



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

**THE UNCITRAL MODEL LAWS RELATING TO INSOLVENCY**

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

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

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

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

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

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

## **ANSWER ALL THE QUESTIONS**

**Total: 35 out of 50**

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

### **QUESTION 1 (multiple-choice questions) [10 marks in total] 5 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] 2 marks

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

Under the MLCBI the appropriate date for determining the COMI of a debtor is the date of the commencement of the foreign proceeding. However in the US, the Second Circuit of Appeals held that the appropriate date is the date of the Chapter 15 petition. Whilst this creates a potential deharmonisation of the two, the Court can consider the period between the two dates if any change of COMI could be considered as having been undertaken in bad faith.

It should be mentioned also, that it is not mentioned explicitly in the MLCBI but follows from the guide to enactment

### Question 2.2 [maximum 3 marks] 3 marks

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

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

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

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

Statement 1 relates to Art 30(c); in the case of concurrence of two foreign non-main proceedings, no foreign proceeding is a priori treated preferentially.

Statement 2 relates to Art 32; also known as the “hotchpot” rule; which avoids situations where a creditor might get more favourable treatment than other creditors in the same class by receiving payment in two different foreign insolvency proceedings. Therefore it takes into consideration (without prejudice to secured creditors or rights in rem) by taking distributions made to creditors already when determining the proportion of any remaining assets held on behalf of a debtor that are to be distributed to those creditors.

Statement 3 relates to Art 16; which contains a rebuttable presumption that a debtor’s COMI is the location of that debtor’s registered office.

### **Question 2.3 [2 marks] 1 mark**

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

In the *IBA* case appeal the English Court of Appeal considered whether it could exercise its power to grant the indefinite Moratorium Continuation sought by the applicants, who sought to circumvent the “Gibbs Rule” by seeking a permanent stay of the English law rights to grant the stay.

The Court considered its ability to decide on the matter of jurisdiction, not on the basis of jurisdiction in the strict sense as to whether it could deal with the matter, but whether on a matter of settled case practice the court should not exercise its discretion to grant an indefinite stay where it may prevent the challenging creditors from exercising their rights under the Gibbs Rule and / or result in the prolonged stay or relief long after the restructuring had come to an end. Indeed the Court considered that it would be inconsistent with the Model Law’s procedural and supporting role for a stay granted under the Cross-Border Insolvency Regulations 2006 (“CBIR 2006”) to far outlast the foreign proceedings to which the stay related.

Thus, the Court upheld the earlier decision that it should not exercise its power to grant the indefinite stay sought by the applicants, as the stay was “not necessary” to protect the interests of OJSC International Bank of Azerbaijan (“IBA”) creditors, nor was it an appropriate way to achieve such protection, particularly as the IBA was trading again and the restructuring was at an end. Moreover, the Court found that the issue could have been dealt with by promoting a parallel scheme of arrangement or similar mechanism in England, but which was not pursued.

Further, the Supreme Court had held in *Rubin v Eurofinance SA* [2012] UKSC 46, the principle of universalism could not be used to justify the disregard of English law to assist a foreign insolvency process.

Indeed, it has since been discussed that creditors who enter into English law contracts, do so in order to access the impartiality, commerciality and due process the English courts are well known for, and for which the Gibbs rule guarantees to creditors a stable, predictable and trusted legal system which will protect their rights. If the Gibbs Rule was to be overturned, there is an argument that this would leave lenders and creditors across the globe in an uncertain position.

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

#### **Question 2.4 [2 marks] 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**.

According to Article 29, after recognition of a foreign main proceeding the court of the enacting state has taken place, the Court needs to:

1. review any relief in effect under article 19 or 21 and modify or terminate any relief if inconsistent with the proceeding in that State; and
2. any stay and suspension as referred to in article 20(1) shall be modified or terminated pursuant to article 20(2) if inconsistent with the proceeding in that State;

According to Article 18, the foreign representative has a duty of information to the court in the enacting state, which sets out that from the time of filing the application for recognition of the foreign proceeding, the foreign representative shall inform the court promptly of

- a) any substantial change in the status of the recognized foreign proceeding or the status of the foreign representative's appointment; and
- b) any other foreign proceeding regarding the same debtor that becomes known to the foreign representative.

#### **QUESTION 3 (essay-type questions) [15 marks in total] 10 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] 3 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 of the Model Law provides the foreign representative with direct access to the domestic court of State A, albeit this is not dependent on the recognition of the foreign proceeding as per Article 25, which provides for the mandatory co-operation and direct communication with the foreign representative from the domestic court.

However, having the necessary standing does not automatically provide the same rights or powers to the foreign representative as it would to a domestic trustee or practitioner. It is Article 11 which provides the foreign representative with access to the domestic courts of State A in order to seek insolvency proceedings/recognition.

Upon acceptance, the foreign representative is afforded the ability to take forward proceedings with the same rights and powers as that given to a domestic proceeding in State A.

Going forward, Article 25 ensures that any co-operation and/or communication is not dependent on the recognition of the foreign proceeding and can therefore be facilitated at the outset. This co-operation and direct communication allows for the efficient co-ordination between the foreign representative / courts and the Courts in State A.

These rights together with the safe conduct rule in Article 10, should give the foreign representative sufficient access and coordination rights when considering making a recognition application in another State.

**For full marks it should be mentioned that access and coordination rights are time and cost preserving.**

**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.

Article 15 requires evidence of the commencement of the foreign proceeding and appointment of the foreign representative in State B. Such evidence may be via a members resolution, or application by creditors, or a Court Order appointing the Liquidator or Trustee. Article 16, also provides for the Court in the enacting state to presume that documents in support of the application are authentic. If no such documents are available then the enacting court in State A may consider any other available evidence with regards to the opening of the foreign proceeding or the status of the foreign representative.

The foreign representative has a duty to provide full and frank disclosure to the court in State A, any failure in this regard may result in the recognition application being refused or retrospectively made void. In this regard Article 18 may be considered relevant, in that the MLCBI requires the foreign representative to keep the court of State A fully informed as to the

status of foreign proceeding or the change in status or appointment of the foreign representative, as well as any other foreign proceedings that the foreign representative may become aware of.

For completeness, in refusing a recognition application, the public policy exception provided for in Article 6 of the MLCBI is rarely used although it could be used to limit the relief granted.

Pursuant to Article 17 of the MLCB for the recognition to be considered a foreign main proceeding, the debtors COMI (which is undefined in the Model Law) must be within State B, or, alternatively as a foreign non-main proceeding because the debtor only has an “establishment” in State B.

Although undefined, COMI, Article 16 of the MLCBI provides a rebuttable presumption that the location of the registered office of the Debtor is its COMI, or where an establishment can be identified. Article 2 of the MLCBI defines an establishment as any place of operations where the debtor carries out a non-transitory economic activity. Either is required to determine if the Court can accept an application.

Further, COMI is generally decided on the date of the petition of the foreign proceeding. As a final note, reciprocity in recognition is not a requirement within the Model Law, and as such this does not exist as a requirement or indeed an exclusion to any recognition application.

**For full marks on this question reference should be made to art. 1(2) on exclusions and art. 3 on restrictions**

### **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.

Article 19 of the MLCBI provides for interim relief after the recognition application has been filed but before a decision is made on the application. In order to provide interim relief, the Court of the enacting state will need to satisfy itself that the relief is necessary to protect and preserve the assets of the company, and all economic stakeholders. Examples of relief granted include a stay on execution of the debtors’ assets, any transfer or assignment of assets or liabilities, and to in essence “preserve the ring”.

Article 20 of the MLCBI provides for automatic mandatory relief which includes a stay on the “commencement or continuation” of proceedings against the debtor as would be provided within the provisions of the domestic proceedings of State A.

Article 21 of the MLCBI provides for additional discretionary relief after recognition has been granted. Various forms of relief can be applied for, but it is at the discretion of the Court to provide it, and again, is normally assessed upon the risk of dissipation of assets, and the need to preserve the assets, and the interests of other key stakeholders.

Finally, Article 22 confirms that the court must, in providing such relief, satisfy itself that the economic interests of all the stakeholders as far as possible are protected.

Such relief is available for both foreign main and foreign non-main proceedings.

**For full marks on this question, reference should 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?

A worldwide freezing order under Article 19 is an urgent provisional relief which if granted, expires when the recognition application is decided upon, in which case under Article 21 the enacting state's insolvency proceedings deal with the debtors assets and they are removed from his/her control in any event, as held in *PROTASOV V DEREV* [2021] EWHC 392.

### **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] 12 marks**

Prior to any determination made in the English Proceedings, Ms G, in her capacity as authorised officer of the Deposit Guarantee Fund (or DGF) of Country A in respect of the liquidation of the Commercial Bank for Business Corporation (the Bank), together with the DGF (the Applicants), applied for recognition of the liquidation of the Bank before the English

court based on the Cross-Border Insolvency Regulations 2006 (CBIR), the English adopted version of the MLCBI.

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

4.1.1 whether the Bank's liquidation comprises a "foreign proceeding" within the meaning of article 2(a) of the MLCBI [**maximum 10 marks**]; and 8 marks

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**].4 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 Foreign Proceeding

Article 2(a) of the MLCBI states that: (a) "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;

To consider whether to recognise the application for recognition under Article 2a, the following must be confirmed:

- a. Is the foreign proceeding a collective judicial or administrative proceeding
- b. Is the proceeding relating to
  - i. insolvency in which the assets and affairs of the debtor are subject to control or supervision by
  - ii. a foreign court for the purposes of reorganization or liquidation.

Yet prior to the above, it must also be confirmed that the proceeding is indeed a foreign proceeding. Article 16 provides that in the absence of proof to the contrary, a company's registered office is presumed to be the centre of its main interests. To that end, I consider that the Bank's registered office is in Country A, with its primary operations located therein, such that it is also subject to that country's regulatory laws; demonstrates that the Bank's COMI is therefore in Country A, and that it can be considered a foreign main proceeding.

With regards to a, The Model Law summarises that a collective insolvency proceeding is based upon achieving a coordinated and global solution for all stakeholders of an insolvency proceeding. Thus a key consideration must be whether substantively, the assets and liabilities are dealt with according to local judicial or administrative regulations and processes. In this instance the Bank is subject to various regulatory inspections and assessments.

Firstly, upon consideration of the steps undertaken for the provisional administration (and subsequent liquidation) of the Bank I note the steps outlined in the affidavit setting out the procedure undertaken once the Bank is classified as "troubled" according to Article 75 of the law of Country A on Banks and Banking activity (LBBA) and has been

unable to remedy the situation within the 180 days stipulated to extract itself from the proceedings.

Under Articles 35(5) and 36(1) of the DGF Law, the DGF shall have full and exclusive rights to manage the bank and all powers of the bank's management once it has taken the bank under its supervision and revoked the bank's licence.

The process is one of insolvency, in that 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

Once the Bank has been taken under the control of the DGF, liquidation follows provisional administration. The DGF having considered the above criteria against the Bank's financial situation acquired 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.

The above is demonstrative of a clear administrative procedure.

With regards to considering if the procedure is a collective one; it is noted that Article 36(5) establishes a moratorium which prevents, inter alia: the claims of depositors or creditors being satisfied; execution or enforcement against the bank's assets; encumbrances and restrictions being created over the bank's property; and interest being charged.

With regards to b, as liquidator, the DGF has extensive powers over the management of the assets, to satisfy creditor claims, to recover property, dispose of the bank's assets, powers of sale, and distribution, and other powers as necessary to complete the liquidation.

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

Thus it would appear to me that, the proceeding in Country A can also be considered a collective proceeding, relating to insolvency, in that all of the Bank's creditors can claim in the liquidation, and that the DGF as liquidator as the requisite powers to meet those claims from available assets.

As a final point, Article 2 e of the Model Law also states that the proceeding which is "judicial or administrative" is also "subject to the control or supervision by a foreign



court". There is prior case law re Sanko Steamship Co Ltd, which held that a foreign proceeding may be recognised where the control or supervision of the proceeding is undertaken by a non-judicial administrative body.

It has been confirmed in the affidavit that 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 as effectively an independent governmental agency afforded administrative and procedural powers and can be considered equivalent to a "foreign court" based on the facts laid in front of me.

Thus the application for recognition is considered to have met the criteria for a foreign proceeding within the meaning of Article 2a of the MCLBI.

**Good answer. For full marks it should be explained what is meant by "relating to a law of insolvency" in more detail and a discussion on whether the proceeding is of the purposes of reorganization or liquidation.**

#### **4.1.2 Foreign Representative**

Article 48(3) of the DGF Law empowers the DGF to delegate its powers to an "authorised officer" or "authorised person" which 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 also 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.

Within this context I review this information against the term of "Foreign representative" as defined by article 2(d) of the Model Law, which states that a "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.

Having considered the criteria of foreign proceeding, I note that Ms G's appointment was made pursuant to a Decision of the Executive Board of the Directors of the DGF, No 1513 (Resolution 1513). Resolution 1513 notes that Ms G is a "leading bank liquidation professional" and without reviewing her cv in detail appears to satisfy the requirements to act as an authorised representative over the Bank appointed by the DGF as its liquidator. Her appointment is made in accordance with Article 48 (3) and Article 235 (1) respectively.

To confirm, certain powers remain with the DGF, such as the inability 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.

Thus, with the recognition application being brought by both the DGF and Ms G jointly, it would appear to me that the issue of foreign representative is fully covered by the Bank's formal Liquidator and by Ms G as its designated representative in the Bank's matters.

Good answer. For full marks it should be discussed how DGF is appointed and if the split in powers effect DGF or Ms G's ability to be considered a foreign representative.

**\* End of Assessment \***