



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 marks 38,5 out of 50

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

QUESTION 1 (multiple-choice questions) [10 marks in total] 8 marks

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

Question 1.1

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

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

Question 1.2

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

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

The correct answer is D

Question 1.3

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

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

The correct answer is C

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.

The concept of COMI (Centre of Main Interest) is fundamental to MLCBI. COMI is not a defined term under MLCBI. There is a rebuttable presumption that the place of the registered office of the debtor is the place of its COMI.

Appropriate date

- The appropriate date for determining COMI is the date of commencement of the foreign proceeding.
- If a debtor moves its registered office at a date that is close to the commencement of the foreign proceeding, it raises an issue as to whether the COMI should be determined (by reference to the place of the “new” registered office) at the date of the commencement of the foreign proceeding. It may be that the court would deem the “old” registered office as its COMI.

- As an illustration, if the registered office is moved from State A to State B on “Day 1” and the foreign proceeding is filed on “Day 10”, the court might decide that the COMI is State A, instead of State B (although at the date of commencement of foreign proceeding, the registered office is in State B) as State A “is the location of the debtor’s business that is readily ascertainable by parties who do business with the debtor”.

Whether an establishment exist

- An “establishment” is defined in the Model Law as “any place of operations where the debtor carries out a non-transitory economic activity with human means and goods or services”.
- Whether an establishment exist in a particular jurisdiction depends on (a) the location of the central administration of the debtor’s business and (b) the location of the debtor’s business that is readily ascertainable by parties who do business with the debtor.
- Factors to consider in determining the place of establishment include - (i) the location of the debtor’s books and records (ii) the location key assets or business operations (iii) location of employees and key personnel, among others.

For full marks on this question it should be mentioned that the MLCBI does not explicitly mention the appropriate time and some jurisdictions have a slightly different approach to it.

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

- In the event of two concurrent foreign non-main proceedings, a prior proceeding is not to be treated preferentially over a later proceeding.
- The court must grant, modify, or terminate relief for the purpose of facilitating coordination of these proceedings: Article 30(c).

Statement 2

- Article 32 (hotchpot rule) provides that “without prejudice to secured claims or rights in rem, a creditor who has received part payment in respect of its claim in a proceeding pursuant to a law relating to insolvency in a foreign State, may not receive a payment for the same claim in a [domestic proceeding in the enacting State] regarding the same debtor ...”
- Effectively, any amount already received by a creditor is to be accounted for when determining the final amount to be paid to the creditor. This avoids a situation where a creditor might obtain a more favourable treatment by obtaining payment in a different jurisdiction.
- However, the rule does not apply where it involves secured claims.

Statement 3

- COMI is not defined under MLCBI.
- Article 16 – This article provides that in the absence of proof to the contrary, the debtor's registered office is presumed to be its COMI.
- While the debtor's registered office is presumed to be its COMI, it is not conclusive (it may be rebutted) for the purpose of determining its COMI.
- Evidence may be adduced to proof to the contrary that the registered office shall not be the debtor's COMI. Creditor may argue that State A is the COMI as State A is "readily ascertainable by the parties who do business with the debtor", although the registered office may have recently been moved to State B.

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.**

- An issue that arose in this case was whether the court has jurisdiction to grant an indefinite moratorium continuation.
- The Court of Appeal held that while the court may have the jurisdiction (power) to grant indefinite moratorium continuation, the court should not do so unless it is satisfied of two things – (1) the stay would be necessary to protect the interest of creditors and (2) the stay would be appropriate to achieve such a protection.
- In the case, the Court of Appeal (based on the evidence before it) concluded that its creditors did not need such a protection.

For full marks on this question a more details on the court's argumentation should be provided.

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**.

- Any post-recognition relief of a foreign main proceeding must be consistent with the domestic insolvency proceeding. Primary is given to the domestic proceeding (Article 29).
- The court in the enacting State shall seek cooperation and coordination with foreign courts and foreign representatives (Articles 25 and 26).
- The court of the enacting State is entitled to request information or assistance directly from the foreign courts or foreign representatives.
- The foreign representatives (in the foreign main proceeding), in the exercise of its functions and subject to the supervision of the court, must cooperate with the court of the enacting State.
- The foreign representatives have an ongoing obligation to update the court of the enacting State of any substantial change (from the time of filing of the application for recognition) on the status of the recognised foreign proceedings, the status of their appointment, or subsequently become aware of other foreign proceedings: Article 18.

QUESTION 3 (essay-type questions) [15 marks in total] 10,5 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] 2 marks

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

- Access and co-ordination enable courts and foreign representatives two (or more) countries to work together to achieve a better or optimal results.
- A foreign representative may make an application in State A for recognition of its proceeding (without the need to file a separate insolvency proceeding in a foreign country, State A – which saves time and costs).
- Upon application (prior to recognition), an interim relief may be granted by State A; Article 19. The interim relief includes a stay of actions or enforcement, providing the debtor with a “breathing space” to the debtor to organise its affairs. The court in State A may also issue an order preventing the moving or transfer of assets, thus preventing the assets from dissipation and preserving the status quo.
- Upon recognition, an automatic relief will be granted if the application qualifies as main foreign proceeding.
- Further, the court in State A may grant other relief upon recognition. The reliefs that may be granted by State A (Article 21) include – (a) staying legal proceedings against the debtor or debtor’s assets (b) staying execution against the debtor’s assets (c) suspend transfer or disposal of debtor’s assets (d) being able to examine witnesses or take evidence relating to the debtor’s assets (e) entrusting the administration of the debtor’s assets in the hands of the foreign representative or any other person as may be appointed by the court and (f) grant interim relief as the court finds appropriate: Article 21.
- MLCBI provides a procedural framework to allow co-ordination and cooperation. It also provides a list of actions which the court may utilise to coordinate and cooperate.

This question focuses on rights prior to recognition. Therefore reference should be made to art. 9, 11 and 25-27 should be made and an overall conclusion that these rights save time and costs for full marks on this question.

Question 3.2 [maximum 5 marks] 3,5 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.

Other evidence, restrictions, exclusions, limitations, and judicial scrutiny includes:

- The application must not breach the full and frank disclosure obligation towards the court to which a recognition application is made.

- The foreign representative must consider whether public policy exception in State A applies (Article 23). If the matter applied for falls within the public policy exclusion, recognition will not be granted. In deciding whether it falls within the public policy exception, the court will give it a restrictive interpretation in that it must be “manifestly” contrary to public policy.
- Banks and insurance companies are typical examples of entities that are excluded from the application of MLCBI. Public utility companies may also be excluded from the application of MLCBI.
- The foreign representative is under an obligation to provide and update the court in State A if there is any material change from the time the recognition application is made: Article 23.
- The foreign representative must ensure that there is COMI or has an establishment in State A. If not, the recognition application will be denied.
- Where a foreign decision was obtained via corruption, the court in State A (if it was convinced that it was obtained via corruption) may refuse to grant recognition.
- The court in State A may also refuse to grant recognition if it is of the view that the debtor is trying to evade payments in State B (an abuse of process).
- To qualify as a “foreign proceeding”, the application must meet a number of requirements (elements). They include – (a) proceeding must be of collection nature (b) it must related to insolvency (c) the affairs of the company are subject to the control and supervision of the foreign court and (d) the purpose is for reorganisation or liquidation.
- To qualify as a “foreign representative”, he needs to be an authorised person (appointed by the court or recognised body), and that he is authorised to administer the debtor’s assets and affairs.
- In relation to other limitation, while ipso facto clause is valid and enforceable in the UK, it is not an “insolvency proceeding” within the meaning of Article 21. The court in the UK therefore has no jurisdiction (under Article 21) to prevent the termination of a contract pursuant to an ipso factor clause: *Pan Ocean case* [2014]
- The ability to terminate a contract based on ipso facto clause has been limited in the light of CIGA 2020; but this is a different issue from the ability (jurisdiction) of the court to prevent termination under Article 21.
- In terms of evidence, the application must be accompanied by documents supporting the application, as set out in Article 15. Among them include (a) a certified copy of the decision commencing the foreign proceeding and appointing the foreign representative, (b) a certificate from the foreign court affirming the existence of the foreign proceeding and of the appointment of the foreign representative, and (c) other supporting documents.
- Another restriction is the applicant is subject to compliance with local procedural and notice requirements.

For full marks reference should also be made to art. 3 and more elaboration on the judicial scrutiny in art 16/17.

Question 3.3 [maximum 5 marks] 4 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.

Prior to the court deciding on whether to recognise a foreign proceeding, the court of the enacting State is entitled to grant interim relief (Article 19). The relief include:

- a stay of execution in relation to the assets of the debtor.
- entrusting the administration of the debtor's assets in the hands of the foreign representative or any other person as may be appointed by the court of the enacting State, to protect and preserve the value of assets.
- suspending the transfer or disposal of assets of the debtor.
- allowing for the examination of witnesses and taking of evidence or information relation to the debtor's asset.

The interim relief is available if it is needed urgently to protect the assets of the debtor, or it is in the interest of the creditors. An example of the need to is to protect and preserve the value of the perishable assets of the debtor. Another example is to prevent the assets of the debtor from dissipation that may prejudice the interest of creditors.

Upon the court recognising the foreign proceeding, the court of the enacting State has discretionary power to grant various relief, and they include (Article 21).

- staying legal proceedings against the debtor or debtor's assets
- staying execution against the debtor's assets
- suspend transfer or disposal of debtor's assets
- being able to examine witnesses or take evidence relating to the debtor's assets
- entrusting the administration of the debtor's assets in the hands of the foreign representative or any other person as may be appointed by the court and
- grant interim relief as the court finds appropriate

Notwithstanding the relief granted by the court (whether it is pre or post recognition of a foreign proceeding), it does not prevent or affect the right of a creditor to commence proceedings against the debtor if it is necessary to preserve a claim against the debtor (Article 20).

Further, it does not affect the right of creditor to commence domestic legal proceedings.

The court of the enacting State will also deny the application if the relief sought falls is such that it is manifestly contrary to public policy.

Other limitation may include institutions that have been "carved out" such that MLCBI will not apply to such institutions; examples are banks, insurance company, and utility companies.

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

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?

Interim relief granted (Article 19) is to protect and preserve the assets of the debtor pending the court's decision on whether to recognise the foreign proceeding.

If the court of the enacting State recognises the foreign proceeding, the relief granted (Article 21) is likely to include all interim relief granted earlier under Article 19.

That being so, the pre-recognition relief will no longer be necessary and therefore unlikely to continue in post-recognition.

Article 19, Paragraph 3 provides that "Unless extended ... the relief granted under this article [relating to interim relief] terminates when the application for recognition is decided upon".

QUESTION 4 (fact-based application-type question) [15 marks in total] 12 marks

Read the following facts very carefully before answering the questions that follow.

(1) Background

The Commercial Bank for Business Corporation (the Bank) has operated since 1991. The Bank's registered office is situated in Country A, which **has not** adopted the MLCBI. As of 13 August 2015, the Bank's majority ultimate beneficial owner was Mr Z, who held approximately 95% of the Bank's shares through various corporate entities (including some registered in England).

The Bank entered provisional administration on 17 September 2015 and liquidation on 17 December 2015. Investigations into the Bank have revealed that it appears to have been potentially involved in a multi-million dollar fraud resulting in monies being sent to many overseas companies, including entities incorporated and registered in England.

Proceedings were issued in the High Court of England and Wales (Chancery Division) against various defendants on 11 February 2021 (the English Proceedings).

An affidavit (the Affidavit) sets out a detailed summary of the legislation of Country A's specific insolvency procedure for Banks. The procedure involves initial input from the National Bank (the NB) and at the time that the Bank entered liquidation, followed a number of stages:

Classification of the bank as troubled

The NB may classify a bank as "troubled" if it meets at least one of the criteria set down by article 75 of the Law of Country A on Banks and Banking Activity (LBBA) or for any of the reasons specified in its regulations.

Once declared "troubled", the relevant bank has 180 days within which to bring its activities in line with the NB's requirements. At the end of that period, the NB must either recognise the Bank as compliant, or must classify it as insolvent.

Classification of the bank as insolvent

The NB is obliged to classify a bank as insolvent if it meets the criteria set out in article 76 of the LBBA, which includes:

- (i) the bank's regulatory capital amount or standard capital ratios have reduced to one third of the minimum level specified by law;
- (ii) within five consecutive working days, the bank has failed to meet 2% or more of its obligations to depositors or creditors; and
- (iii) the bank, having been declared as troubled, then fails to comply with an order or decision of the NB and / or a request by the NB to remedy violations of the banking law.

The NB has the ability to classify a bank as insolvent without necessarily needing to first go through the troubled stage. Article 77 of the LBBA accordingly provides that a bank can be liquidated by the NB directly, revoking its licence.

Provisional administration

The Deposit Guarantee Fund (DGF) is a governmental body of Country A tasked principally with providing deposit insurance to bank depositors in Country A. However, the Affidavit explained that the DGF is also responsible for the process of withdrawing insolvent banks from the market and winding down their operations via liquidation. Its powers include those related to early detection and intervention, and the power to act in a bank's interim or provisional administration and its ultimate liquidation.

Pursuant to article 34 of the DGF Law, once a bank has been classified as insolvent, the DGF will begin the process of removing it from the market. This is often achieved with an initial period of provisional administration. During this period:

- (i) the DGF (acting via an authorised officer) begins the process of directly administering the bank's affairs. Articles 35(5) and 36(1) of the DGF Law provide that during provisional administration, the DGF shall have full and exclusive rights to manage the bank and all powers of the bank's management.
- (ii) Article 36(5) establishes a moratorium which prevents, *inter alia*: the claims of depositors or creditors being satisfied; execution or enforcement against the bank's assets; encumbrances and restrictions being created over the bank's property; and interest being charged.

Liquidation

Liquidation follows provisional administration. The DGF is obliged to commence liquidation proceedings against a bank on or before the next working day after the NB's decision to revoke the bank's licence.

Article 77 of the LBBA provides that the DGF automatically becomes liquidator of a bank on the date it receives confirmation of the NB's decision to revoke the bank's licence. At that point, the DGF acquires the full powers of a liquidator under the law of Country A.

When the bank enters liquidation, all powers of the bank's management and control bodies are terminated (as are the provisional administrators' powers if the bank is first in provisional administration); all banking activities are terminated; all money liabilities due to the bank are deemed to become due; and, among other things, the DGF alienates the bank's property and funds. Public encumbrances and restrictions on disposal of bank property are terminated and offsetting of counter-claims is prohibited.

As liquidator, the DGF has extensive powers, including the power to investigate the bank's history and bring claims against parties believed to have caused its downfall. Those powers include:

- (i) the power to exercise management powers and take over management of the property (including the money) of the bank;
- (ii) the power to compile a register of creditor claims and to seek to satisfy those claims;
- (iii) the power to take steps to find, identify and recover property belonging to the bank;
- (iv) the power to dismiss employees and withdraw from/terminate contracts;

(v) the power to dispose of the bank's assets; and

(vi) the power to exercise "such other powers as are necessary to complete the liquidation of a bank".

The DGF also has powers of sale, distribution and the power to bring claims for compensation against persons for harm inflicted on the insolvent bank.

However, article 48(3) of the DGF Law empowers the DGF to delegate its powers to an "authorised officer" or "authorised person". The "Fund's authorised person" is defined by article 2(1)(17) of the DGF Law as: "*an employee of the Fund, who on behalf of the Fund and within the powers provided for by this Law and / or delegated by the Fund, performs actions to ensure the bank's withdrawal from the market during provisional administration of the insolvent bank and/or bank liquidation*".

Article 35(1) of the DGF Law specifies that an authorised person, must have: "*...high professional and moral qualities, impeccable business reputation, complete higher education in the field of economics, finance or law...and professional experience necessary.*" An authorised person may not be a creditor of the relevant bank, have a criminal record, have any obligations to the relevant bank, or have any conflict of interest with the bank. Once appointed, the authorised officer is accountable to the DGF for their actions and may exercise the powers delegated to them by the DGF in pursuance of the bank's liquidation.

The DGF's independence is addressed at articles 3(3) and 3(7) of the DGF Law which confirm that it is an economically independent institution with separate balance sheet and accounts from the NB and that neither public authorities nor the NB have any right to interfere in the exercise of its functions and powers.

Article 37 establishes that the DGF (or its authorised person, insofar as such powers are delegated) has extensive powers, including powers to exercise managerial and supervisory powers, to enter into contracts, to restrict or terminate the bank's transactions, and to file property and non-property claims with a court.

(2) The Bank's liquidation

The Bank was formally classified by the NB as "troubled" on 19 January 2015. The translated NB resolution records:

"The statistical reports-based analysis of the Bank's compliance with the banking law requirements has found that the Bank has been engaged in risky operations."

Those operations included:

- (i) a breach, for eight consecutive reporting periods, of the NB's minimum capital requirements;
- (ii) 10 months of loss-making activities;
- (iii) a reduction in its holding of highly liquid assets;

- (iv) a critically low balance of funds held with the NB; and
- (v) 48% of the Bank's liabilities being dependent on individuals and a significant increase in "adversely classified assets" which are understood to be loans, whose full repayment has become questionable.

Despite initially appearing to improve, by September 2015 the Bank's financial position had deteriorated further with increased losses, a further reduction in regulatory capital and numerous complaints to the NB. On 17 September 2015, the NB classified the Bank as insolvent pursuant to article 76 of the LBBA. On the same day, the DGF passed a resolution commencing the process of withdrawing the Bank from the market and appointing Ms C as interim administrator.

Three months later, on 17 December 2015, the NB formally revoked the Bank's banking licence and resolved that it be liquidated. The following day, the DGF initiated the liquidation procedure and appointed Ms C as the first of the DGF's authorised persons to whom powers of the liquidator were delegated. Ms C was replaced as authorised officer with effect from 17 August 2020 by Ms G.

Ms G's appointment was pursuant to a Decision of the Executive Board of the Directors of the DGF, No 1513 (Resolution 1513). Resolution 1513 notes that Ms G is a "leading bank liquidation professional". It delegates to her all liquidation powers in respect of the Bank set out in the DGF Law and in particular articles 37, 38, 47-52, 521 and 53 of the DGF Law, including the authority to sign all agreements related to the sale of the bank's assets in the manner prescribed by the DGF Law. Resolution 1513 expressly excludes from Ms G's authority the power to claim damages from a related party of the Bank, the power to make a claim against a non-banking financial institution that raised money as loans or deposits from individuals, and the power to arrange for the sale of the Bank's assets. Each of the excluded powers remains vested in the DGF as the Bank's formally appointed liquidator.

On 14 December 2020, the Bank's liquidation was extended to an indefinite date, described as arising when circumstances rendered the sale of the Bank's assets and satisfaction of creditor's claims, no longer possible.

On 7 September 2020, the DGF resolved to approve an amended list of creditors' claims totalling approximately USD 1.113 billion. The Affidavit states that the Bank's current, estimated deficiency exceeds USD 823 million.

QUESTION 4.1 [maximum 15 marks] 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

4.1.2 whether the Applicants fall within the description of “foreign representatives” as defined by article 2(d) of the MLCBI [maximum 5 marks].

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

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

Article 2(a) of MLCBI defines foreign proceeding as follows:

(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 or reorganisation or liquidation”

To qualify as a “foreign proceeding”, all the elements of the definition must be satisfied. These elements will be discussed below. A number of elements were tested and explained in English court in the case of *Agrokor* [2017].

- Judicial or administrative proceeding – Only one requirement (either it is a judicial or administrative proceeding) is required to be met. In this case, the law in Country A provides for the Bank to be placed in liquidation by NB (this is not a judicial proceeding). While it was not placed in liquidation by the court, it was placed in liquidation by operation of law where DGF is the authorised body. On the facts, NB and DGF are administrative bodies or special agencies. This element is deemed met.
- Collective proceeding – To qualify as a collective proceeding, it must have various characteristics, which include having an orderly framework to address the rights and obligations of all creditors and all the debtor’s assets. There must exist opportunities for creditors’ participation, including the creditors right to seek remedy in courts. Creditors rights were considered. On the facts, DGF had resolved an approved an amended list of creditors’ claims totalling about USD 1.113 billion. There is nothing on the facts to suggest that it is not a collective proceeding. On this basis, it should be deemed that this element has also been met.
- Pursuant to a law relating to insolvency – The facts are self-evident in that the Bank is insolvent, as declared by NB. It has been placed in liquidation, and individuals have been appointed to administer the assets of the Bank, for its stakeholders. This element has therefore been met:
- **In which the assets and affairs of the debtor are subject to control or supervision by a foreign court** – It is also evident on the facts that Ms C and/or Ms G were/are in control of the assets and affairs of the Bank. While Ms C and/or Ms G are not subject to the supervision by the court in Country A, the courts have indicated that control and supervision may be exercised not only be the court, but also by an insolvency

representative who is subject to the control or supervision by the court or other regulatory authority: *Betcorp Limited*. Ms C and/or Ms G are both subject to control and supervision by the regulatory body (DGF). It should be noted that the Courts have confirmed that both the assets and affairs of the debtor must be subject to control to meet this element. However, “Resolution 1513 expressly excludes from Ms G’s authority the power to ... 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”. An issue that arises is whether it meets the requirement of “both the affairs and assets are subject to control”. I am of the view that it does. Ms G has control of the affairs and assets of the debtor and DGF (a regulatory body) reserves these powers to itself (DGF itself is a foreign representative). Even if this is an issue, arguably, (Ms G lacks the certain powers under Resolution 1513), Article 7 provides that “Nothing in this Law limits the power of a court to provide additional assistance to a foreign representative under other laws of this State”. The court in the UK may consider this Article in deciding whether all the elements of “foreign proceeding” have been met. In making the decision (interpretation of the powers of the court under MLCBI), Article 8 provides that “regard is to be had to its international origin and the need to promote uniformity in its application and the observance of good faith”.

- For the purposes of liquidation or reorganisation – This is self-evident on the facts, the Bank has been placed in liquidation. The element is met.

Although the application meets all the elements, the court is entitled to refuse to grant the recognition if it is manifestly contrary to public policy in the UK: *Lex Agrokor*. On the facts, there is no suggestion that granting it would be contrary to public policy.

It is noted that Country A has not adopted MLCBI. However, reciprocity is not a requirement under MLCBI unless the enacting country (UK) provides for it. On the facts, there is nothing to suggest that UK requires reciprocity. There is no impediment for the court in the UK to grant recognition of the foreign proceeding.

For full marks the requirements and interpretations hereof inbuilt in art. 2(a) should be addressed more elaborately, i.e. what is meant by law of insolvency.

Article 2(d) of MLCBI defined “foreign representatives” as follows:

(d) “Foreign representative” means a person or body, including one appointed on an interim basis, authorised in a foreign proceeding to administer the reorganisation or liquidation of the debtor’s assets or affairs or to act as a representative of the foreign proceeding”.

The elements in the definition of “foreign representatives” are discussed below:

- **A person or body** – A person is a natural person, and a body includes a non-natural person - for example, a special agency other than the court. On the facts, DGF should qualify as a special agency (body). It is also noted that there is no requirement under Article 2 to satisfy the disinterested test or be free of conflict of interest. On the facts, Ms G and/or DGF (arguably an interested party) are in control of the affairs and assets

of the Bank. In any case, the law in country provides that DGS is “an economically independent institution”.

In making the application for recognition, both DGF and Ms G (foreign administrative body and representative) are to provide documents (set out in Article 15) to support the application that it qualifies as “foreign proceeding” and “foreign representatives”. The court in the UK is entitled to presume that documents submitted in support of the application for recognition are authentic, whether or not they have been legalised”: Article 16.

In the assessment is should also be discussed which rights have been conferred to Ms G and DGF and if the powers can be delegated – and finally if they both could be recognised as foreign representative. A more elaborate answer is required in this regard.

*** End of Assessment ***