



**SUMMATIVE (FORMAL) ASSESSMENT: MODULE 2A**

**THE UNCITRAL MODEL LAWS RELATING TO INSOLVENCY**

This is the **summative (formal) assessment** for **Module 2A** of this course and is compulsory for all candidates who **selected this module as one of their compulsory modules from Module 2**. Please read instruction 6.1 on the next page very carefully.

If you selected this module as **one of your elective modules**, please read instruction 6.2 on the next page very carefully.

**The mark awarded for this assessment will determine your final mark for Module 2A.** In order to pass this module, you need to obtain a mark of 50% or more for this assessment.

## **INSTRUCTIONS FOR COMPLETION AND SUBMISSION OF ASSESSMENT**

**Please read the following instructions very carefully before submitting / uploading your assessment on the Foundation Certificate web pages.**

1. You must use this document for the answering of the assessment for this module. The answers to each question must be completed using this document with the answers populated under each question.
2. All assessments must be submitted electronically in MS Word format, using a standard A4 size page and a 11-point Arial font. This document has been set up with these parameters – **please do not change the document settings in any way. DO NOT** submit your assessment in PDF format as it will be returned to you unmarked.
3. No limit has been set for the length of your answers to the questions. However, please be guided by the mark allocation for each question. More often than not, one fact / statement will earn one mark (unless it is obvious from the question that this is not the case).
4. You must save this document using the following format: **[student ID.assessment2A]**. An example would be something along the following lines: 202122-336.assessment2A. **Please also include the filename as a footer to each page of the assessment** (this has been pre-populated for you, merely replace the words “studentID” with the student number allocated to you). Do not include your name or any other identifying words in your file name. **Assessments that do not comply with this instruction will be returned to candidates unmarked.**
5. Before you will be allowed to upload / submit your assessment via the portal on the Foundation Certificate web pages, you will be required to confirm / certify that you are the person who completed the assessment and that the work submitted is your own, original work. Please see the part of the Course Handbook that deals with plagiarism and dishonesty in the submission of assessments. **Please note that copying and pasting from the Guidance Text into your answer is prohibited and constitutes plagiarism. You must write the answers to the questions in your own words.**
- 6.1 If you selected Module 2A as one of your **compulsory modules** (see the e-mail that was sent to you when your place on the course was confirmed), the final time and date for the submission of this assessment is **23:00 (11 pm) GMT on 1 March 2022**. The assessment submission portal will close at 23:00 (11 pm) GMT on 1 March 2022. No submissions can be made after the portal has closed and no further uploading of documents will be allowed, no matter the circumstances.
- 6.2 If you selected Module 2A as one of your **elective modules** (see the e-mail that was sent to you when your place on the course was confirmed), you have a **choice** as to when you may submit this assessment. You may either submit the assessment by **23:00 (11 pm) GMT on 1 March 2022** or by **23:00 (11 pm) BST (GMT +1) on 31 July 2022**. If you elect to submit by 1 March 2022, you **may not** submit the assessment again by 31 July 2022 (for example, in order to achieve a higher mark).
7. Prior to being populated with your answers, this assessment consists of **12 pages**.

## **ANSWER ALL THE QUESTIONS**

**Total marks received 37 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] 7 marks**

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

#### **Question 1.1**

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

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

#### **Question 1.2**

Which of the following statements is **unlikely** to be a reason for the development of the Model Law?

- (a) The existence of a statutory basis in national (insolvency) laws for co-operation and co-ordination of domestic courts with foreign courts or foreign representatives.**
- (b) The difficulty of agreeing multilateral treaties dealing with insolvency law.
- (c) The practical problems caused by the disharmony among national laws governing cross-border insolvencies, despite the success of protocols in practice.
- (d) None of the above.

**The correct answer is D**

### Question 1.3

Which of the following challenges to a recognition application under the Model Law **is most likely to be successful**?

- (a) The registered office of the debtor is not in the jurisdiction where the foreign proceedings were opened, but the debtor has an establishment in the jurisdiction of the enacting State.
- (b) The registered office of the debtor is in the jurisdiction of the enacting State, but the debtor has an establishment in the jurisdiction where the foreign proceedings were opened.
- (c) The debtor has neither its COMI nor an establishment in the jurisdiction where the foreign proceedings were opened.
- (d) The debtor has neither its COMI nor an establishment in the jurisdiction of the enacting State.

### Question 1.4

“Cross-border insolvencies are inherently chaotic and value evaporates quickly with the passage of time”. Which of the following rules or concepts set forth in the Model Law **best addresses** this feature of cross-border insolvencies?

- (a) The *locus standi* access rules.
- (b) The public policy exception.
- (c) The safe conduct rule.
- (d) The “hotchpot” rule.

### Question 1.5

For a debtor with its COMI in South Africa and an establishment in Brazil, foreign main proceedings are opened in South Africa and foreign non-main proceedings are opened in Brazil. Both the South African foreign representative and the Brazilian foreign representative have applied for recognition before the relevant court in the UK. Please note that South Africa has implemented the Model Law subject to the so-called principle of reciprocity (based on country designation), Brazil has not implemented the Model Law and the UK has implemented the Model Law without any so-called principle of reciprocity. In this scenario, **which of the following statements is the most correct one**?

- (a) The foreign main proceedings in South Africa will not be recognised in the UK because the UK is not a designated country under South Africa’s principle of reciprocity, but the foreign non-main proceedings in Brazil will be recognised in the UK despite Brazil not having implemented the Model Law.
- (b) Both the foreign main proceedings in South Africa and the foreign non-main proceedings in Brazil will not be recognised in the UK because the UK has no principle of reciprocity and Brazil has not implemented the Model Law.

(c) Both the foreign main proceedings in South Africa and the foreign non-main proceedings in Brazil will be recognised in the UK.

(d) None of the statements in (a), (b) or (c) are correct.

#### Question 1.6

Which of the following statements regarding concurrent proceedings under the Model Law **is true**?

(a) No interim relief based on Article 19 of the Model Law is available if concurrent domestic insolvency proceedings and foreign proceedings exist at the time of the application of the foreign proceedings in the enacting State.

(b) In the case of a foreign main proceeding, automatic relief under Article 20 of the Model Law applies if concurrent domestic insolvency proceedings and foreign proceedings exist at the time of the application of the foreign proceedings in the enacting State.

(c) The commencement of domestic insolvency proceedings prevents or terminates the recognition of a foreign proceeding.

(d) If only after recognition of the foreign proceedings concurrent domestic insolvency proceedings are opened, then any post-recognition relief granted based on Article 21 of the Model Law will not be either adjusted or terminated if consistent with the domestic insolvency proceedings.

#### Question 1.7

When using its discretionary power to grant post-recognition relief pursuant to Article 21 of the Model Law, what should the court in the enacting State primarily consider?

(a) The court must be satisfied that the interests of the creditors and other interested parties, excluding the debtor, are adequately protected.

(b) The court should consider whether the relief requested is necessary for the protection of the assets of the debtor or the interests of the creditors and strike an appropriate balance between the relief that may be granted and the persons that may be affected.

(c) The court should consider both (a) and (b).

(d) Neither (a) nor (b) must be considered by the court.

The correct answer is B

#### 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.

The correct answer is D

**QUESTION 2 (direct questions) [10 marks in total] 9 marks**

**Question 2.1 [maximum 3 marks] 2 marks**

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

The appropriate date for determining the COMI of a debtor or whether an establishment exist is the date of commencement of the foreign proceeding. However, certain US authority (Morning Mist Holdings Ltd v Krys (2<sup>nd</sup> Cir Appeals Apr 16,2013) and English authority (In the Matter of Toisa Limited, ICC, 29 March 2019)) suggest that the court is leaning towards using the date of the recognition petition as the appropriate date to determine the COMI of a debtor.

For full marks, it should be mentioned that the date is not explicitly mentioned in the MLCBI and it should be addressed what to do if the business has ceased prior to application.

**Question 2.2 [maximum 3 marks] 3 marks**

The following **three (3) statements** relate to particular provisions / concepts to be found in the Model Law. Indicate the name of the provision / concept (as well as the relevant Model Law article), addressed in each statement.

**Statement 1** *“This Article provides guidance in case of concurrence of two foreign non-main proceedings.”*

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

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

Statement 1 relates to Article 30(c) which provides for the coordination between two foreign non-main proceedings.

Statement 2 relates to Article 32 that the hotchpot rules does not affect secured claims.

Statement 3 relates to Article 16 that the debtor’s registered office, or in the case of an individual, her habitual residence, is presumed to be the debtor’s COMI.

**Question 2.3 [2 marks] 2 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.**

The English Court of Appeal’s decision was based on the following:

- (1) an English court could only properly grant such relief if it is necessary to protect the interests of the creditors and the stay would have to be an appropriate way of achieving such protection (Article 21(1)). The Court was in the view that the indefinite stay was not necessary to achieve the aim of protecting creditors, and even if it was, the more appropriate means would be a parallel scheme of arrangement in the UK
- (2) the Model Law is to provide a procedural means to facilitate cross-border insolvency, and it does not empower the court to vary or discharge substantive rights conferred under English law. An indefinite stay would be in effect discharge the relevant creditors’ substantive right.
- (3) it is inferred, once the foreign proceeding ends, the foreign representative no longer holds office, so there is no scope for other orders under the Model Law, and the reliefs previously granted under the Model Law should terminate.

**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.**

In such a situation, Article 29(a) of the MLCBI applies. The automatic relief under Article 20 does not apply (Article 29(a)(ii)), and the court should make sure the relief granted under Article 19 or 21 must be consistent with the domestic proceeding (Article 29(a)(i)).

The foreign representative has an ongoing obligation to promptly inform the court in the enacting state of any substantial change in the status of the recognised foreign proceedings or the status of his or her appointment, and any other foreign proceedings regarding the same debtor that becomes known to the foreign representative (Article 18 of the MLCBI).

### **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] 0 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?

[One of the benefits of getting recognition is that the foreign representative may access certain tools and protections available to a local insolvency officeholder in State A (for example, stay of individual actions concerning the debtor's assets, rights, obligations or liabilities, stay of execution against the debtor's assets, examination of witness, taking of evidence or the delivery of information concerning debtor's assets, affairs, rights, obligations or liabilities) without the need to open a local insolvency proceeding in State A. As a result, significant time and costs can be saved, and the debtor's asset can be preserved and protected from dissipation.

Upon application for recognition, the Court in State A must cooperate to the maximum extent possible with foreign courts or foreign representative. The Court may communicate directly with foreign courts and foreign representatives. The Court will coordinate the administration and supervision of the debtor's assets and affairs, and coordinate concurrent proceedings and establish appropriate protocols.

If State B is the debtor's COMI, the proceeding opened in State B will be recognised as a foreign main proceeding. The consequences of that are, (1) once opened, any subsequent proceeding in the State A may be commenced only if the debtor has assets in State A, and the proceeding will be restricted to the assets in State A; (2) if there are other foreign proceedings, any relief granted to the foreign representative of other foreign (non-main) proceeding must be consistent with the foreign main proceeding.]

**The answer should deal with rights prior to recognition, so the answer should include the following:**



- Legal standing (Article 9 MLCBI): The key access for the foreign representative is set forth in Article 9 MLCBI. In the capacity of foreign representative, the foreign representative has automatically standing before the courts in State A without having to meet any formal requirements such as a license or any consular action. In other words, the “status” in State B of the foreign representative is automatically recognised in State A for the purpose of granting the foreign representative standing before the courts in State A. This allows the foreign representative to safeguard and pursue assets of the debtor estate in State A before its courts.
- Opening domestic insolvency proceedings (Article 11 MLCBI): The foreign representative is further specifically entitled to apply for the opening of domestic insolvency proceedings in State A, as reflected in Article 11 of the MLCBI. Whether or not the foreign representative would wish to do this will depend on what the requirements are for opening such domestic proceedings. Can these requirements be met? On the other hand, it will depend on what the foreign representative believes he/she can get in terms of (interim) relief for the foreign proceedings in State B. In other words, are domestic insolvency proceedings really needed, or just additional time and costs that should be avoided?
- Cooperation: Similar to access rights, the cooperation provisions in the MLCBI (articles 25-27) also operate independently of recognition and it is not a prerequisite to the use of the cooperation provisions that recognition of the foreign proceedings is obtained in advance. Courts in State A can freely cooperate with the foreign representative without having to worry whether the status in State B of the foreign representative can be recognised in State A.
- Save Time & Costs: The key benefits of both the access provisions and the cooperation provisions are that they save time and therefore also costs, as a result of which value destruction can be avoided and value enhancement is being promoted.

**Question 3.2 [maximum 5 marks] 4 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.

[For successful application, the foreign representative must provide (1) a certified copy of the decision commencing the foreign proceeding and appointing the foreign representative; or a certification from the foreign court affirming the existence of the foreign proceeding and of the appointment of the foreign representative; or in absence of the aforesaid, any other evidence acceptable to the court of the existence of the foreign proceeding and the appointment of the foreign representative. (2) a statement identifying all foreign proceedings in respect of the debtor that are known to the foreign representative. (Model Law, Article 15).

The Court in State A will determine whether the debtor’s COMI is in State B, in which case the foreign proceeding will be recognised as foreign main proceeding, or whether the debtor has an establishment in State B, in which case, the foreign proceeding will be recognised as a foreign non-main proceeding. If the debtor’s COMI is not in State B, nor does the debtor have an establishment in State B, the recognition application will be denied. (Model Law, Article 17.2) COMI is not defined in the Model Law, but is determined by reference to the location where the central administration of the debtor takes place and which is readily ascertainable as such by creditors. Establishment is defined in Article 2(f) of the Model Law.

The model law enacted in State A may contain provisions excluding certain proceedings. Enacting state may exclude foreign insolvency proceedings subject to special regulatory regime, for example insolvency proceedings regarding banks and insurance companies, from the Model Law (Model Law, Article 1).

The Court in State A may refuse to grant recognition if doing so would be manifestly contrary to the public policy of State A (Model Law, Article 6).

The Court in State A may refuse to grant recognition if it considered seeking recognition constitutes an abuse of process in accordance with State A's domestic law. For example, if the foreign representative failed to comply with its full and frank disclosure obligation to the court in seeking recognition, the Court may consider it to be abuse of process. So the foreign representative should be mindful of its disclosure obligation, which requires them to, from the time of filing of the recognition application, promptly inform the court in State A of any substantial change in the status of the recognised foreign proceeding or the status of foreign representative's appointment, and any other foreign proceeding regarding the same debtor that becomes known to the foreign representative (Model Law, Article 18).]

**For full marks, the answer should also address art 3 on international obligations of the state.**

**Question 3.3 [maximum 5 marks] 2 marks**

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

[If relief is urgently needed to protect the debtor's asset or the interests of the creditors, the foreign representative may apply for the following interim relief:

- (a) Staying execution against the debtor's assets;
- (b) Entrusting the administration or realisation of the debtor's assets located in State A to the foreign representative or another person in order to protect and preserve the value of the debtor's assets;
- (c) Suspending the right to transfer, encumber or disposal of the debtor's assets
- (d) Providing for the examination of witnesses, taking of evidence or the delivery of information concerning the debtor's assets and affairs,
- (e) Any other relief that may be available to a domestic officeholder under the domestic laws of State A. (Article 19)

Upon recognition, the foreign representative may apply for the following relief:

- (a) Staying the commencement or continuation of individual actions concerning the debtor's assets, rights, obligations or liabilities;
- (b) Staying execution against the debtor's assets;
- (c) Entrusting the administration or realisation of the debtor's assets located in State A to the foreign representative or another person;
- (d) Suspending the right to transfer, encumber or disposal of the debtor's assets
- (e) Providing for the examination of witnesses, taking of evidence or the delivery of information concerning the debtor's assets and affairs,
- (f) Extending relief interim pre-recognition relief.
- (g) Any other relief that may be available to a domestic officeholder under the domestic laws of State A,(Article 21)

If State B is the debtor's COMI, upon recognition, the following automatic relief will apply:

- (a) a stay of commencement or continuation of individual actions concerning the debtor's assets, rights, obligations and liabilities;

- (b) a stay of execution against the debtor's assets; and
- (c) a suspension of the right to transfer, encumber or disposal of the debtor's assets.

The foreign representatives need to consider the limitations set by the relevant case law in State A. Assuming they are the same as English law, the foreign representative should consider the following. The Court will not enforce an insolvency judgment obtained by default of appearance of the defendants (Rubin v Eurofinance SA [2010] UKSC 46). The relief under the Model Law does not allow the Court to go beyond the relief it would grant in a domestic insolvency proceeding (Fibria Celulose S/A v Pan Ocean Co Ltd ([2014] EWHC 2124 (Ch)). A debt governed by English law cannot be discharged by a foreign insolvency proceedings unless the relevant creditor submits to the foreign insolvency proceedings, and the reliefs under the Model Law cannot be used to circumvent the aforesaid rule (the IBA case [2018 EWHC 59 (ch)])

**The answer should also address: art. 3, art. 6 on public policy as well as art. 22 on adequate protection.**

**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?

[MLCBI is meant to made available to foreign representatives tools available to local insolvency officeholder. Freezing injunction is not a type of relief usually used in insolvency proceedings. The assets of the debtor is protected by giving the liquidators' the power to administer the debtor's assets and affairs. There is no real need for freezing injunction. Further, an injunction post recognition would restrain dealing with assets in liquidation. (In the matter of Khadzimurat Derev, [2021] EWHC 392 (Ch))]

**QUESTION 4 (fact-based application-type question) [15 marks in total] 14 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]. 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.

**[Foreign Proceeding]**

Foreign proceeding is defined in Article 2 of MLCBI. There are four elements that must be met in order for the foreign proceeding to be characterised as a 'foreign proceeding' under the MLCBI. The four elements are: (1) the proceeding must be a judicial or administrative proceeding pursuant to a law relating to insolvency; (2) the proceeding involves creditors collectively; (3) there must be control or supervision of the assets and affairs of the debtor by a court; (4) the purpose of the proceeding is reorganization or liquidation of the debtor.

**A judicial or administrative proceeding**

Whether the proceeding is a judicial or administrative proceeding pursuant to a law relating to insolvency must be determined by English law, not the law of Country A. A 'proceeding' is not restricted to court proceedings, it means a "*statutory framework that contains a company's actions and that regulates the final distribution of a company's asset*" (Re Betcorp, 400 B.R. at 278). Here the liquidation procedure was based on the statutory framework of Country A (LBBA and DGF Law) which regulates the distribution of the Bank's assets. The insolvency procedure is administered by DGF, a governmental body, so it is administrative in nature (re The Irish Bank Resolution Corporation Limited 538 BR 62). Hence the liquidation process in Country A is an administrative proceeding under MLCBI.

### Pursuant to a law relating to insolvency

It is not required that the law pursuant to which the foreign proceeding is conducted must exclusively deal with insolvency or labelled as insolvency law. But nevertheless, the law must deal with insolvency or severe financial distress. The liquidation process in Country A was conducted under the LBBA. The Bank was put into liquidation process under Articles 75-77 of the LBBA. The criteria for characterising the Bank as insolvency as set out in Article 76 clearly relate to solvency and financial situation of the Bank. The powers of the liquidator (DGF) under the LBBA include satisfying creditors' claim, collecting and distributing the Bank's assets. All of these indicates that the LBBA is a law relating to insolvency under the MLCBI. (Re Stanford International Bank Ltd [2010] EWCA Civ 137).

### Collective proceeding

In evaluating whether a given proceeding is collective, key considerations are whether substantially all of the assets and liabilities of the debtor are dealt with in the proceeding (para 70 of The Guide to Enactment of MLCBI) and whether the proceeding affects creditors collectively and not only private rights and obligations of the immediate parties to the proceeding (Aero Inventory (UK) Limited (No.2) [2009] FCA 1481).

In Country A's proceeding, the liquidator has the power to compile a list of creditors' claims and seek to satisfy these claims. It seems that the proceeding affects creditors collectively, and is a collective proceeding under the MLCBI,

### Control or supervision by a foreign court

Foreign Court is defined in Article 2 of the MLCBI as a judicial or other authority competent to control or supervise a foreign proceeding. The Guide on Enactment provides that to fall within the definition of foreign proceedings, in that proceeding, the debtor's assets and affairs must be subject to control or supervision by a foreign court or a official body (paragraph 23).

DGF is a governmental body of Country A tasked principally with providing deposit insurance to bank depositors in Country A. It 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. It seems that DGF is a authority competent to control or supervise banks' liquidation proceedings. (ENNIA Caribe Holdings NV 594 B.R. 631)

Under the laws of Country A, upon commencement of liquidation of the Bank, all powers of the Bank's management and control bodies are terminated, the Bank's assets and affairs are controlled by the liquidator, DGF. DGF also has the power to dispose the Bank's assets and recover properties belonging to the Bank. Therefore, the Bank's assets and affairs are in fact subject to control or supervision of DGF. Thus the requirement of control or supervision by a foreign court under MLCBI is satisfied here.

### Purpose of the proceeding

The purpose of the proceeding in Country A is to liquidate the Bank. Thus it satisfies the requirement of the purposes of liquidation or reorganization under the MLCBI.

In light of the above, the proceeding in Country A can be characterised as a foreign proceeding under MLCBI.



Great answer. For full marks, one could also address the independence of the DGF and a bit more reference to the facts of the case.

### Foreign Representative

Foreign representative is defined in Article 2 of MLCBI as “a person or body, including one appointed on an interim basis, authorised in a foreign proceeding to administer the reorganisation or the liquidation of the debtor’s assets or affairs or to act as a representative of the foreign proceeding.” It is required that a foreign representative must have the power to administer the reorganization or liquidation of the debtor’s assets or affairs at the time of the application for recognition (Oversight & Control Commission of Avanzit S.A. 385 B.R. 525).

The Applicants, Ms G and DGF, are a person and a body (respectively) within the meaning of the MLCBI. The MLCBI does not specify that the foreign representative must be authorised by the foreign court. The focus is upon the authorisation being provided in the course of the proceeding, rather than upon the body providing the authorisation, which might include the court or the law (). On 18 December 2015, DGF was appointed the liquidator of the Bank under Article 77 and was given the full powers which include the power to exercise management powers and take over management of the property of the Bank, power to dispose of the Bank’s assets, and the power to seek to satisfy creditor’s claims. The broad powers given to DGF suggest that it is authorised in the proceeding in Country A to administer the liquidation of the Bank’s assets or affairs.

On 17 August 2020, DGF delegated most of its powers to Ms G under the DGF law. The residual powers that have not been delegated to Ms G remain vested in DGF. So at the time of the application for recognition, Ms G and DGF together, have the full power to administer the liquidation of the Bank’s assets or affairs in the proceeding in Country A, and hence are foreign representatives under the MLCBI.]

**\* End of Assessment \***