



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: 31,5 out of 50 marks

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] 5 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] 7,5 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 is for determining the COMI of a debtor, or whether an establishment exists is the date of the commencement of the foreign proceedings.

However, it should be noted that in the case of *Morning Mist Holdings Ltd v Kryz (Matter of Fairfield Sentry Ltd)* (2nd Cir Appeals) (as US judgment) the court held, taking an alternative approach, that:

"A debtor's COMI should be determine based on its activities at or around the time the Chapter 15 petition is filed, as the statutory text suggest. But given the EIR and other international interpretations, which focus on the regularity and ascertainability of the debtor's COMI, a court may consider the period between the commencement of the foreign insolvency proceedings and the filing of the Chapter 15 petition to ensure that a debtor has no manipulated its COMI in bad faith."

This approach has been positively received in other jurisdictions, such as the UK, which could lead to the appropriate date for determining the COMI of a debtor being slightly different to the date of the commencement of the foreign proceedings.

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.*”

Article 30(c) – Provides guidance in the event of two concurrent foreign non-main proceedings, the court must grant, modify or terminate relief for the purpose of facilitating of the proceedings.

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

Article 32 and/or Hotchpot Rule

Article 32 provided:

Without prejudice to secured claims or rights in rem, a creditor who has received part payment in respect of its claim in a proceeding pursuant to a law relating to insolvency in a foreign State, may not receive a payment for the same claim in a [domestic proceeding in the enacting State] regarding the same debtor, so long as the payment to the other creditors of the same class is proportionally less than the payment the creditor has already received.

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

Article 16 has the rebuttable presumption that the debtor's registered office, or habitual residence in the case of an individual, is presumed to be the centre of the debtor's main interest (the COMI). However, COMI is not defined by the MLCBI.

[Type your answer here]

Question 2.3 [2 marks] ½ 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, one of the primary consideration was the application of the *Gibbs Rule*. The *Gibbs Rule*, in effect, holds that a debt governed by English law cannot be discharged or compromised by a foreign insolvency proceedings. In the *IBA* case, relief was sought under article 21 of the Model Law in the form of an indefinite continuation of the automatic moratorium, which would have resulted in certain creditors not being able to pursue claims under a contract governed by English Law.

Accordingly, after much consideration, it was Mr Justice Hildyard's opinion that a permanent stay cannot be deployed as the way around the *Gibbs Rule*.

He concluded that "*there is presently and at this level no real doubt but as to the continued application of the rule in Gibbs [...] there is similarly no real doubt that the fact of foreign insolvency, even one recognised formally in the jurisdiction, is not of itself a gateway for the application of foreign insolvency laws or rules or given them 'overriding effect' over ordinary principles of English contract law*".

Accordingly, Justice Hildyard upheld the decision that the court should not exercise its power to grant the indefinite Moratorium Continuation.

The question relates to the appeal case not the arguments from Justice Hildyard.

Question 2.4 [2 marks] 1 mark

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**.

Article 20 of the MLCBI provides that where there is recognition of a foreign main proceeding:

1. A stay of the commencement (or relevantly) 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.

The above steps are supposed to allow time for steps to organise cross-border proceedings.

However, Article 22 provides that the Court in the enacting State must strike a balance between the relief that may be granted to the foreign representative and the person who is, or may be affected by the relief. In particular, this includes creditors, the debtor and other interest parties.

Art. 29 (a) on concurrent proceedings is the correct answer

Article 18 of the MLCBI places the foreign representative under an ongoing obligation to update the Court on developments. This obligation exists from the time of filing the recognition application and requires the foreign representative to promptly inform the court of:

1. any substantial change in the status of the recognised foreign proceeding or the status of the foreign representative's appointment; and
2. if the foreign representative becomes aware of any other foreign proceedings regarding the same debtor .

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

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

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

Question 3.1 [maximum 4 marks] 2 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?

There are certain access and co-ordination rights provided for in the Model Law which would benefit the foreign representative in State A (as the enacting state) which would be available to the foreign representative prior to the foreign proceedings being recognised.

Firstly, the *locus standi* provisions, provides that the foreign representative has standing in the Courts in the enacting state. In particular:

Article 9 provides that no recognition of the foreign proceeding is required in the enacting State, being State A, to provide the foreign representative with standing in the courts of the enacting State.

Article 11 provides the foreign representative with the ability to request the commencement of a domestic insolvency proceeding in the enacting State, without recognition of the foreign proceedings,

The "safe conduct" rules (provided for in Article 10) provides that once a recognition application has been made (assuming prior to it being granted) the Court in the enacting State does not assume jurisdiction over all the assets of the debtor.

Finally, the Model Law does not have any reciprocity requirement. Therefore, per the scenario above, the foreign proceeding would not be denied recognition solely on the basis that the court in the State in which the foreign proceeding was commenced (or in this case the Enacting State) does not have any reciprocity provisions.

For full marks reference should be made to art. 25-27 and an overall conclusion that access rights are time and cost preserving.

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.

Evidence

Article 15 provides that an application for recognition will enclose one of the following:

1. A certified copy of the decision commencing the foreign proceedings 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. Where the evidence sought in paragraph 1 and 2 above is not available, any other evidence acceptable to the Court of the existence of the foreign proceeding and the appointment of the foreign representative.

Further there is a requirement for recognition to be accompanied by a statement identifying all foreign proceedings in respect of the debtor that are known to the foreign representative.

Exclusions

While the Model Law ought to apply to any proceeding that qualifies as a "foreign proceeding" (as defined in Article 2(a)):

- a. banks and insurance companies are mentioned as examples of entities that the enacting State might decide to exclude from the Model law as they (sometimes) are required to be administered under specialty regimes.;
- b. public utility companies or consumers/non-traders could also require special solutions.

Abuse of Process

The enacting state is left to determine what is or constitutes an abuse of process as the Model Law does not contain any provisions on abuse of process. Accordingly, a foreign representative has an obligation of full and frank disclosure to the Court in the enacting State. Failure to do so could lead to the enacting State considering it to be an abuse of process.

Further, pursuant to Article 18, the foreign representative has an obligation (which commences as the time of filing the application for recognition) to update the court on developments. This includes:

1. any substantial changes in the status of the recognised foreign proceeding or the status of the foreign representative's appointment; and
2. any other foreign proceedings regarding the same debtor become known to the foreign representative.

For full marks, the following should also be included:

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.
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.

Pre-recognition relief

Article 19 provides for that an enacting State may grant provision relief, upon the request of the foreign representative, from the time of filing the recognition application. This relief can include, *inter alia*:

1. stay of execution against the debtor's assets;
2. providing the foreign representative (or any other person appointed by the Court) with the administration of all or part of the debtor's assets located in the enacting State in order to protect and preserve the value of the asset; and

3. certain post-recognition relief provided for in Article 21, including:
 - a. suspending the right to transfer, encumber or otherwise dispose of any assets of the debtor;
 - b. ability to examine witnesses or take evidence or delivery of information regarding the debtor's assets, affairs, rights, obligations or liabilities; and
 - c. granting of relief which may be available to a domestic liquidator pursuant to the laws of the enacting State.

Post-recognition relief

Article 20 provides three automatic effects upon the recognition of a foreign main proceeding:

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

Article 21(1) provides discretionary power to the court of the enacting state to protect the assets of the debtor or interest of creditors at the request of the foreign representative. This can include the power to:

1. staying the commencement or continuation of individual actions or proceedings which relate to or concern the debtor's assets, rights, obligations or liabilities (to the extent they were not automatically stayed under Article 20(1)(a)).
2. staying execution against the debtor's assets to the extent they were not automatically stayed under Article 20(1)(b)).
3. The relief provided for above under 3(a)-(c);
4. extending interim relief granted pursuant to Article 19(1);

Granting additional relief that may be available to a liquidator under the laws of the enacting State.

Further, Article 21 provides the court of the enacting State with the discretionary power to hand over all or part of the debtor's assets located in the enacting state of the foreign representative (provided that the Court is satisfied that the interests of the local creditors in the enacting State are adequately protected).

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

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] 1 mark

Briefly explain why a worldwide freezing order granted as pre-recognition interim relief ex article 19 MLCBI, is unlikely to continue post-recognition ex article 21 MLCBI?

The worldwide freezing order granted pursuant to Article 19 of the Model Law provides "breathing space" until appropriate measures can be taken (for instance, a reorganisation or

liquidation). This ensures that money and property is not moved across international boundaries and thereby protecting parties legitimate interests. This, in effect, ensures no change to status quo for the benefit of relevant stakeholders until the application is heard.

However, once the application is heard the Court can apply more substantive relief after it balances the interest (per Article 22).

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]; 7 marks and
- 4.1.2 whether the Applicants fall within the description of "foreign representatives" as defined by article 2(d) of the MLCBI [maximum 5 marks]. 5 marks

While not all facts provided in the fact pattern for this question (Question 4) are immediately relevant for your answer, please do use, where appropriate, those relevant facts that directly support your answer.

For the purpose of this question, you may further assume that the Bank is **not excluded** from the scope of the MLCBI by article 1(2) of the MLCBI.

1 . Does the Bank's liquidation comprises a "foreign proceeding" within the meaning of article 2(a) of the MLCBI?

Article 2(a) of the MLCBI states that:

"Foreign proceedings" means a collective judicial or administrative proceeding in a foreign State, including an interim proceeding, pursuant to a law relating to insolvency in which proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganisation or liquidation"

This definition can be broken into the following separate parts:

- a) collective judicial or administrative proceeding;
- b) pursuant to a law relating to insolvency;
- c) subject to control or supervision by a foreign court; and
- d) for the purpose of reorganisation or liquidation.

While these parts are considered separately the characteristics are cumulative and accordingly, article 2(a) must be considered as a whole.

1. Is it collective in nature?

The notion of a collective insolvency proceeding is about achieving a coordinated, global solution for all stakeholders of an insolvency proceeding. Accordingly, one of the primary considerations on whether it is collective in nature is whether substantially all 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. The Model Law is not intended to be used just for an individual creditor or group of creditors.

However, a proceeding should not be considered to fail the test of collectively purely because a particular class of creditors' rights is unaffected by it.

2. is it authorised or conducted under a law relating to insolvency?

The Model Law does not require that the law be labelled as an insolvency law. It merely requires that the law deals with or addresses insolvency or severe financial distress.

The law in question is Article 75 of the Law of Country A on Banks and Banking Activity which allows for a bank to be classified as "troubled". If 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.

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.

This law deals with or addresses insolvency or severe financial distress.

3. Subject to control or supervision by a foreign court

There is no distinction drawn between a judicial body or an administrative body. This ensures that where a legal system allows for control or supervision to be undertaken by a non-judicial body/authority it can still be classified as a foreign proceeding.

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.

Accordingly, this would be considered subject to control or supervision by a foreign court.

4. For the purpose of liquidation or reorganisation

The proceedings need to be to liquidate or reorganise the insolvency estate.

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.

Conclusion

Yes, the Bank's liquidation comprises a "foreign proceeding" within the meaning of article 2(a) of the MLCBI.

For full marks on this question, more should be explained about the requirements as interpreted in art 2(a) and more facts should be applied to the question of collective in nature and whether the proceeding is administrative or not.

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

Article 2(d) defines a foreign representative as follows:

"means a person or body, including one appointed on an interim basis, authorised in a foreign proceeding to administer the reorganization or the liquidation of the debtor's assets or affairs or to act as a representative of the foreign proceeding"

The definition of "*foreign representative*" includes a person who is authorised to administer a foreign proceeding (as defined above). This would include, *inter alia*, to seek recognition, relief and cooperation in another jurisdiction.

The Model Law does not specify or require that the foreign representative be authorised by the Court with the definition being sufficiently broad to include a foreign representative appointed by a special agency.

1. Is a foreign representative

Relevant Facts

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 the DGF (acting via an authorised officer) begins the process of directly administering the bank's affairs.

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.

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.

Analysis

Ms G is a "Leading bank liquidation professional" appointed by the Deposit Guarantee Fund which is:

"a governmental body of Country A tasked principally with providing deposit insurance to bank depositors in Country A [...] 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"

This would clearly fall within the requirement of "special agency" for the purpose of Article 2(d).

The delegated person, being Ms G is pursuant to 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"

This clearly is a person who is authorised to administer a foreign proceeding (as defined above). This would include, *inter alia*, to seek recognition, relief and cooperation in another jurisdiction.

Ms G is a "foreign representative".

*** End of Assessment ***