



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 points: 28,5 out of 50

Please note that all references to the “MLCBI” or “Model Law” in this assessment are references to the Model Law on Cross-Border Insolvency.

QUESTION 1 (multiple-choice questions) [10 marks in total] 5

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] 6

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.

Under the MLCBI, the appropriate date for determining the COMI of a debtor, or whether an establishment exists, is the date of commencement of the foreign proceeding.

There is no definition of COMI in the Model Law however, a key factor in determining COMI is the location where the central administration of the debtor takes place and there is the requirement that the COMI must be readily ascertainable by third parties. The COMI can move and where it moves in close proximity to the commencement of the proceedings it will be harder to establish the appropriate evidence to determine the COMI.

For full marks, you should also mention that there are slight difference in different jurisdictions, ex. The US.

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 – Article 30 (c) of the MLCBI provides guidance in the case of two concurrent foreign non-main proceedings. Under this Article the court shall, grant, modify or terminate relief for the purpose of facilitating coordination of the proceedings.

Statement 2 – The ‘hotchpot’ rule as set out in Article 32 in the relevant provision/concept addressed in Statement 2. The intention of the rule is to avoid situations where a creditor is treated more favourably than another creditor in the same class. Per Article 32, to the extent that claims of secured creditors are paid in full, those claims are not affected by the provision.

Statement 3 – Under Article 16 (3) of the MLCBI there is rebuttable presumption that the registered office of the debtor is considered the centre of the debtor’s main interest. The centre of main interest is not defined in the Model Law.

Question 2.3 [2 marks] 1 mark

In the *IBA* case appeal, the English Court of Appeal upheld the decision that the court should not exercise its power to grant the indefinite Moratorium Continuation. **Please explain.**

In the *IBA* case appeal, the English Court of Appeal held that there were two conditions that should be satisfied in order to properly grant the indefinite moratorium and these conditions had not been satisfied. The conditions being:

- 1) The stay would have to be necessary to protect the interests of *IBA*’s creditors; and
- 2) The stay would have to be an appropriate way of achieving such protection.

Issue to should also be mentioned here:

ANSWER

- According to the English Court of Appeal, the real issue was whether as a matter of settled practice the UK court should not exercise its power to grant the indefinite moratorium where to do so would (i) in substance prevent the English creditors (that is the Challenging Creditors) from enforcing their English law rights in accordance with the Gibbs Rule (“Issue 1”) and / or (ii) prolong the stay after the Azeri reconstruction has come to an end (“Issue 2”).
- In respect of each issue, the English Court of Appeal held that:
 1. Issue 1: The UK court would need to be convinced that (a) the indefinite stay is necessary to protect the interests of *IBA*’s creditors and (b) an indefinite stay is the appropriate way of achieving such protection. The factual evidence that can be brought before the court will ultimately decide Issue 1.

2. **Issue 2:** Based on Article 18 of the MLCBI, the English Court of Appeal in the IBA case appeal held that had the MLCBI ever contemplated the continuance of relief after the end of the relevant foreign proceeding, it would have addressed the question explicitly and provided appropriate machinery for that purpose.

Question 2.4 [2 marks] 0 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**.

After recognition of the foreign main proceeding, the court should review any relief granted under Article 19 or Article 21. If there is any inconsistency with the domestic proceeding, then this should be relief should be modified or terminated.

Article 19 requires that a foreign representative inform the court in the enacting State:

- Where there is any change in the status of the foreign proceeding or the foreign representative's appointment
- If they become aware of any other foreign proceeding opened in respect of the debtor.

Art. 29 (a) on concurrent proceedings and art. 18 are the correct answers.

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] 2,5 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?

Access rights in State A, as provided to the foreign representative in Article 9 of the Model Law, benefits the foreign representative as they give the foreign representative standing before the court in State A, as the enacting State, without requiring the foreign proceedings to be recognised in State A.

Access rights provided for in Article 11 of the Model Law, benefit the foreign representative as they would allow the foreign representative, where all requirements have been met, to open domestic proceedings in State A.

Article 13 of the Model Law provides for foreign creditors to be given the same rights as creditors in State A, allowing for the foreign representative to coordinate with all creditors without the need for separate proceedings in State A. This saves the foreign representative time and the creditors, cost.

The answer should also make reference to art. 25-27 along with an overall conclusion that access rights and coordination rights are time and cost preserving.

Question 3.2 [maximum 5 marks] 2 marks

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

The intention of the MLCBI is to provide a clear framework for obtaining recognition of the foreign proceeding, opened in State B, in State A, prescribing straight forward and easy to meet conditions for obtaining recognition.

Article 15 (2) of the MLCBI sets out the requirements for recognition of the foreign proceeding. The application to the court in State A by the foreign representative to recognise the foreign proceeding must be accompanied by:

- 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
- c) In the absence of evidence referred to in subparagraphs (a) and (b), any other evidence acceptable to the court of the existence of the foreign proceeding and of the appointment of the foreign representative.

In addition, the foreign representative should also include a statement identifying all known foreign proceedings in respect of the Debtor.

Article 16 of the MLCBI sets out the presumptions concerning recognition, whereby if the documentation provided in accordance with the application under Article 15 indicates that the foreign proceeding qualifies as a foreign proceeding under the MLCBI and the same with the foreign representative, then the court is entitled to presume so. In addition, the court is entitled to presume that the documentation submitted is authentic and the Debtor’s registered office is presumed to be the centre of main interests (“COMI”).

Under Article 17 of the MLCBI, where the requirements of Article 15 (2) have been met and both the foreign proceeding and foreign representative qualify within the meaning of article 2(a) and 2(d) of the MLCBI, respectively, then the recognition should be granted.

Under Article 17 of the MLCBI, the foreign proceedings would either be recognised as foreign main proceedings or foreign non-main proceedings. If the COMI of the debtor is in State B, then under Article 17, the foreign proceedings would be recognised as foreign main proceedings in State A. If the Debtor only had an establishment in State B, then the foreign proceedings would be recognised as foreign non-main proceedings in State A.

In the instance that there was neither COMI nor establishment in State B then the court in State A would deny the recognition application.

The following should also be included for full marks:

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] 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.

Under the Article 19 of the MLCBI, pre-recognition relief can be granted by the court on an interim basis, at the time of filing the recognition application until the application is decided upon. Interim relief under Article 19 is granted provisionally and where the relief is needed to protect the assets of the debtor or the interests of the creditors. The interim relief can be provided to both foreign main proceedings and foreign non-main proceedings.

Post recognition relief is provided for in Articles 20 and 21. In the first instance to determine under which article post-recognition relief is granted, the COMI of the Debtor would need to be determined, as the COMI of the Debtor determines the consequences of a recognition application and relief available. If the COMI is in State B (where the foreign proceedings were opened), then Under Article 17 of the Model Law the foreign proceedings would be considered foreign main proceedings. If the Debtor has only establishment in State B, then under Article 17, the foreign proceedings would be considered main proceedings.

Article 20 of the MLCBI provides for automatic relief where the foreign proceeding in State B is recognised in State A as a foreign main proceeding. The automatic relief provided in Article 20 (1) upon recognition is:

- a) Commencement or continuation of individual actions or individual proceedings concerning the debtor's assets, rights, obligations or liabilities is stayed;
- b) Execution against the debtor's assets is stayed; and
- c) The right to transfer, encumber or otherwise dispose of any assets of the debtor is suspended.

The Article does also provide for the court in State A with the authority to make changes to the scope, modify or terminate the relief. In addition, the Article does not affect the right to commence individual actions or proceedings to the extent necessary to preserve a claim against the debtor or to request the commencement of a proceeding under the laws of State A.

Article 21 of the Model Law will provide the court in State A with the discretionary power to grant appropriate relief upon recognition of the foreign proceedings. Article 21 1 (a) – (g) lists the relief the court can grant under the article, including extending any interim relief that was granted pre-recognition pursuant to Article 19 of the MLCBI. Unlike Article 20, the court can grant the discretionary relief in both foreign main proceedings and foreign non-main proceedings.

For full marks, reference should also be made to art. 22, 3 and 6.

Question 3.4 [maximum 1 mark] 1

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

The stay of execution against the debtor's assets granted pre-recognition under Article 19 of the MLBCI is unlikely to continue post-recognition as the same can be granted under Article 21 of the MLBCI where it has not been stayed under Article 20 of the MLCBI.

QUESTION 4 (fact-based application-type question) [15 marks in total] 10 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]**; 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].

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 Under the MLCBI, ‘foreign proceeding’ is defined as “*a collective judicial or administrative proceeding in a foreign State, including an interim proceeding, pursuant to a law relating to insolvency in which proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganization or liquidation*”.

In considering whether the Bank’s liquidation comprises a “foreign proceeding” within the meaning of article 2(a) of the MLCBI, we will look at each element of the definition per the MLCBI.

- A proceeding – The Bank was placed into provisional administration on 17 September 2015 and liquidation on 17 December 2015.
- Judicial or administrative – DGF is a governmental body of Country A. The DGF are responsible for the process of withdrawing insolvent banks from the market and winding down their operations via liquidation. As the DGF can act in the provisional administration and liquidation of the Bank under the DGF Law, the proceeding would be considered an administrative proceeding.
- Collective in nature – Here we would need to consider if the assets realised in the liquidation of the Bank were for the benefit of all creditors in order to determine if the proceeding is collective in nature.

From the information provided it is not set out that the assets of the Bank were for the benefit of all creditors, It should be noted that a proceeding should not be considered to fail the test of collectivity purely because a particular class of creditors’ rights is unaffected by it¹.

- In a foreign State – the registered office of the Bank is situated in Country A. Under Article 16 of the Model Law there is the presumption that the registered office is consider the centre of main interest for the debtor. Given this the proceeding is taking place in a foreign State.
- Authorised or conducted under a law relating to insolvency – Pursuant to Article 34 of the DGF law of Country A, once a bank has been classified as insolvent, the DGF will begin the process of removing it from the market. While the DGF Law does not seem to be strictly an insolvency law there are provisions in the DGF Law authorising the administration or liquidation of the Bank.
- Assets and affairs of the debtor are subject to control or supervision by a foreign court – From the information provided it is not clear that the assets and affairs of the debtor

¹ UNCITRAL Model Law on Cross-Border Insolvency: The Judicial Perspective

are subject to control or supervision by a foreign court. The DGF is governmental body and its powers include the power to act in a bank's liquidation. In addition, under Articles 3(3) and 3(7) of the DGF law neither public authorities nor the NB have any right to interfere in the DGFs exercise of its functions or powers. Article 37 does however establish that the DGF does have powers to file property and non-property claims with the court, so in this aspect there is some control by a foreign court.

- Proceeding for the purpose of reorganisation or liquidation – The Bank was first classified by the NB as troubled on 19 January 2015, the Bank was given the opportunity by the NV to bring its activities in line with the NB's requirements. The Bank's financial position further deteriorated, and the NB declared the Bank insolvent. As a result, the Bank was first placed into provisional administration and subsequently into liquidation upon revocation of its licence.

It is considered that the Bank's liquidation comprises a "foreign proceeding" within the meaning of article 2(a) of the MLCBI.

For full marks on this question it is of importance to discuss the meaning of each requirement in art. 2(a) as this can be interpreted to either the guide to enactment, case law or other interpretation tools more thoroughly and not just an application of facts. The answer is lacking a discussion of what can be considered a foreign court, what is meant by collectivity and the reference to insolvency law.

4.1.2 Under the MLCBI, 'foreign representative' is defined as *"a person or body, including one appointed on an interim basis, authorized in a foreign proceeding to administer the reorganization or the liquidation of the debtor's assets or affairs or to act as a representative of the foreign proceeding"*.

In considering whether the Applicants fall within the description of "foreign representatives" as defined by article 2(d) of the MLCBI, we will look at each aspect of the definition per the MLCBI.

- Appointed person or body authorised in a foreign proceeding – Under the LBBA of Country A, the NB can classify the Bank as insolvent once it meets the criteria set out in article 76 of the LBBA. The DGF is responsible for the winding up process of banks in Country A by either provisional administration or liquidation, acting via an authorised officer.

Under Article 34 once the bank is classified insolvent then the DGF can begin the process of removing the Bank from the market which can be achieved by an provisional administrator. Under Article 77 of the LBBA, the DGF automatically becomes the liquidator on the date it receives confirmation that the NB's decision to revoke the bank's license and acquires the full powers of a liquidator under the law of Country A. As such in the case of the Bank, the DGF became an authorised body first when it was became provisional administrator on 17 September 2015 and continued as authorised body when the NB revoked the Bank's license on 17 December 2015 and the DGF automatically became liquidator.

The DGF Law provides the DGF with the power to "delegate its powers to and "authorised officer" or "authorised person"" as defined in article 48 (3) of the DGF Law with Article 35 (1) of the DGF Law specifying that the authorised person be "...high professional and moral qualities, impeccable business reputation, complete higher education in the field of economics, finance or law...and professional experience necessary.". Provided that Mrs G, is an employee of the DGF, as required under article 48 (3) of the DGF, and as she is considered a "leading bank liquidation professional"

as noted in the resolutions appointing Mrs G, it would be appropriate to consider Mrs G as an appointed person authorised in a foreign proceeding.

- Authorised to administer the reorganisation or liquidation of the debtor's assets or affairs or to act as representative of the foreign proceeding – As liquidator the DGF has the full powers of a liquidator under the law of Country A and all powers of the bank's management and control bodies are terminated. As such as authorised body, the DGF is authorised to administer the reorganisation or liquidation of the debtor's assets or affairs.

Resolution 1513, appointing Mrs G. as authorised person, delegated her certain liquidation powers set out in the DGF Law to act as a representative of the liquidator in the liquidation of the Bank.

It is considered that the Applicants fall within the description of "foreign representatives" as defined by article 2(d) of the MLCBI.

More attention should again be given to what is meant by the different requirement and a discussion on the split of powers and the effect hereof.

*** End of Assessment ***