rights are helpful to the foreign representative because they ensure that local tools are available to him/her without the need for any separate proceedings in the enacting State to obtain such standing. This saves both time and costs.

Article 25(1) is of further assistance to the foreign representative since it provides that courts must co-operate to the maximum extent possible with foreign courts or foreign representatives.

Question 3.2 [maximum 5 marks] 2 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.

Under article 15 of the Model Law, an application for recognition must be accompanied by:

1. A certified copy of the decision commencing the foreign proceeding and appointing the foreign representative; or
2. A certificate from the foreign court affirming the existence of the foreign proceeding and of the appointment of the foreign representative; or
3. In the absence of any of the evidence referred to above, any other evidence acceptable to the court of the existence of the foreign proceeding and the appointment of the foreign representative.

Any application for recognition must also be accompanied by a statement which identifies all foreign proceedings in respect of the debtor that are known to the foreign representative.

The court may require a translation of documents supplied in support of the application for recognition into an official language of the enacting state.

It is important to note that in making the recognition application, the foreign representative has a duty of full and frank disclosure to the court in the enacting State. If he/she breaches this obligation, for example by falsely claiming that the COMI of the debtor is in a particular State, or the foreign representative has improper alternative motives for the recognition application which are not disclosed to the court, the court in the enacting State could consider this to be an abuse of process based on its domestic law rules which could affect the recognition application.

Article 6 of the Model Law contains the "public-policy exception", which is the ultimate safeguard to the enacting State's sovereignty. It provides that nothing in the Model Law prevents the court in the enacting State from refusing to take an action governed by the Model

Law if it would be manifestly contrary to that State's public policy. Although as a general rule this exception should rarely be the basis for refusing an application for recognition, it is a possibility.

The court of the enacting State will also need to determine, in accordance with Article 12(2), whether the debtor's COMI is in the foreign state in which the foreign proceedings are opened or whether the debtor just has an establishment in the foreign State where the foreign proceedings were opened. This will determine whether the foreign proceedings can be recognised as foreign main proceedings or foreign non-main proceedings.

If neither the COMI nor an establishment of the debtor exists in the foreign State where the foreign proceedings were opened, the court in the enacting State will have to deny the recognition application altogether.

For full marks, reference should also be made to art. 1(2) exclusions and art 3 on restrictions.

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.

Even prior to a decision on a recognition application, the court in the enacting State is entitled to grant urgently needed interim relief upon the application for recognition of a foreign proceeding, pursuant to Article 19 of the Model Law, in order to protect the assets of the debtor or the interests of the creditor. This relief can include a stay of execution against the debtor's assets.

Pursuant to Article 20, the recognition of a foreign main proceeding has three automatic effects:

1. A stay of the commencement or continuation of individual actions or individual proceedings concerning the debtor's assets, rights, obligations or liabilities;
2. A stay of execution against the debtor's assets; and
3. A suspension of the right to transfer, encumber or otherwise dispose of any assets of the debtor.

These automatic consequences allow time for steps to be taken to organise a fair and orderly cross-border insolvency proceeding.

Upon recognition of a foreign proceeding (whether main or non-main), Article 21(1) provides the court in the enacting State with the discretionary power to grant appropriate relief, where such relief is necessary to protect the assets of the debtor or the interests of the creditors and at the request of the foreign representative. This might include:

1. Staying the commencement or continuation of individual actions or individual proceedings concerning the debtor's assets, rights, obligations or liabilities, to the extent they have not been automatically stayed under Article 20(1)(a);
2. Providing for the examination of witnesses, the taking of evidence or the delivery of information concerning the debtor's assets, affairs, rights, obligations or liabilities.

Although Article 20(1) is drafted broadly, the appropriate relief the court of the enacting State can grant is not unlimited. For example, the English Supreme Court has concluded that the

enforcement of an insolvency related *in personam* default judgment is not covered by the Model Law.

Article 22 provides that, in granting or denying any relief based on either Article 19 (interim pre-recognition relief) or Article 21 (discretionary post-recognition relief) the court in the enacting State must be satisfied that the interests of the debtor's creditors and other interested parties are adequately protected. The court is therefore granted the power to subject relief to conditions it considers appropriate, and at the request of the foreign representative or an affected person the court may further modify or terminate the relief.

Again, for full marks, references should also be made to art. 3 and art. 6 on public policy.

Question 3.4 [maximum 1 mark] 1/2

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?

The freezing order would be unnecessary post-recognition because, upon recognition, there is an automatic suspension of the right to transfer, encumber or otherwise dispose of any asset of the debtor, which should have the same effect as the freezing order.

For full mark it should be noted that the question refers to art 21 and not the automatic recognition. Also on a discretionary basis there is adequate protection available in art. 21

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

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

(1) Background

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

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

Proceedings were issued in the High Court of England and Wales (Chancery Division) against various defendants on 11 February 2021 (the English Proceedings).

An affidavit (the Affidavit) sets out a detailed summary of the legislation of Country A's specific insolvency procedure for Banks. The procedure involves initial input from the National Bank (the NB) and at the time that the Bank entered liquidation, followed a number of stages:

Classification of the bank as troubled

The NB may classify a bank as "troubled" if it meets at least one of the criteria set down by article 75 of the Law of Country A on Banks and Banking Activity (LBBA) or for any of the reasons specified in its regulations.

Once declared “troubled”, the relevant bank has 180 days within which to bring its activities in line with the NB’s requirements. At the end of that period, the NB must either recognise the Bank as compliant, or must classify it as insolvent.

Classification of the bank as insolvent

The NB is obliged to classify a bank as insolvent if it meets the criteria set out in article 76 of the LBBA, which includes:

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

The NB has the ability to classify a bank as insolvent without necessarily needing to first go through the troubled stage. Article 77 of the LBBA accordingly provides that a bank can be liquidated by the NB directly, revoking its licence.

Provisional administration

The Deposit Guarantee Fund (DGF) is a governmental body of Country A tasked principally with providing deposit insurance to bank depositors in Country A. However, the Affidavit explained that the DGF is also responsible for the process of withdrawing insolvent banks from the market and winding down their operations via liquidation. Its powers include those related to early detection and intervention, and the power to act in a bank’s interim or provisional administration and its ultimate liquidation.

Pursuant to article 34 of the DGF Law, once a bank has been classified as insolvent, the DGF will begin the process of removing it from the market. This is often achieved with an initial period of provisional administration. During this period:

- (i) the DGF (acting via an authorised officer) begins the process of directly administering the bank’s affairs. Articles 35(5) and 36(1) of the DGF Law provide that during provisional administration, the DGF shall have full and exclusive rights to manage the bank and all powers of the bank’s management.
- (ii) Article 36(5) establishes a moratorium which prevents, *inter alia*: the claims of depositors or creditors being satisfied; execution or enforcement against the bank’s assets; encumbrances and restrictions being created over the bank’s property; and interest being charged.

Liquidation

Liquidation follows provisional administration. The DGF is obliged to commence liquidation proceedings against a bank on or before the next working day after the NB’s decision to revoke the bank’s licence.

Article 77 of the LBBA provides that the DGF automatically becomes liquidator of a bank on the date it receives confirmation of the NB's decision to revoke the bank's licence. At that point, the DGF acquires the full powers of a liquidator under the law of Country A.

When the bank enters liquidation, all powers of the bank's management and control bodies are terminated (as are the provisional administrators' powers if the bank is first in provisional administration); all banking activities are terminated; all money liabilities due to the bank are deemed to become due; and, among other things, the DGF alienates the bank's property and funds. Public encumbrances and restrictions on disposal of bank property are terminated and offsetting of counter-claims is prohibited.

As liquidator, the DGF has extensive powers, including the power to investigate the bank's history and bring claims against parties believed to have caused its downfall. Those powers include:

- (i) the power to exercise management powers and take over management of the property (including the money) of the bank;
- (ii) the power to compile a register of creditor claims and to seek to satisfy those claims;
- (iii) the power to take steps to find, identify and recover property belonging to the bank;
- (iv) the power to dismiss employees and withdraw from/terminate contracts;
- (v) the power to dispose of the bank's assets; and
- (vi) the power to exercise "such other powers as are necessary to complete the liquidation of a bank".

The DGF also has powers of sale, distribution and the power to bring claims for compensation against persons for harm inflicted on the insolvent bank.

However, article 48(3) of the DGF Law empowers the DGF to delegate its powers to an "authorised officer" or "authorised person". The "Fund's authorised person" is defined by article 2(1)(17) of the DGF Law as: "*an employee of the Fund, who on behalf of the Fund and within the powers provided for by this Law and / or delegated by the Fund, performs actions to ensure the bank's withdrawal from the market during provisional administration of the insolvent bank and/or bank liquidation*".

Article 35(1) of the DGF Law specifies that an authorised person, must have: "*...high professional and moral qualities, impeccable business reputation, complete higher education in the field of economics, finance or law...and professional experience necessary.*" An authorised person may not be a creditor of the relevant bank, have a criminal record, have any obligations to the relevant bank, or have any conflict of interest with the bank. Once appointed, the authorised officer is accountable to the DGF for their actions and may exercise the powers delegated to them by the DGF in pursuance of the bank's liquidation.

The DGF's independence is addressed at articles 3(3) and 3(7) of the DGF Law which confirm that it is an economically independent institution with separate balance sheet and accounts from the NB and that neither public authorities nor the NB have any right to interfere in the exercise of its functions and powers.

Article 37 establishes that the DGF (or its authorised person, insofar as such powers are delegated) has extensive powers, including powers to exercise managerial and supervisory

powers, to enter into contracts, to restrict or terminate the bank's transactions, and to file property and non-property claims with a court.

(2) The Bank's liquidation

The Bank was formally classified by the NB as "troubled" on 19 January 2015. The translated NB resolution records:

"The statistical reports-based analysis of the Bank's compliance with the banking law requirements has found that the Bank has been engaged in risky operations."

Those operations included:

- (i) a breach, for eight consecutive reporting periods, of the NB's minimum capital requirements;
- (ii) 10 months of loss-making activities;
- (iii) a reduction in its holding of highly liquid assets;
- (iv) a critically low balance of funds held with the NB; and
- (v) 48% of the Bank's liabilities being dependent on individuals and a significant increase in "adversely classified assets" which are understood to be loans, whose full repayment has become questionable.

Despite initially appearing to improve, by September 2015 the Bank's financial position had deteriorated further with increased losses, a further reduction in regulatory capital and numerous complaints to the NB. On 17 September 2015, the NB classified the Bank as insolvent pursuant to article 76 of the LBBA. On the same day, the DGF passed a resolution commencing the process of withdrawing the Bank from the market and appointing Ms C as interim administrator.

Three months later, on 17 December 2015, the NB formally revoked the Bank's banking licence and resolved that it be liquidated. The following day, the DGF initiated the liquidation procedure and appointed Ms C as the first of the DGF's authorised persons to whom powers of the liquidator were delegated. Ms C was replaced as authorised officer with effect from 17 August 2020 by Ms G.

Ms G's appointment was pursuant to a Decision of the Executive Board of the Directors of the DGF, No 1513 (Resolution 1513). Resolution 1513 notes that Ms G is a "leading bank liquidation professional". It delegates to her all liquidation powers in respect of the Bank set out in the DGF Law and in particular articles 37, 38, 47-52, 521 and 53 of the DGF Law, including the authority to sign all agreements related to the sale of the bank's assets in the manner prescribed by the DGF Law. Resolution 1513 expressly excludes from Ms G's authority the power to claim damages from a related party of the Bank, the power to make a claim against a non-banking financial institution that raised money as loans or deposits from individuals, and the power to arrange for the sale of the Bank's assets. Each of the excluded powers remains vested in the DGF as the Bank's formally appointed liquidator.

On 14 December 2020, the Bank's liquidation was extended to an indefinite date, described as arising when circumstances rendered the sale of the Bank's assets and satisfaction of creditor's claims, no longer possible.

On 7 September 2020, the DGF resolved to approve an amended list of creditors' claims totalling approximately USD 1.113 billion. The Affidavit states that the Bank's current, estimated deficiency exceeds USD 823 million.

QUESTION 4.1 [maximum 15 marks]

Prior to any determination made in the English Proceedings, Ms G, in her capacity as authorised officer of the Deposit Guarantee Fund (or DGF) of Country A in respect of the liquidation of the Commercial Bank for Business Corporation (the Bank), together with the DGF (the Applicants), applied for recognition of the liquidation of the Bank before the English court based on the Cross-Border Insolvency Regulations 2006 (CBIR), the English adopted version of the MLCBI.

Assuming you are the judge in the English court considering this recognition application, you are required to discuss:

4.1.1 whether the Bank's liquidation comprises a "foreign proceeding" within the meaning of article 2(a) of the MLCBI **[maximum 10 marks]; 9 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.

4.1.1.

The definition of "foreign proceeding" in the Model Law has a number of elements to it.

The first is that there has to be a proceeding, which can include interim proceedings. It appears from the facts above that there are insolvency proceedings underway in Country A. The NB formally revoked the Bank's licence on 17 December 20215 and the following day the DGF initiated the liquidation procedure and appointed the first authorised person.

Second, the proceeding must be judicial or administrative. While the liquidation procedure in Country A does not appear to be judicial as there seems to be limited Court involvement, it should qualify as administrative in nature as when the Bank enters liquidation, the DGF automatically becomes liquidator and all powers of the Bank's management and control bodies are terminated and the DGF has extensive powers to take over the management of the property of the bank. Furthermore, DGF is an economically independent institution with a separate balance sheet from the NB, and neither public authorities nor the NB have any right to interfere in the exercise of its functions and powers.

The proceeding must also be collective in nature. 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. These proceedings seem to meet this requirements since the DGF has extensive powers in relation to the Bank's assets and liabilities, including the power to take steps to find, identify and recover property belong to the Bank, and the power to dispose of the Banks' assts.

The proceeding must be in a foreign state, which is clearly met in this situation.

The proceeding must be authorised or conducted under a law relating to insolvency. It is important to note that the Model Law does not require "insolvency law" as a label. Rather, it is sufficient if the law deals with or addresses insolvency or severe financial distress. This requirement appears to be met here because the Law of Country A on Banks and Banking Activity sets out the requirements for a bank to be considered "troubled" i.e. in financial distress.

A further requirement is that the assets and affairs of the debtor are subject to control or supervision by the foreign court. The level of court supervision required by the Model Law is relatively low. Under the CBIR, which applies in this case, such court supervision can be potential rather than actual and indirect rather than direct. It has been held previously that the fact that the foreign law gave some control to the government did not negate the supervision of the court. In the present case, the DGF is a governmental body, so the proceeding is almost entirely under the control of the government, and the court seems to have very little input or oversight. This may, potentially, be a bar to the proceeding being recognised as a foreign proceeding before the English court.

Finally, the foreign proceeding must be for the purpose of reorganisation or liquidation. That requirement is clearly met in the present case, as the DGF is responsible for the process of withdrawing insolvent banks from the market and winding down their operations via liquidation.

For full marks more reference should be made to the interpreting tools such as the guide to enactment or court cases. However, great answer!

4.1.2.

A foreign representative must meet the following criteria:

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

The foreign representative need not be authorised by the foreign court.

Ms. G. clearly meets these requirements, as she is authorised by the DGF and performs actions on behalf of DGF to ensure the bank's withdrawal from the market and pursuance of the bank's liquidation. The DGF also appears to meet these requirements, as it is a government body tasked with withdrawing insolvent banks from the market and winding down their operations via liquidation.

For full marks on this question it should have a more elaborate discussion on the interpretation of the requirement and applying the fact more thoroughly including a discussion on the delegation of powers.

*** End of Assessment ***