



SUMMATIVE (FORMAL) ASSESSMENT: MODULE 2A

THE UNCITRAL MODEL LAWS RELATING TO INSOLVENCY

This is the **summative (formal) re-sit 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: 43 out of 50

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

QUESTION 1 (multiple-choice questions) [10 marks in total] 7 marks

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

Question 1.1

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

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

Question 1.2

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

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

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] 8 marks

Question 2.1 [maximum 3 marks] 1

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. Please note that, should a change/move in COMI occur near the commencement of the proceedings, it may be difficult to establish appropriate evidence as it may not be readily ascertainable by third parties as to where the debtor's COMI is.

Further guidance on this issue can be found in the Guide to Enactment (paras. 157-160).

For full marks on this question, it should be mentioned that it is not explicitly mentioned in the MLCBI and there are slightly different approaches in different jurisdictions.

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(d) – Concurrent foreign non-main proceedings. In such a situation, the court must grant, modify, or terminate relief to facilitate co-ordinating of the proceedings. I note that the Model Law does not provide a rule as to which once should be preferred between the concurrent non-main proceedings.

Statement 2: Article 32 – The hotchpot rule. This rule seeks to avoid certain creditors obtaining more favourable treatment over others in the same class if they manage to obtain payment of the same claim in different jurisdictions. I.e., if a creditor has received a return of 5% in the foreign proceeding, any payments made in the domestic proceeding, will need to be reduced by this same portion so that the creditor is treated equally within its same rank (e.g. between all unsecured creditors). Given secured creditors have separate terms/agreements directly with debtors, it is specifically noted in Article 32 that the hotchpot rule does not apply to secured creditors.

Statement 3: Article 16(3) – COMI. There is a rebuttable presumption that the place of the debtor's registered office is the place of COMI (in the absence of proof to the contrary). COMI is not defined in the MLCBI in article 2.

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 *IBA* case involved an Azeri foreign representative, who requested relief under article 21 of the Model Law for an indefinite continuation of the automatic moratorium period (which had been granted pursuant to an earlier recognition order).

This was contested by creditors (the “**Challenging Creditors**”) who had unpaid claims under English law governed agreements. On the basis of the Gibbs Rule¹, it was possible that once the Azeri restructuring ended, the Challenging Creditors would enforce their English law claim in England (on the basis that the Azeri restructuring cannot discharge an English law obligation) and jeopardise the whole restructuring objective.

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. It was queried if the English court actually lacked jurisdiction to grant the indefinite Moratorium Continuation which was requested by the foreign representative. The Court of Appeal considered that the case was not a strict jurisdiction issue but was rather an issue as to whether the court should not exercise its power to grant the indefinite Moratorium Continuation as, if it did grant such, the following would occur:

1. English creditors would be prevented from enforcing their rights under English law in accordance with the Gibbs Rules; and
2. The stay would be prolonged and exist after the Azeri reconstruction came to an end.

The Court of Appeal held that an English court can only grant the indefinite Moratorium Continuation if the stay is:

1. Necessary to protect the interests of creditors; and
2. The appropriate way to protect such interests.

In this case, the Court of Appeal held with neither were satisfied. The creditors did not need their interests protected further. In addition, it would have been possible for the foreign representative to have organised a parallel scheme of arrangement in the UK (so there would be no risk of claims from the Challenging Creditors under their English law agreements) so as to protect the interests in a more effective manner.

Further, the Court of Appeal noted that the information obligation imposed on foreign representatives under article 18 of the Model Law, would require the foreign proceeding to still be in existence and the representative still be appointed. As such, it is implied that no indefinite moratorium would be possible once the proceeding comes to an end as the relief would be terminated. It was also held that if continued relief, post the cessation of proceedings, was ever envisaged by the Model Law, this would likely have been specifically addressed.

¹ Antony Gibbs & Sons v La Societe Industrielle et Commerciale des Metaux

Question 2.4 [2 marks] 2 marks

In terms of relief, what should the court in an enacting State, where a domestic proceeding has already been opened in respect of the debtor, do after recognition of a foreign main proceeding? In your answer you should **mention the most relevant article of the MLCBI**. What (ongoing) duty of information does the foreign representative in the foreign main proceeding have towards the court in the enacting State? Here too you are required to **mention the most relevant article of the MLCBI**.

Article 29(a) addresses the situation whereby a domestic proceeding is open at the time of the application for recognition of a foreign proceeding. Any relief granted either on an interim basis (Article 19) or post-recognition (Article 21), must be consistent with the domestic proceedings.

Article 18 requires the foreign representative (from the time of filing the recognition application) to promptly inform the court in an enacting State of:

1. Any substantial change in the status of the recognised foreign proceedings/ foreign representative's appointment; and
2. Any other known foreign proceeding regarding the same debtor.

The purpose of article 18 is to allow the court to modify and/or terminate the relief granted upon recognition. This will ensure that the relief is appropriate and consistent between proceedings concerning the same debtor pursuant to article 30 of the MLCBI, for the purposes of facilitating cooperation.

QUESTION 3 (essay-type questions) [15 marks in total] 12 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?

As State A follows the Model Law, the following articles will be followed to the benefit of the foreign representative:

- Article 9 of the Model Law provides access rights to foreign representatives standing before the court in the enacting state without a need for the foreign proceeding to be recognised in the enacting State.
- Article 11 of the Model Law provides the foreign representative with standing to open domestic proceedings in the enacting State (provided all requirements are met).

These access rights save time and costs as the foreign representative is able to use the enacting state's rules without a need for separate proceedings in such place to obtain the required standing.

In addition, State A will follow the rules set out in Articles 25-27 of the Model Law which deal with cross-border cooperation and allows the enacting State's court to determine what coordination among the jurisdictions is required and what relief is warranted. Cooperation is not dependent upon recognition.

Cooperation allows courts and foreign/local representatives to be efficient and economical in achieving their goals for the benefit of the insolvency estate. For example:

- Article 25(1) states courts must co-operate to the maximum extent possible with foreign courts/foreign representatives.
- Article 27 provides an indicative list of the types of cooperation authorised under the model law, such as: communication of information, coordination of the administration and supervision of the debtor's assets and affairs, coordination of concurrent proceedings, amongst others.

Question 3.2 [maximum 5 marks] 4 marks

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

Article 15 sets out evidential requirements. The recognition application must include certain items e.g.

- Certified copy of decision/court order to commence the foreign proceeding and appoint the representative.
- A statement identifying all other known foreign proceedings.
- Translated copies of any documents.

Article 16 – Sets out the recognition presumption. If the court decision/appointment document indicates that the foreign proceeding is a proceeding within article 2(a) and 2(d), then the enacting court is entitled to rely on such and believe that is the case.

Article 16 & COMI – Evidence needs to be given as to the location of the central administration of the debtor and if such is readily ascertainable by the creditors of the debtor.

Article 17 - Should the grounds for granting recognition be shown to be fully or partially lacking or have ceased to exist, the recognition can be modified or terminated.

Article 6 - Public Policy Exception – If there are grounds in the enacting State to deny a request for recognition on the basis of overriding public policy considerations, noting that it is expected to rarely occur.

Article 1(2) – Allows the enacting State to exclude certain proceedings e.g. banks and insurance companies as they may need special regulatory administration.

Restrictions – Certain states have included reciprocity provisions when enacting Model Law which work to undermine the effectiveness of the Model law as these states will not provide relief if the foreign jurisdiction does not meet their reciprocity requirements.

Article 28 – The supremacy of domestic insolvency proceedings. If there is already a proceeding in the domestic statement prior to the foreign proceeding application for recognition, then any relief granted must be consistent with the domestic insolvency proceedings. In the case of a foreign main proceeding, the automatic relief of Article 20 does not apply. In granting relief to a foreign non-main proceeding, the court must be satisfied that (Article 29(c)) the relief relates to assets that should be administered in the foreign non-main proceeding or the relief concerns information required in the foreign non-main proceeding.

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

Question 3.3 [maximum 5 marks] 3 marks

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

If the debtor's COMI is in the jurisdiction of the foreign proceedings, these are the main proceedings with an automatic mandatory relief. If only the establishment is in the jurisdiction of the foreign proceedings, these are non-main proceedings with automatic relief, but only discretionary post-recognition relief is granted by the court.

Pre-Recognition Relief

Post the filing of the recognition application, urgent interim relief can be granted prior to the recognition decision on the basis that creditors and other interest parties' interests are protected.

Article 19 sets out that prior to a decision on the recognition application, the enacting State's court may grant urgent interim relief upon application. This relief is of a provisional nature between the time of filing until it is decided on and may include:

- A stay of execution against the debtor's assets
- Entrusting the debtor's assets located in the enacting state to the foreign representative
- Suspending the right to transfer, encumber or dispose of the debtor's assets.
- Providing for the examination of witness, obtaining evidence and records concerning the debtor.
- Granting any other additional relief that would be available to a local liquidator of the enacting state.

Article 19(4) limits such relief available to be provided by the court if it would interfere with the administration of a foreign main proceeding.

Post-Recognition Relief

Article 21 sets out the court's discretionary power to provide post-recognition relief. Such relief may include:

- The stay of proceedings concerning the debtor's assets, rights, obligations or liabilities (to the extent they have not already automatically been).
- The stay of execution against debtor's assets.
- Suspending the right to transfer, encumber, or dispose of assets of the debtor;
- Providing for the examination of witness, obtaining evidence and records concerning the debtor.
- Entrusting the debtor's assets located in the enacting state to the foreign representative

- Extending any interim relief granted
- Granting any other additional relief that would be available to a local liquidator of the enacting state.

Whilst the above is broad, there are limits to the relief that is deemed to be appropriate to grant under the Model Law as seen in the following three cases:

1. Rubin v Eurofinance SA²
 - The English Court concluded that the Model Law does not cover the enforcement of an insolvency related judgement against a particular person.
 -
2. Fibria Celulose S/A v Pan Ocean Co Ltd³
 - The English first instance Court concluded that it was outside of the court's scope of appropriate relief to apply foreign insolvency law to an English law governed contract.
3. IBA case appeal⁴
 - The English court determined that it did not have jurisdiction to grant a foreign main proceeding with an indemnity continuation of the automatic moratorium.

In addition, I note that:

- Article 20 sets out automatic mandatory relief for foreign main proceedings
- Article 22 sets out that for either Articles 19 or 21 – the court must be satisfied that the interests of the debtor's creditors and other parties are protected. Further the court may subject such relief under 19 or 21 to conditions or may modify / terminate such relief.
- Per Article 23, post the recognition decision the foreign representative obtains standing to initiate actions under the law of the enacting State e.g. antecedent/voidable transactions.
- Per article 24, post the recognition decision the foreign representative obtains the right to intervene in any local proceedings in the enacting State in which the debtor is a party (assuming they meet local requirements).

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

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?

Article 19 sets out that prior to a decision on the recognition application, the enacting State's court may grant urgent interim relief upon application. This relief is of a provisional nature between the time of filing until the recognition application is decided upon. At which point, it will cease.

The purpose of a freezing order is to obtain an injunction to prevent a defendant from disposing of assets pending the resolution of a certain issue e.g. recognition proceedings.

² [2010] UKSC 46

³ [2014] EWHC 2124 (Ch)

⁴ Court of Appeal decision of 18 December 2018 paras 23-26 [2018] EWCA civ 2802

Upon the granting of the recognition order, the foreign representative can apply for post-recognition relief if required to secure and take possession of such assets under article 21.

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

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] 14 marks

Prior to any determination made in the English Proceedings, Ms G, in her capacity as authorised officer of the Deposit Guarantee Fund (or DGF) of Country A in respect of the liquidation of the Commercial Bank for Business Corporation (the Bank), together with the DGF (the Applicants), applied for recognition of the liquidation of the Bank before the English court based on the Cross-Border Insolvency Regulations 2006 (CBIR), the English adopted version of the MLCBI.

Assuming you are the judge in the English court considering this recognition application, you are required to discuss:

4.1.1 whether the Bank's liquidation comprises a "foreign proceeding" within the meaning of article 2(a) of the MLCBI **[maximum 10 marks]; 9 marks** and

Article 2(a) states that "Foreign proceeding" means a collective judicial or administrative proceeding in a foreign State, including an interim proceeding, pursuant to a law relating to insolvency in which proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganization or liquidation:

It is noted that the Model Law is not intended to afford recognition to all foreign insolvency proceedings. Consideration needs to be given to the laws of the originating state, the involvement of creditors collectively, the extent of control/supervision of the assets and affairs of the debtor by a court or another official body, and the purpose of the proceeding⁵. As such there are four key issues to address within the above definition of 'foreign proceeding'.

1. "Collective Judicial or administrative proceedings in a foreign state, including an interim proceeding"

Issue:

The proceedings need to have the aim of a coordinated global approach for all stakeholders, rather than for just a particular class of creditors. The Model Law is not intended to simply collect assets, but rather it should also be used to distribute such assets to creditors.

Evidence:

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.

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. The DGF has prepared a list creditors' claims totalling approximately USD 1.113 billion. The Affidavit states that the Bank's current, estimated deficiency exceeds USD 823 million.

As such, it appears that the proceedings to work to benefit all stakeholders and that all classes of creditors are included in the proceedings.

⁵ Guide to Enactment and Interpretation, Part 2, page 28

Further comment:

An interim proceeding may be included in such definition, however, after being declared as 'insolvent' on 17 September 2015 and being resolved to be liquidated on 17 December 2015 (pursuant to article 76 of the LBBA) this is no longer an interim proceeding. Further, 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.

Conclusion: Therefore, the foreign proceeding satisfies this part of the definition of 2(a).

2. "For the purpose of reorganization or liquidation"

Issue:

A foreign proceeding must be for the stated purpose of reorganization or liquidation and should be for the benefit of creditors rather than shareholders (which would also tie back to the 'collective proceeding' issue).

Evidence:

From the background material provided, the purpose of the proceedings is to liquidate the assets and distribute money to creditors as the following items are mentioned:

- DGF is responsible for the process of withdrawing insolvent banks from the market and winding down their operations via liquidation;
- All powers of the bank's management and control bodies are terminated;
- DGF has the power to compile a register of creditor claims and to seek to satisfy those claims; and
- 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.

Conclusion: Therefore, the foreign proceeding satisfies this part of the definition of 2(a).

3. "Pursuant to a law relating to insolvency"

Issue:

Unfortunately, the Model Law does not define the term 'insolvency'. However, it is used and referred to as various types of proceedings with respect to debtor that is in severe financial distress or is insolvent⁶.

It is noted that a foreign proceeding to wind up a solvent entity (where the goal is to dissolve the entity) does not fall within the scope of article 2(a) as the proceedings are not insolvency proceedings. Where a proceeding serves several purposes, including the winding up of a solvent entity, it falls under article 2, subparagraph (a) of the Model Law only if the debtor is insolvent or in severe financial distress."⁷

There is no requirement for a balance sheet or cash flow test to be undertaken and there is no exclusion should the company be wound up on a just and equitable basis.

⁶ Guide to Enactment and Interpretation, Part 2, pages 32-33

⁷ Guide to Enactment and Interpretation, Part 2, pages 32-33

Evidence:

Despite the 'insolvency requirement' the following cases have held that it is possible for this section to be satisfied if the LBBA and the DGF Law, is considered to be a law relating to insolvency:

- In the matter of *Betcorp*⁸ the United States court held that a voluntary liquidation commenced under Australian law was "pursuant to a law relating to insolvency" because when the relevant foreign legislation was considered, it was noted that it regulated the whole life-cycle of a company, including its insolvency.
- In the matter of *Chow Cho Poon*⁹, the Australian court held that a judicial liquidation, ordered by a Singapore court on the ground that it was just and equitable to do so, without any finding, express or implied of insolvency, was made "pursuant to a law relating to insolvency."

However, at times the English court has taken an alternative approach to the above:

- In the matter of *Sturgeon Central*¹⁰, the English court held that a solvent foreign winding up proceeding on just and equitable grounds qualified as a "foreign proceeding" within the meaning of article 2(a) of the MLCBI.
- However, the decision was overturned, and the English court held that "*it would be contrary to the stated purpose and object [of the MLCBI] to interpret "foreign proceedings" to include solvent debtors and more particularly include actions that are subject to a law relating to insolvency which have the purpose of producing a return to members not creditors.*"
- As such, the English courts would be bound by this precedent should it be determined that the foreign proceedings would produce a return to shareholders.

There is no evidence that the liquidation is expected to generate a return to shareholders, as in fact 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.

⁸ Re *Betcorp Limited* 400 B.R. 26, 276 (Bankr.D.Nev. 2009)

⁹ *Chow Cho Poon (Private Limited)* [2011] NSWSC 300 [64]

¹⁰ *Sturgeon Central Asia Balance Fund Ltd* [2019] EWHC 1215 (Ch)

Issue:

The proceedings simply need to be connected to a law relating to insolvency, rather, than any determination as to the insolvency of the entity.

Evidence:

On 17 September 2015, the NB classified the Bank as insolvent pursuant to article 76 of the LBBA.

It is not clear from the evidence if the LBBA appears to specifically relates to "insolvency" for banking entities. The LBBA simply appears to indicate that the NB is obliged to classify a bank as insolvent if it meets the criteria set out in article 76 of the LBBA. Further article 77 of the LBBA provides that the DGF automatically becomes liquidator of a bank and acquires the full powers of a liquidator.

Any further 'insolvency' related liquidation steps/actions appear to come directly from the DFG Law. i.e. the ability to collect and distribute assets. Therefore, it appears that relevant law is the DGF law, however, DGF is a governmental body tasked principally with providing deposit insurance to bank depositors in Country A.

However, I note that this definition was intended to be broad to account for various jurisdictions laws which may not be specific insolvency laws. Under the LBBA and the DGF laws it appears that the laws specifically address the insolvent liquidation of a banking entity such as this one.

Conclusion: Therefore, the foreign proceeding satisfies this part of the definition of 2(a).

4. Assets and affairs of the debtor are subject to control or supervision by a foreign court

Issue:

In order to obtain recognition, both the assets and affairs of the debtor need to be subject to control/supervision by the foreign court. The Model Law does not specify the extent of any control or supervision which would be required to satisfy this aspect of the definition. Further, whilst it is intended that the control or supervision is to be formal in nature, it may be potential oversight rather than actual.

In addition, the Model Law does not specify how control or supervision occurs as it may be exercised by an insolvency representative where, for example, the insolvency representative is subject to control or supervision by the court. Please note however, that the supervision of an insolvency representative by a licensing authority would not satisfy such.

Evidence:

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.

This proceeding was commenced the NB following the LBBA, rather than a court process. There is no evidence of a court's insolvent or potential involvement.

It is possible that the DGF, as a governmental body, is subject to report to the court. However, 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. As such, it appears unlikely that assets and affairs of the debtor are subject to control or supervision by a foreign court.

Conclusion: Therefore, the foreign proceeding does not satisfy this part of the definition of 2(a).

Conclusion

Based on the above four requirements, all but one appears to be satisfied. Accordingly, based on the information provided the foreign proceeding will not be recognised by the English Court. To satisfy the requirement for the foreign court supervision, the foreign representatives will need to provide evidence of the foreign court's ability to intervene in the proceedings and control the debtor's assets and affairs, which based on the evidence provided does not appear to exist.

Other Considerations/Exclusions

The English court will also need to consider the following other reasons that may preclude the recognition order from being made.

Article 1(2)

- The English court may exclude certain proceedings from the application of the implemented Model Law "such as banks or insurance companies, that are subject to a special insolvency regime in this State and that this State wishes to exclude from this Law".
- It could be possible that the insolvency of the Bank gives rise to the need to protect vital interests of a large number of individuals and may be best administered under a special regulatory regime.
- However, the English court may wish to make sure that it would not inadvertently/undesirably limit ability of the foreign representative to seek assistance/ recognition merely because the foreign proceeding is subject to a special regulatory regime.

Article 6

- The English court should consider Article 6 which allows recognition to be refused where it would be "*manifestly contrary to the public policy*" of the State in which recognition is sought.
- However, "*differences in insolvency schemes do not themselves justify a finding that enforcing one State's laws would violate the public policy of another State*"¹¹.

Good answer, for full marks on this question the following should be noted:

¹¹ Guide to Enactment and Interpretation, Part 2, page 28

1. The term “*foreign court*” is defined at article 2(e) of the MLCBI and means: “a *judicial or other authority competent to control or supervise a foreign proceeding*”.
2. The Guide to Enactment notes: “87) A *foreign proceeding that meets the requisites of article 2, subparagraph (a), should receive the same treatment irrespective of whether it has been commenced and supervised by a judicial body or an administrative body. Therefore, in order to obviate the need to refer to a foreign non-judicial authority whenever reference is made to a foreign court, the definition of “foreign court” in subparagraph (e) includes also non-judicial authorities.*”
3. In **Re Sanko Steamship Co Ltd** [2015] EWHC 1031 (Ch) Simon Barker QC, noted that a foreign proceeding may be recognised where the control or supervision of the proceeding is undertaken by a non-judicial administrative body.
4. The Guide to Enactment states: “74) *The Model Law specifies neither the level of control or supervision required to satisfy this aspect of the definition nor the time at which that control or supervision should arise. Although it is intended that the control or supervision required under subparagraph (a) should be formal in nature, it may be potential rather than actual. As noted in paragraph 71, a proceeding in which the debtor retains some measure of control over its assets, albeit under court supervision, such as a debtor-in-possession would satisfy this requirement. Control or supervision may be exercised not only directly by the court but also by an insolvency representative where, for example, the insolvency representative is subject to control or supervision by the court. Mere supervision of an insolvency representative by a licensing authority would not be sufficient.*”
5. In this case the DGF has control of all of the Bank’s assets and overall control of the liquidation.
6. 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.
7. 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.
8. Taking these factors into account, the Bank’s liquidation is *administrative*. The assets and affairs of the Bank are subject to the control of the DGF, an official body which exercises its powers in the liquidation free from intervention by government or the NB and which should be considered, for the purposes of the definition set out in article 2(e) of the MLCBI, as a “*foreign court*”.

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.

Article 2(d) states that “Foreign representative” means 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.

Issue:

Are both of the applicants, being Ms G (in her capacity as authorised officer of the DGF for the Bank) and DGF, able to be classified as foreign representatives by the English Court.

In relation to proving the foreign representative’s appointment, article 15 will need to be satisfied. The foreign representative needs to provide one of the following: a certified copy of the decision to commence the proceedings and appoint the foreign representative, a similar certificate from a court, or any other evidence of such.

Evidence:

In relation to proving the foreign representative’s appointment, article 15 will need to be satisfied. The foreign representative needs to provide one of the following: a certified copy of the decision to commence the proceedings and appoint the foreign representative, a similar certificate from a court, or any other evidence of such. The foreign representative needs to be a person authorized to administer the foreign proceedings, which would include seeking recognition, relief and cooperation in another jurisdiction. In addition, they may simply be a person authorized specifically for the purposes of representing those proceedings.

It is likely that the foreign representatives can provide the following as evidence:

- Article 77 of the LBBA accordingly provides that a bank can be liquidated by the NB directly, revoking its licence. 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.
- 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.
- DGF has been authorised to act pursuant to the above. The Model Law does not specify that the foreign representative must be authorized by the court and is broad enough to include appointments that might be made by a special agency other than the court.

Ms G will also be able to evidence her appointment on the following basis

- Ms G's appointment was pursuant to a Decision of the Executive Board of the Directors of the DGF, No 1513 (Resolution 1513).
- 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"*.
- 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.
- Despite, resolution 1513 expressly excluding 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. The foreign representative definition is broad enough to include a person specifically authorised for the purpose of representing the proceedings.

Finally, it must be noted that if the decision/certificate indicates that the foreign representative is a person of body within the meaning of article 2(d), then the English court is entitled to presume such is the case under article 16. As such, whilst it is helpful that 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.", if Ms. G's appointment resolutions indicate that 2(d) applies, then the English court need not query her experience.

Conclusion: It appears that Ms. G and DFG can both be considered foreign representatives on the provision that they can show provide sufficient evidence of the liquidation appointment, given that there is no specific court order.

*** End of Assessment ***