



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**.

Commented [DB1]: Please read and comply with the instructions – if you don't, I have to do this for you.

ANSWER ALL THE QUESTIONS

Total: 29 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] 8 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]

Question 2.1 [maximum 3 marks] 1 mark

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 is the date of commencement of the foreign proceedings.¹

It should be mentioned here also, that it is not explicitly mentioned in the MLCBI and therefore there are slightly different approaches in different jurisdictions.

Question 2.2 [maximum 3 marks] 2 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.

¹ GEL (paras 157-160)

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 – Article 30(c) provides that the Court must grant, modify or terminate relief for the purpose of facilitating coordination of the proceedings.

Statement 2 – relates to Article 32 and the Hotchpot rule relating to payments in concurrent proceedings, but which is without prejudice to secured claims

Statement 3 – Article 31 provides that for the purposes of opening domestic insolvency proceedings in the enacting estate that there is a rebuttable presumption that the recognition of a foreign main proceedings is proof that the debtor is insolvent (but not in foreign non main proceedings). **The correct art. is art. 16(3)**

Question 2.3 [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 Court decided that to do so would prevent the English creditors from enforcing their English law rights in accordance with the Gibbs Rule and further the Court held that the Model Law had not contemplated the continuance of relief after the end of the relevant foreign proceedings. There was no need to grant the relief for the purposes of protecting the interests of IBA's creditors and a stay was not considered the appropriate way of achieving that even had it have been relevant.

Issue 2 of the following should also be addressed:

- According to the English Court of Appeal, the real issue was whether as a matter of settled practice the UK court should not exercise its power to grant the indefinite moratorium where to do so would (i) in substance prevent the English creditors (that is the Challenging Creditors) from enforcing their English law rights in accordance with the Gibbs Rule (“Issue 1”) and / or (ii) prolong the stay after the Azeri reconstruction has come to an end (“Issue 2”).
- In respect of each issue, the English Court of Appeal held that:
 1. **Issue 1:** The UK court would need to be convinced that (a) the indefinite stay is necessary to protect the interests of IBA's creditors and (b) an indefinite stay is the appropriate way of achieving such protection. The factual evidence that can be brought before the court will ultimately decide Issue 1.
 2. **Issue 2:** Based on Article 18 of the MLCBI, the English Court of Appeal in the IBA case appeal held that had the MLCBI ever contemplated the continuance of relief after the end of the relevant foreign proceeding, it would have addressed the question explicitly and provided appropriate machinery for that purpose.

Question 2.4 [2 marks] 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**.

Upon recognition of a foreign main proceeding, the continuation of the domestic proceedings would be stayed, however, this is subject to the modification or termination of the stay subject to any provisions of the enacting State that may apply and/or as are otherwise necessary to preserve a claim against the debtor (Article 20). The foreign representative has a continuing duty of disclosure. Article 18 requires the foreign representative to promptly inform the court in the enacting State of (1) any substantial change in the status of recognised foreign proceeding or the status of the foreign representative's appointment and (2) any other foreign proceeding regarding the same debtor that becomes known to the foreign representative.

Art. 29 (a) is the correct answer to the first question.

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

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

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

Question 3.1 [maximum 4 marks] ½ mark

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

Article 27 provides an illustrative list setting out the ability of the courts to co-ordinate and provide suitable relief. It could assist in co-ordinating the administration and supervision of the debtor's assets and affairs and assist with the recovery of assets for the benefit of creditors, as well as co-ordinating and harmonising reorganisation plans.

For full marks the following should be included:

- **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] 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.

Article 15 of the MLCBI sets out the evidential requirements necessary for a recognition application to succeed, including (a) a certified copy of the decision commencing the foreign proceeding and appointing the foreign representative; or (b) a certificate from the foreign court affirming the existence of the foreign proceeding and of the appointment of the foreign representative; or (iii) in the absence of the above, other evidence acceptable to the court of the existence of the foreign proceeding and the foreign representative's appointment.

Article 15 further confirms that any application for recognition must also include a statement identifying all foreign proceedings in respect of the relevant debtor which are known to the foreign representative, and possibly a translations of documents supplied in support of the application (into an official language of the enacting state).

Pursuant to article 16 of the MLCBI, the court is entitled to presume that the documents submitted in support of the recognition application are authentic, regardless of whether they have been legalised. Additionally, in the absence of proof to the contrary, the debtor's registered office or individual's habitual residence is presumed to be the debtor's COMI. Whilst the MLCBI does not provide a definition of COMI, the determination of its location is nevertheless fundamental to any recognition application. The court must see evidence that the debtor has its COMI or establishment in the country where the foreign proceedings are taking place.

Article 18 of the MLCBI imposes on the foreign representative, from the time of filing the recognition application, to promptly inform the court in the enacting state of (i) any substantial changes in the status of the recognised foreign proceeding or the status of the foreign representative's appointment; and (ii) any other foreign proceeding concerning the same debtor known to the foreign representative. In this context, the foreign representative has a full and frank disclosure obligation to the court in the enacting state. Failure to respect that obligation risks an abuse of process finding.

For full marks, the following should be included in the answer:

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

Question 3.3 [maximum 5 marks]

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

Both interim pre-recognition relief and discretionary post-recognition relief are available under articles 19 and 21 of the MLCBI respectively. In each instance, the court in the enacting state must be satisfied that the interests of the debtor's creditors and other interested parties are adequately protected. Accordingly, article 22 of the MLCBI confirms the court's power to make relief conditional as appropriate, or indeed terminate or modify the same at the request of a foreign representative or an affected person, noting always the balance between the interests of creditors, the debtor and other interested parties.

Following a request from the foreign representative where relief is urgently needed to protect the assets of the debtor or the interests of their creditor, the court of the enacting state may, pursuant to article 19, grant provisional relief from the time of filing the recognition application until the application is decided upon. This applies to both foreign main and foreign non-main proceedings; however, where such relief would interfere with the administration of a foreign main proceeding, the court may instead refuse to grant that relief. Examples include a stay of execution against the debtor's assets or entrusting the administration or realisation of all or part of the debtor's assets located in the enacting state to the foreign representative or another person designated by the court in order to protect and preserve the value of those assets that are otherwise subject to devaluation or in jeopardy. Similarly, any of the post-recognition relief available under article 21 of the MLCBI is also available under article 19 of the MLCBI.

Turning to article 21 of the MLCBI, such relief is available upon recognition of the foreign main or non-main proceeding at the request of the foreign representative where necessary to protect the assets of the debtor or the interests of creditors. Other notable examples of relief include the ability to examine witnesses or extending interim relief granted under article 19 of the MLCBI. The debtor's assets located in the enacting state may also be provided to the foreign representative (or another person designated by the court) where the court is satisfied that the interests of local creditors in the enacting state are adequately protected. Relief in a foreign non-main proceeding should not interfere with the administration of another insolvency proceeding, in particular the main proceeding.

Note however that appropriate relief under article 21 of the MLCBI is limited, such that (i) default judgment; (ii) applying foreign insolvency law to an English law governed contract and (iii) an indefinite moratorium continuation resulting from an earlier recognition order are not envisaged by the MLCBI.

For full mark on this question, art. 3 and art. 6 should also be included.

Question 3.4 [maximum 1 mark] 0

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?

Although the ability to suspend transfers provides an immediate restriction preventing the dissemination of monies and property across international boundaries, article 22 of the MLCBI requires the court to conduct a balancing exercise between the interests of creditors, the debtor and other interested parties. A worldwide freezing order imposing obligations on a significant number of interested third parties and given the potential prejudice it is unlikely to continue on that basis.

The question should include a discussion on the other forms of protection granted by art 21 which would make the freezing order unwarranted.

QUESTION 4 (fact-based application-type question) [15 marks in total] 10,5

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]. 3,5 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.

4.1.1

A "foreign proceedings" within the meaning of article 2(a) MLCBI has the following elements:

- A proceedings (including an interim proceeding) – as referenced in the Digest of Case Law on the UNCITRAL Model Law on Cross-Border Insolvency, "a hallmark of a "proceeding" was "a statutory framework that constrains a company's actions and that regulates the final distribution of a company's assets'". In this case, the interim administration and subsequent liquidation on 17 September 2015 and 17 December 2015 subsequently and the clear framework provided by the LBBA and DFG Law, would appear to satisfy this requirement;
- That is either judicial or administrative – here, there is no reference to any formal judicial applications being made to put the Bank into administration or liquidation, but nonetheless, the provisions in the LBBA and DFG Law provided mechanisms for the administrative regime allowing such actions;
- That is collective in nature – we are told that 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. Further that the liquidator has the power to compile a register of creditor claims and to seek to satisfy those claims. Accordingly, the collective criteria appears to be satisfied;
- That is in a foreign state – with the initial proceedings opened in Country A and the fraud proceedings opened on 11 February 2021, this appears satisfied;
- That is authorised or conducted under a law relating to insolvency – this was considered in *Agrokor DD [2017] EWHC 2791 (Ch)* case and it was held that the Model Law does not require "insolvency law" as a label and it was sufficient that the law deals with or addresses insolvency or severe financial distress. The fact pattern and recitals of the various breaches of LBBA and DFG Law, categorisation as "troubled" and withdrawing of the licence appear to satisfy this requirement.
- In which the assets and affairs of the debtor are subject to control or supervision by a foreign court – this was also considered in *Agrokor DD [2017] EWHC 2791 (Ch)* which

confirmed that the level of court supervision required by the Model Law is relatively low and can be potential, rather than actual and indirect rather than direct. It would seem logical to conclude that the liquidator (formerly Ms C or now Ms G) could apply to the Court for directions and/or determination of issues under the LBBA or DFG Law, and/or determination of creditor claims and as such, would invoke and satisfy this provision.

- Which proceeding is for the purpose of reorganisation or liquidation – here the Bank is in liquidation and so this element appears to be obviously satisfied without further analysis. However, Ms G's limited powers and inability to arrange for the sale of the Bank's assets causes difficulties. As noted at para 18 of the Digest of Case Law on the UNCITRAL Model Law on Cross-Border Insolvency, Courts have confirmed that proceedings designed to prevent dissipation and waste, or to prevent detriment to investors, rather than to liquidator or reorganise the insolvency estate, and proceedings in which the foreign representative does not have the authority to liquidate and distribute assets to satisfy claims do not satisfy the requirements of Article 2.

For full marks on this question a more elaborate discussion on the requirements of art 2(a) is needed, including what is according to interpreting tools such as the Guide to Enactment or case law meant by "collectivity", "foreign court" and an administrative proceeding. Also the facts of the case could be more widespread applied.

4.1.2

A "foreign representative" has the following elements:

- A person or body appointed, including on an interim basis;
- Authorised in a foreign proceeding;
- To administrator the reorganisation or liquidation of the debtor's assets or affairs or to act as representative of the foreign proceedings.

We are told Ms C was "Ms C as the first of the DGF's authorised persons to whom powers of the liquidator were delegated." And 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" and 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". However, there was a resolution (Resolution 1513) expressly excluding Ms G's authority to claim damages from a related party of the Bank, and the power to arrange for the sale of the Bank's assets." Each of the excluded powers remains vested in the DGF [*sic* – Ms C?] as the Bank's formally appointed liquidator. The Model Law does not define "person" but the courts have found that a foreign representative might be a firm of accountants. We are told 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." Ms G appears to satisfy the requirements and in England and Wales, the appointment of a liquidator is person, and as such, an individual could be recognised.

Based on these facts, it appears clear that Ms C and Ms G were appointed and authorised in a foreign proceeding. Article 9 and 11 of the Model Law give the foreign representative access rights before the Court. However, as noted above, by reason of Ms G's powers being limited, more so than ordinarily associated with the powers or duties typically associated with a liquidator, further consideration may be necessary. However, the Model law does not specify

that the foreign representative be authorised by the foreign court and the GEI (para 86) notes that the definition is broad enough to include appoints by special agency other than the court. Without varying Ms G's powers such as to allow her to administer the estate more generally, there is a question as to whether she would have standing to make the application for recognition.²

For full marks it should also be discussed if the DGF also is a foreign representative along with a discussion on the effects of the split powers between the two.

*** End of Assessment ***

ⁱ United StatesL Irish Bank Resolution Corporation (IBRC) Limited, 538 B.R. 692, 697 (D.Del 2015)

² Stanford International Bank Limited [2010] EWCA Civ. 1441 [para 29], CLOT 1003; United States, Loy, 448 B.R. 420, 432-433 (Bankr E.D. Va. 2011).