



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.**
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- 6.1 If you selected Module 2A as one of your **compulsory modules** (see the e-mail that was sent to you when your place on the course was confirmed), the final time and date for the submission of this assessment is **23:00 (11 pm) GMT on 1 March 2022**. The assessment submission portal will close at 23:00 (11 pm) GMT on 1 March 2022. No submissions can be made after the portal has closed and no further uploading of documents will be allowed, no matter the circumstances.
- 6.2 If you selected Module 2A as one of your **elective modules** (see the e-mail that was sent to you when your place on the course was confirmed), you have a **choice** as to when you may submit this assessment. You may either submit the assessment by **23:00 (11 pm) GMT on 1 March 2022** or by **23:00 (11 pm) BST (GMT +1) on 31 July 2022**. If you elect to submit by 1 March 2022, you **may not** submit the assessment again by 31 July 2022 (for example, in order to achieve a higher mark).
7. Prior to being populated with your answers, this assessment consists of **12 pages**.

ANSWER ALL THE QUESTIONS

Total marks received 38 out of 50

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

QUESTION 1 (multiple-choice questions) [10 marks in total] 6 marks

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

Question 1.1

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

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

The correct answer is D

Question 1.2

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

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

The correct answer is D

Question 1.3

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

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

Question 1.4

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

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

Question 1.5

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

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

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

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

Question 1.6

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

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

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

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

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

Question 1.7

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

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

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

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

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

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).

The correct answer is C

Question 1.10

When for the interpretation of the Model Law “its original origin” is to be considered in accordance with article 8 of the Model Law, which of the following texts is likely to be of relevance?

- (a) The UNCITRAL Guide of Enactment and the Practice Guide.
- (b) The UNCITRAL Guide of Enactment and the Legislative Guide – Parts One, Two, Three and Four.
- (c) The UNCITRAL Guide of Enactment and the Judicial Perspective.
- (d) All of the above.

The correct answer is D

QUESTION 2 (direct questions) [10 marks in total] 8 marks

Question 2.1 [maximum 3 marks] 3 marks

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

[The Guide to Enactment and Interpretation discusses that the appropriate date for determining the COMI or establishment of the debtor is the date of commencement of the proceedings. The date of commencement has not been specifically addressed by the Model Law. The application for recognition under article 15 should be accompanied by relevant evidence.

It is harder to establish if it is the case that the debtor has moved closer to the commencement of the foreign proceedings and the same may not be easily ascertainable by the third parties. Therefore, determination by reference to the date of commencement produces a clear result.

However, some courts have opined that the date could be based on its activities at or around the time of filing the application. While doing so the court may consider the period between the filing of the application and commencement of proceedings to ensure that the address has not been manipulated in bad faith.]

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.

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

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

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

[Statement 1 relates to Coordination of more than one foreign proceeding and under Article 30(c) “If, after recognition of a foreign non-main proceeding, another foreign non-main proceeding is recognised, the court shall grant, modify or terminate relief for the purpose of facilitating coordination of the proceedings.” The Model Law does not treat preferentially any foreign proceeding apart from foreign main proceeding.

Statement 2 is known as the hotchpot rule under Article 32 and relates to the Rule of payment in concurrent proceedings. Establishes the equal treatment of creditors of the same class conditional to the payment to the claims of secured creditors as per law of the State where the proceedings are conducted.

Statement 3 is for presumption of insolvency of debtor under Article 31 on the recognition of a foreign main proceeding where the Model Law has not defined the term insolvent.] **The correct answer is art. 16(3)**

Question 2.3 [2 marks] 2 marks

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

[The English Court of first instance had denied relief for indefinite moratorium based on the Gibbs Rule that debt governed by English law cannot be discharged or compromised by a foreign insolvency proceeding.

The English Court of Appeal upheld the decision of the English Court but by observing that as a matter of settled practice the court should not exercise its power to grant indefinite Moratorium Continuation since it shall prevent English creditors from enforcing their English law rights and/or prolong the stay after the reconstruction of the debtor had come to an end.

The Appeals court held that stay would have been proper if the creditors required protection and it was the appropriate way to protect. However in the present case the creditors needed no further protection. It further held that once the foreign proceedings comes to an end and

the foreign representative is no longer in office there is no further scope for any order or reliefs to be granted.]

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**.

[As per article 20 the court in the enacting State is to grant three automatic reliefs that have the effect of a stay of the commencement or continuation of individual actions or proceedings, stay of execution against debtor assets and suspension of right to transfer, encumber or otherwise dispose of debtor assets. However, the court shall have authority to modify or terminate the effects if it would be contrary to the legitimate interests of a party in interest.

The correct answer is 29 regarding concurrent proceedings.

As per article 18 the foreign representative is to promptly inform the court in the enacting State of any substantial change in status of the recognised foreign proceeding or that of the foreign representative's appointment and any other foreign proceedings in relation to the same debtor that become known to the foreign representative.]

QUESTION 3 (essay-type questions) [15 marks in total] 11 marks

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

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

Question 3.1 [maximum 4 marks] 4 marks

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

[Article 9 allows standing of and direct access to the foreign representative to courts of the enacting State. Such access does not vest the foreign representative with any other right or powers. He is freed from having to meet formal requirements in the enacting State.

Article 11 allows the foreign representative to request the commencement of a domestic insolvency proceeding in the enacting State without otherwise modifying any of the conditions for the opening of such a proceeding. Such request may be crucial to preserve the value of debtor assets.

Article 25 allows for direct communication or to request information or assistance and this could be on basis of presence of assets in the enacting State.

Article 26 mandates the domestic insolvency office-holder to co-operate to the maximum extent possible with foreign representative. This would lead to benefits of cost optimisation.]

Question 3.2 [maximum 5 marks] 3 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.

[1. Article 15 provides for a flexible approach. It requires the appointed foreign representative to file the application for recognition of foreign proceeding with certified copy of decision commencing the foreign proceeding or a certificate from the foreign court or other acceptable evidence. Further the application would be accompanied with a statement of all ongoing known proceedings. All documents provided may be translated to an official language of the enacting State if required.

2. Article 15 makes no provision for the receiving court in the enacting State to embark on a consideration whether the foreign proceeding was correctly commenced.

3. Article 16 presumes the authenticity of the documents submitted and the debtor’s registered office is considered the centre of debtor’s main interests (COMI) thus deciding it as a main foreign proceeding. Where COMI is alleged to be at a place other than the registered office, the party making allegations shall satisfy the court of the location of COMI. The court shall consider the COMI on two principal factors, one of place of debtor’s central administration; and second that the place is readily ascertainable by creditors. Where the debtor has an establishment in the foreign State, non-transitory economic activity, then it shall be foreign non-main proceeding.

4. Article 17 provides for modification or termination of the recognition if the grounds of granting recognition ceased to exist were fully or partially. The courts in the enacting state are bound to consider protection of interests of creditors, debtor and other interested parties. The application should have been filed with the competent court of authority as mentioned under article 4. The court may deny recognition of foreign proceeding on public policy exceptions under article 6. However this would have to be an exception. The court is to decide between recognizing the proceeding as main foreign proceeding as defined under article 2(b) or non-main foreign proceeding as defined under article 2(c).

5. Article 18 provides the ongoing duty of the foreign representative to keep the court informed of any substantial change in the status of the recognised foreign proceeding.]

For full marks on this question should also address the exclusions in article 1(2) and restrictions in art. 3.

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.

[1. Article 19 allows the court in the enacting State to provide pre-recognition immediate interim relief on the filing of the application for recognition by foreign representative of the foreign proceeding. The relief are provisional in nature upon urgent need to protect the assets of the debtor. Reliefs include stay of execution against debtor assets, entrusting administration or realisation of debtor assets, suspending right of action on assets of the debtor, examination of witnesses or taking evidence or granting additional relief available to domestic liquidator or office holder. Relief shall be granted post appropriate notice.

2. Article 20 allows for automatic mandatory relief post-recognition as foreign main proceeding. Reliefs include stay of commencement or continuation of individual action against the debtor, stay on execution against debtor assets, suspending right of action on assets of the debtor. Relief against actions that take place for or against the debtor in State apart from the foreign or enacting State may be difficult to enforce. Reliefs are limited to the protection of interests under applicable domestic law of the enacting State. Further the right to file a claim against the debtor or to request commencement of proceedings under the domestic law.

3. Article 21 provides court in the enacting State to provide appropriate relief vide discretionary powers upon recognition of the foreign proceedings and on the application made by the foreign representative. Court to apply such discretionary powers for the protection of assets of the debtor or the interest of the creditors. However courts have ruled in certain cases the limits to appropriate reliefs that include non-enforcement of insolvency related *in personam* default judgement or applying foreign insolvency law to a contract governed by domestic law or indefinite continuation of automatic moratorium resulting from an earlier recognition order.

4. Article 22 allows the court in the enacting State to balance reliefs and interests. The powers of the court subject reliefs to conditions or to modify or terminate reliefs that may have been granted earlier. The underlying requirement shall be adequate protection.

5. Article 23 & Article 24 provides standing and right of the foreign representative respectively. Allowing the foreign representative to take action against acts detrimental to creditors or relating to assets of the debtor or intervening in the proceedings where debtor is a party.]

Again, reference in the answer should also be made to art. 3 and art 6 on public policy.

Question 3.4 [maximum 1 mark] 1 mark

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

[Relief under article 19 are provisional in nature, urgently needed to protect assets of the debtor. However under article 21 appropriate relief is provided, whether it main or non-main foreign proceedings, and such relief should not interfere with the administration of another insolvency proceeding.]

QUESTION 4 (fact-based application-type question) [15 marks in total] 13

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

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

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

[4.1.1 Country A has not adopted MLCBI. However, the Model Law does not require reciprocity by the enacting State to consider a proceeding as a foreign proceeding under the Model Law.

As per article 2(a), to qualify as a foreign proceeding, the proceeding must satisfy all elements and should be considered as a whole. These elements include:

Collective involvement of creditors – foreign proceedings are for achieving a coordinated, global solution for all stakeholders; should not be for a particular group of creditors or gathering assets in a winding up or conservation proceedings that does not include provision for addressing claims of creditors; substantially all assets and liabilities of the debtor are dealt with subject to local priorities; all creditor participation with adequate notice – *DGF power to compile a register of creditor claims and to seek to satisfy those claims; has the power to take steps to find, identify and recover property belonging to the bank; DGF resolved to approve an amended list of creditors' claims totalling approximately USD 1.113 billion; there was no exclusion of creditor claims.*

Receiverships – where the receivers were not required to consider the rights and obligations of all creditors and designed to allow certain party to collect debt; to prevent an ongoing fraud and did not include authority to liquidate and distribute assets to satisfy creditors' claims – *Bank was not put under receivership; DGF is responsible for the process of withdrawing insolvent banks from the market and winding down their operations via liquidation; DGF 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.*

Judicial or administrative – statutory framework to regulate – *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 and at the time that the Bank entered liquidation. The stages included Classification of the bank as insolvent, Provisional administration and thereafter Liquidation. Therefore matter of foreign law is a question of fact that is decided on expert evidence.*

Foreign State – Article 8 provides that the elements are to be applied in light of the international origins – *Bank's registered office is situated in Country A that is apart from UK.*

Interim proceeding – In many States insolvency proceedings are often commenced on an "interim" or "provisional" basis. Except for being labelled as interim, those proceedings meet all the other requisites of the definition in article 2 (a).

Pursuant to a law relating to insolvency – not labelled as insolvency law but addresses insolvency or severe financial distress; law needn't exclusively deal with insolvency; liquidation pursuant to regulatory misbehaviour – *It is unchallenged evidence that the Bank was in a state of serious financial distress.*

Debtor assets and affairs are subject to control or supervision by a foreign court – as per article 2(e) court would be a judicial or other competent authority; control of court should be formal & notional rather than actual; mere supervision of an insolvency representative by an licensing authority is not sufficient; no day-to-day involvement – *DGF is a competent and independent authority that operates under the laws of Country A. Model law requires relatively low level of court supervision.*

Purpose of reorganisation or liquidation – designed to prevent dissipation and waste or to prevent detriment to investor rather than to liquidate or reorganize; allowing certain party to collect its debt; powers & duties had been conferred or imposed on the receiver by the order commencing – Country A's legislation specifically provides for insolvency procedure in order to reorganize and restructure banks in financial distress. Initially the Bank is put in to provisional administration and where provisional administration for the purpose of financial restructuring fails, the Bank is put into liquidation.

As per article 15, an affidavit sets out a detailed summary of the legislation of Country A's specific insolvency procedure for Banks and the procedure involving initial input from the National Bank and at the time that the Bank entered liquidation would be considered acceptable evidence for existence of foreign proceeding and appointment of foreign representative.

Based on the above elements, Bank's liquidation would comprise a foreign proceeding under Article 2(a).]

For full marks on this question the assessment should entail more argumentation on the proceeding as administrative as well as more arguments on the interpretation of the requirements as set in art. 2(a).

[4.1.2 As per Article 2(d) foreign representative may be a person or body, an artificial person created by a legal authority, authorised in a foreign proceeding either to administer or represent in the proceeding – *DGF as competent authority authorised under law of Country A. DGF delegated its powers to an "authorised officer" or "authorised person". Ms C & Ms G were delegated powers by DGF.*

The representative need not be authorised by a foreign court and thus may be appointed by a special agency or competent authority – *DGF being a competent authority delegated its authority to Ms C & Ms G.*

The definition being broad includes debtor in possession after the commencement of insolvency proceedings including interim appointments – *Ms C being an interim liquidator and later liquidator qualifies as foreign representative.*

The operative of the definition is appointment in context of or in the course of the foreign proceeding – *DGF was in appointment during course of the proceeding and delegated its powers to Ms C & Ms G.*

The appointed representative should satisfy the conditions of disinterested party or to be free of conflict of interest in relation to the proceeding - *DGF Law which confirms that it is an economically independent institution with separate balance sheet and accounts. Further the 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."*

The foreign representative should have the power to administer the reorganisation or liquidation of the debtor's assets or affairs – *As per DGF Law authorised person is: "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". Ms C as the first of the DGF's authorised persons to whom powers of the liquidator were delegated. However, Board of Directors 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.*

Based on the above elements, DGF and Ms C qualify as foreign representatives under Article 2(e) at relevant time in the proceedings. However, Ms G may not qualify as foreign representative as her powers to administer all assets or affairs of the debtor were curtailed by the Board of Directors of DGF.]

*** End of Assessment ***