INSOL INTERNATIONAL

FOUNDATION CERTIFICATE

IN INTERNATIONAL INSOLVENCY LAW

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**.

Commented [DB1]: Not sure how you managed to enter your student ID as 320? Your student ID is 202122-505. Actually, could you explain why you have used a student ID from the 20221 course (the student ID you have used is 202021IFU-320, which belongs to a different student who is also based in Cayman). I have changed this now for the purposes of marking but I do require an explanation.

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: 27 out of 50 marks

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

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

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

Question 1.1

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

(a) The Model Law provides effective mechanisms for dealing with cases of cross-border insolvency so as to promote a number of objectives, including the protection and maximisation of trade and investment.

(b) The Model Law provides effective mechanisms for dealing with cases of cross-border insolvency so as to promote a number of objectives, including the fair and efficient administration of cross-border insolvencies that protects the interests of all creditors and other interested persons, not including the debtor.

(c) The Model Law is a substantive unification of insolvency law so as to promote co-operation between courts of the enacting State and foreign States and facilitation of the rescue of financially troubled businesses.

(d) All of the above.

Question 1.2

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

(a) The existence of a statutory basis in national (insolvency) laws for co-operation and co-ordination of domestic courts with foreign courts or foreign representatives.

(b) The difficulty of agreeing multilateral treaties dealing with insolvency law.

(c) The practical problems caused by the disharmony among national laws governing cross-border insolvencies, despite the success of protocols in practice.

(d) None of the above.

Question 1.3

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

(a) The registered office of the debtor is not in the jurisdiction where the foreign proceedings were opened, but the debtor has an establishment in the jurisdiction of the enacting State.

(b) The registered office of the debtor is in the jurisdiction of the enacting State, but the debtor has an establishment in the jurisdiction where the foreign proceedings were opened.

(c) The debtor has neither its COMI nor an establishment in the jurisdiction where the foreign proceedings were opened.

(d) The debtor has neither its COMI nor an establishment in the jurisdiction of the enacting State.

Question 1.4

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

(a) The *locus standi* access rules.

(b) The public policy exception.

(c) The safe conduct rule.

(d) The "hotchpot" rule.

Question 1.5

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

(a) The foreign main proceedings in South Africa will not be recognised in the UK because the UK is not a designated country under South Africa's principle of reciprocity, but the foreign non-main proceedings in Brazil will be recognised in the UK despite Brazil not having implemented the Model Law.

(b) Both the foreign main proceedings in South Africa and the foreign non-main proceedings in Brazil will not be recognised in the UK because the UK has no principle of reciprocity and Brazil has not implemented the Model Law.

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

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

Question 1.6

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

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

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

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

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

Question 1.7

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

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

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

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

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

Question 1.8

Which of the statements below regarding the Centre of Main Interest (or COMI) and the Model Law **is incorrect**?

(a) COMI is a defined term in the Model Law.

(b) For a corporate debtor, the Model Law does contain a rebuttable presumption that the debtor's registered office is its COMI.

(c) While (for purposes of the Model Law) the COMI of a debtor can move, the closer such COMI shift is to the commencement of foreign proceedings, the harder it will be to establish that the move was "ascertainable by third parties".

(d) None of the above.

Question 1.9

Which of the following types of relief have, prior to the adoption of the Model Law on Recognition and Enforcement of Insolvency-Related Judgments, been declared beyond the limits of the Model Law?

(a) Enforcement of insolvency-related judgments.

(b) An indefinite moratorium continuation.

(c) Both (a) and (b).

(d) Neither (a) nor (b).

Question 1.10

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

(a) The UNCITRAL Guide of Enactment and the Practice Guide.

(b) The UNCITRAL Guide of Enactment and the Legislative Guide – Parts One, Two, Three and Four.

(c) The UNCITRAL Guide of Enactment and the Judicial Perspective.

(d) All of the above.

QUESTION 2 (direct questions) [10 marks in total] 6 marks

Question 2.1 [maximum 3 marks]

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

In accordance with MLCBI, the appropriate date for determining the COMI of a debtor, or whether an establishment exists, is the date of commencement of the foreign proceeding. Although a debtor's COMI can move, if a move is close to the commencement of the proceedings, evidence that this is the COMI may be more challenging to establish. The COMI must be definite to creditors and shareholders.

The answer should also mention that this is not explicitly mentioned in the MLCBI and slightly different approaches have been taken in different jurisdictions.

Question 2.2 [maximum 3 marks] 2 marks

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

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

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

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

Statement 1: Concurrent foreign non-main proceeding in accordance with Article 30, the court must grant, modify or terminate relief to facilitate co-ordination of the proceedings.

Statement 2: The hotchpot rule in accordance with Article 32 does not affect secured claims.

Statement 3: Presumption of insolvency in accordance with Article 31 provides for a rebuttable presumption that the recognition of a foreign main proceeding is proof that the debtor is insolvent. The correct answer is 16(3)

Question 2.3 [2 marks] 2 marks

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

The English Court of Appeal upheld the decision that the court should not exercise its power to grant the indefinite Moratorium Continuation as if it were to do so, it would:
Stop the English creditors from enforcing English law in accordance with the Gibbs Rule. The Court of Appeal held that an English Court could only grand an indefinite Moratorium Continuation if a stay was necessary to protect the interest of the creditors and the stay was the correct way to achieve protection. The Court of Appeal held that these conditions were not satisfied.
It would prolong the stay after the Azeri reconstruction was finished. Finally, the Court of Appeal considered the information obligation. According to the Court of Appeal, once the foreign proceedings have concluded, there is no scope for further orders supporting the foreign proceedings to be made, and previous relief will conclude.

Question 2.4 [2 marks] 1 mark

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

In accordance with Article 29(a) of the MLCBI, concurrent domestic insolvency proceedings and foreign proceedings exist. Accordingly, the court will review the relief granted under article 19 or 21 and determine if it shall be modified or terminated if inconsistent with the domestic insolvency proceeding. Similarly, in foreign main proceedings, the same applied to automatic relief that has already been granted.

The answer to question 2 is art. 18

QUESTION 3 (essay-type questions) [15 marks in total] 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] 1 mark

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

Co-ordination rights per Article 9 can benefit the foreign representative – Article 9 applies domestically and in a cross-border context. In addition, the willingness of courts to take a global view of the group may benefit the group's financial difficulties.

The limitations of the effect of communications be article 9 is detailed in article 11. The fact that communication within the corporate group has taken place does not imply a substantive effect on the court's authority. Article 11 aims to reduce the objections to planned communication.

State A should follow the rules under Article 25, the group representative will be able to participate in any proceedings in another State affecting a group member; this would benefit the foreign representative.

The question does not (necessarily) deal with groups as coordination is an issue in a single company with establishments in different places. The answer should reflect the following:

- Legal standing (Article 9 MLCBI): The key access for the foreign representative is set forth in Article 9 MLCBI. In the capacity of foreign representative, the foreign representative has automatically standing before the courts in State A without having to meet any formal requirements such as a license or any consular action. In other words, the "status" in State B of the foreign representative is automatically recognised in State A for the purpose of granting the foreign representative standing before the courts in State A. This allows the foreign representative to safeguard and pursue assets of the debtor estate in State A before its courts.
- Opening domestic insolvency proceedings (Article 11 MLCBI): The foreign representative is further specifically entitled to apply for the opening of domestic insolvency proceedings in State A, as reflected in Article 11 of the MLCBI. Whether or not the foreign representative would wish to do this will depend on what the requirements are for opening such domestic proceedings. Can these requirements be met? On the other hand, it will depend on what the foreign representative believes he/she can get in terms of (interim) relief for the foreign proceedings in State B. In other words, are domestic insolvency proceedings really needed, or just additional time and costs that should be avoided?
- Cooperation: Similar to access rights, the cooperation provisions in the MLCBI (articles 25-27) also operate independently of recognition and it is not a prerequisite to the use of the cooperation provisions that recognition of the foreign proceedings is obtained in advance. Courts in State A can freely cooperate with the foreign representative without having to worry whether the status in State B of the foreign representative can be recognised in State A.

- Save Time & Costs: The key benefits of both the access provisions and the cooperation provisions are that they save time and therefore also costs, as a result of which value destruction can be avoided and value enhancement is being promoted.

Question 3.2 [maximum 5 marks] 2,5 mark

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.

Public Policy Exception
Article 6 – If there is ground in State A to deny a request per the states public policy they can do so.

Evidence
Article 15 details the evidential requirements. The recognition application in State A must include certified copy of the court order to commence the foreign proceeding and appointment of the foreign representative, a statement identifying all other known foreign proceedings and translated copies of any documents.

Recognition Presumption
Article 16 details the recognition presumption. If the court decision indicated that the foreign proceeding is within article 2(a) and 2(b), then the court can also presume the same.

COMI
Article 16 - Evidence needs to be provided detailing the location of the central administration.

Grounds for Recognition
Article 17 - If the ground for granting recognition are lacking or ceased to exist the recognition can be modified or terminated.

Domestic Proceedings
Article 28 – the supremacy of domestic insolvency proceedings. If there is proceedings before the foreign proceeding application then relief has to be consistent with the domestic insolvency proceedings. In foreign main proceedings, the automatic relief in accordance with Article 20 is not applicable.

The answer should provide a more detailed explanation on the judicial scrutiny and mention art. 1(2) exclusions, art 3 (restrictions)

Question 3.3 [maximum 5 marks] 1,5 marks

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

In accordance with Article 19, when relief is needed urgently to safeguard assets, the court may grant provisional relief from the time of filing the application until the application is decided upon. Relief includes a stay against the assets or entrusting an administrator in the enacting State with the assets.

In accordance with Article 21 of the Model Law post-recognition relief includes temporarily stopping the right to transfer or dispose of assets and granting relief to a local liquidator.

Limitations to the pre-and post- recognition include:
Model Law does not cover enforcement of an insolvency default judgement.
Applying foreign insolvency law to an English governed contract is outside the scope of the relief.
The court does not have jurisdiction to grant a foreign representative of a foreign main proceeding and indefinite continuation of a moratorium from a previous recognition order.

For full marks the following should be mentioned:

1. Pre-recognition interim relief: From the time of filing the recognition application until the recognition decision has been made certain interim relief as set forth in Article 19(1)(a), (b) and (c) of the Model Law can be requested. The foreign representative will have to demonstrate to the court that such relief is urgently needed to protect the assets of the debtor or the interests of the creditors. If the foreign proceedings are non-main proceedings, the court may refuse to grant interim relief if it would interfere with the administration of a foreign main proceeding (Article 19(4) of the Model Law).
2. Post-recognition relief (automatic or discretionary): In case of a foreign main proceeding, there will be automatic relief as set forth in Article 20 of the Model Law. For both foreign main and non-main proceedings, article 21 of the Model Law set forth what post-recognition relief can be requested by the foreign representative. Appropriate relief under Article 21(1) of the Model Law must be necessary to protect the assets of the debtor or the interests of the creditors. The relief set forth in Article 21(2) of the Model Law requires the court to be satisfied that the interests of the creditors in State A are adequately protected. In case of a foreign non-main proceeding there is an additional requirement that needs to be met before relief can be granted. According to Article 21(3) of the Model Law the court in such a case must also be satisfied that the relief relates to assets that, under the law of State A, should be administered in the foreign non-main proceeding or concerns information required in that proceeding.
   [*In this context of relief, the foreign representative of State B could also think about the need to exercise any anti-avoidance powers in State A based on article 23 of the MLCBI*]
3. Adequate protection: Pursuant to Article 22 of the Model Law any interim relief under Article 19 of he Model Law or any post-recognition relief under Article 21 of the Model Law require the court in State A to be satisfied that the interests of the creditors and the other interested persons, including the debtor, are adequately protected and any relief may be subject to conditions as the court considers appropriate.
4. Existing international obligations of State A: Based on Article 3 of the Model Law, the court in State A should again verify that there are no existing international obligations of State A (under a treaty or otherwise) that may conflict with granting the requested relief under the implemented Model Law in State A.
5. Public policy exception: The court in State A should, based on Article 6 of the Model Law, also again verify that the relief application is not manifestly contrary to public policy of State A.

Question 3.4 [maximum 1 mark] 0 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 pre-recognition is unlikely to continue as it is the court's discretionary power to provide any post-recognition relief. In the IBA, the relief was denied for a Moratorium Continuation as the judge noted that a permanent stay could not be deployed as the way around Gibs Rule.
The answer can be found in the various ways of protection available in art 21 after recognition leaving the freezing order un-warranted.

QUESTION 4 (fact-based application-type question) [15 marks in total] 9 marks

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

(1) Background

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

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

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

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

Classification of the bank as troubled

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

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

Classification of the bank as insolvent

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

(i) the bank's regulatory capital amount or standard capital ratios have reduced to one third of the minimum level specified by law;

(ii) within five consecutive working days, the bank has failed to meet 2% or more of its obligations to depositors or creditors; and

(iii) the bank, having been declared as troubled, then fails to comply with an order or decision of the NB and / or a request by the NB to remedy violations of the banking law.

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

Provisional administration

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

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

(i) the DGF (acting via an authorised officer) begins the process of directly administering the bank's affairs. Articles 35(5) and 36(1) of the DGF Law provide that during provisional administration, the DGF shall have full and exclusive rights to manage the bank and all powers of the bank's management.

(ii) Article 36(5) establishes a moratorium which prevents, *inter alia*: the claims of depositors or creditors being satisfied; execution or enforcement against the bank's assets; encumbrances and restrictions being created over the bank's property; and interest being charged.

Liquidation

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

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

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

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

(i) the power to exercise management powers and take over management of the property (including the money) of the bank;

(ii) the power to compile a register of creditor claims and to seek to satisfy those claims;

(iii) the power to take steps to find, identify and recover property belonging to the bank;

(iv) the power to dismiss employees and withdraw from/terminate contracts;

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

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

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

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

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

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

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

(2) The Bank's liquidation

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

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

Those operations included:

(i) a breach, for eight consecutive reporting periods, of the NB's minimum capital requirements;

(ii) 10 months of loss-making activities;

(iii) a reduction in its holding of highly liquid assets;

(iv) a critically low balance of funds held with the NB; and

(v) 48% of the Bank's liabilities being dependent on individuals and a significant increase in "adversely classified assets" which are understood to be loans, whose full repayment has become questionable.

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

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

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

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

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

QUESTION 4.1 [maximum 15 marks]

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

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

4.1.1 whether the Bank's liquidation comprises a "foreign proceeding" within the meaning of article 2(a) of the MLCBI **[maximum 10 marks]**; and 6 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]**. 3 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
In accordance with article 2(a) of the MLCBI foreign proceedings means a collective judicial or administrative proceeding in a foreign state, including a interim proceeding, pursuant to a law relating to insolvency n which proceedings the assets and affairs of the debtor are subject to control or supervision by a foreign court, for reorganisation.

In order to see whether the Bank's liquidation comprises of a foreign proceeding in accordance with article 2(a). I have set out the definition below in a table:

1. **Judicial or administrative proceeding with its basis in insolvency-related law**

Even if some proceedings have a judicial and administrative element, only one characteristic is required. A proceeding is a statutory framework that constrains a company's actions and regulates the final distribution of the company's assets.

An administrative proceeding has commenced as a result of the law relating to insolvency due to NB's decision to classify the Bank as insolvent; as the same time, under Article 77 of the LBBA details, DGF acquired the full power of the liquidator under the law of Country A.

The element of a foreign main proceeding is met. However, the Bank's powers have been curtailed due to the appointment of Ms G as the liquidator.

The liquidator's appointment will result in the Bank's management powers being terminated, all banking activities terminated, and liabilities being due.

2. **Involvement of creditors collectively**

Collective proceedings have the following characteristics:
Implementing a regime that affects the rights and obligations of all creditors and all the assets to the debtor. All creditors need not receive a share of the distribution. However, all assets should be distributed in accordance with statutory priorities. Interested parties should not be able to enhance their position by exploiting fortunate circumstances that may give an unfair advantage. Creditors must participate. Adequate notice should be provided to creditors.

Ms. G, the DFG has extensive powers to compile a register of creditor claims and seek to satisfy them. Additionally, on 7 September 2020, the DGF resolved to approve an amended list of creditors' claims totalling approx. US$1.113 billion. The Affidavit states that the Bank's current estimated deficiency exceeds US$823 m. On 14 December 2020, the Bank's liquidation was extended to an indefinite date, when it was deemed no longer possible to satisfy the creditor's claims. It is evidenced from the text that creditors are dealt with collectively as the creditors' amount is detailed and inserted in the Affidavit, so the Bank's liquidation is now to an indefinite date as such the sale of the assets and satisfaction of the creditors' claims are no longer possible.

3. **Control or supervision of the assets and affairs of the debtor by a court or another official body**

In accordance with the MLCBI, neither is the level of control of supervision required to satisfy this determination. However, it does state that the control or supervision should be formal in nature. Courts have indicated that the court or the liquidator may use control or is supervision. Court detailed that the assets and affairs of the debtor must be subject to control to meet the definition.

DGF's authorised representative is Ms. G for the bank liquidation. Ms G's appointment was pursuant to a Decision of the Executive Board of the Directors of DGF, No 1513. The resolution noted that Ms G has the appropriate experience for the role. Additionally, Ms G has been given 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 relating to the sale of assets.

The characteristic has been met due to the powers given to Ms G by the DGF. Ms. G has supervision over the Bank's liquidation to act on their behalf in the liquidation.

4. **Reorganisation or liquidation of the debtor as the purpose of the proceeding**

In accordance with MLCBI, some proceedings may not be eligible for recognition because they are not for reorganisation or liquidation. This includes proceedings designed to prevent dissipation and waste rather than liquidate or reorganise the insolvent estate. The court may have to take account of circumstances arising after the application of recognition.

DGF passed a resolution to commence the process of withdrawing the Bank from the market and appointing an administrator. Additionally, the NB revoked the Bank's banking licence and resolved that it be liquidated. DGF started the liquidation process and appointed Ms C as an authorised person with the powers of the liquidator. As the bank has been removed from the market and placed in insolvency, it has entered a foreign proceeding to peruse a liquidation and not to limit asset preservation or loss to the Bank's stakeholder.

Based on the information in the case and the characteristics of a foreign proceeding, the Bank's liquidation comprises of a foreign proceeding within the meaning of article 2(a) of the MLCBI.

For full marks on this question a more elaborate answer should be given – preferably with reference to the Guide to Enactment or court cases on what is meant by "foreign court", "insolvency law" and "collective in nature".

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]**.

In accordance with article 2(d) of the MLCBI, a foreign representative is:

- 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

To note is that MLCBI does not specify that the foreign court must authorise the foreign representative.

The Applicants are deemed a foreign representative for the following reasons:

- The foreign representative does not have to be authorised by the courts and can include appointments made by a special agency. In this case, the insolvency appointment was made due to NB's decision to deem the Bank as insolvent; pursuant of Article 77 of the LBBA, the DGF acquired the full powers of a liquidator that were delegated to Ms G.
- Ms G is authorised in a foreign proceeding as the DGF appointed Ms G as a result of a decision of the board of directors of the DGF, no 1513 (Resolution 1513).
- The person has the power to administer the reorganisation and does so at the time of the reorganisation. Per the case, the liquidator has extensive powers, including the power to sell assets and the power to bring claims for compensation to people for harm put on the insolvent Bank.
- Each of the excluded powers remains vested in the DGF as the Bank's formally appointed liquidator.

As such, given the facts of the case the Applicants fall within the description of a foreign representative.

Attention should also be given to the characteristics of DGF and whether this body is also eligable as a foreign representative.

*** End of Assessment ***