



**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 24 out of 50 (Course Leader: mark adjusted upward to 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]**

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]

### 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.

[COMI of a debtor is not defined in the MLCBI but understood to refer to the Centre of the Main Interests of the debtor while establishment according to article 2(f) of the MLCBI place where the debtor carries out a non- transitory economic activity with human means and goods or services.

Both COMI and establishment are critical for recognition of foreign proceedings. Proceedings commenced in a jurisdiction where the debtor has COMI are according to article 2(b) of the MLCBI recognised as main proceedings while those in jurisdictions where the debtor as an establishment are recognised as foreign non- main proceedings (article 2(c).

Article 17 of the MLCBI provides for recognition of proceedings. This is subject to meeting the requirements in other provisions. A key issue in relation to the determination of foreign proceedings is the relevant period for determination of the debtor’s COMI. The presumption is

that a debtor's COMI is situated in the place where the debtor has a registered office. However, this is rebuttable and it is widely acknowledged that a debtor's centre of main interests may be different from where the debtor has a registered office. It is also acknowledged that a debtor, may, for commercial or other reasons move COMI. However, for purposes of consistency in application of the Model Law and to avoid forum shopping, it is important that courts have a clear reference date for purposes of determining COMI.

The MLCBI does not prescribe the relevant date for purposes of determining a debtor's COMI hence four possible dates, each with pros and cons:

- a) the date of commencement of foreign proceedings- this does not consider the operational history of the debtor and recognises that COMI may shift but only up to the point of commencement of proceedings. This approach allows for consistency of decisions or approach in a situation where there might be multiple applications for recognition of proceedings made in various jurisdictions.
- b) the date of the application for recognition- this approach recognises that debtors may shift COMI for purposes of moving to a jurisdiction where they may obtain the best outcome for purposes of restructuring.
- c) the date of deciding the application for recognition- this approach allows a court to take into account the most recent circumstances of the debtor.
- d) a date determined by referring to the operational history of the debtor- this approach may prevent opportunistic COMI shifting but is the least favoured because it may lead to inconsistent outcomes.

Both the guide to enactment and the practice guide recognise that COMI may shift. What is critical for a court is to take into account any relevant factors including applying a third-party test, to determine the COMI of the debtor.]

**It should be mentioned that according to the Guide to Enactment it is the date of commencement, but different jurisdictions have taken slightly different approaches.**

### **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: This statement relates to coordination of more than foreign proceedings and is provided for in article 30(c). It allows for modification or termination of relief for purposes of facilitating coordination of the proceedings.

Statement 2: This statement refers to the exceptions to rule on automatic stay as provided for in article 20(1) (b) of the MLCB as one of the effects of recognition of foreign main proceedings. The exception is provided for in article 20(2). **The correct answer is art 32**

Statement 3: This article refers to the rebuttable presumption in article 16(3) that the debtor's registered office or habitual residence is the debtor's COMI.]

### 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.**

[Article 20 of the MLCBI provides for automatic stay as one of the effects of recognition of foreign main proceedings. The objective is to allow for orderly conduct of the debtor's affairs. One of the issues court had to deal with in the *IBA* case was whether the automatic stay or moratorium can stay can remain in place following termination of the insolvency proceedings. In the *IBA* case, proceedings in Azerbaijan were recognised in the UK under the Cross Border Insolvency Regulation. A restructuring plan that was binding on all creditors was approved under Azeri law. The foreign representative applied for indefinite continuation of the automatic stay/ moratorium with the objective of preventing the two English creditors who had opted not to submit to the Azeri proceedings, from pursuing their claims in England. The judge declined to grant the application and was not persuaded by the *BTA Bank* case where it had been allowed.

The two cases can be distinguished. In the *BTA Bank* case, there were no opposing creditors while in the *IBA* case, allowing an indefinite moratorium would have the effect of preventing the challenging creditors from pursuing their claims under the *GIBS* rule ( a principle arising out of the *Anthony Gibbs* case that a debt governed by English law cannot be discharged or compromised by foreign insolvency proceedings unless the creditor voluntarily submits to the insolvency proceedings).]

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

### Question 2.4 [2 marks] 1mark

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

[Article 20 of the MLCBI provides for effects of recognition of a foreign main proceeding. This includes a stay on commencement or continuation of proceedings concerning the debtor's assets, rights, obligations or liabilities. In situations where a domestic proceeding has already been opened, recognition of foreign main proceedings does not lead to automatic suspension of the domestic proceedings. The modified universalism approach of the model law recognises that it is not practical to resolve cross border insolvency matters under a single forum. The court has an obligation to determine whether it is necessary to continue those proceedings within the exceptions permitted by article 20(2) or whether it is necessary to take further action to protect the interests of creditors. The court will also consider the nature of relief to be granted to ensure that it is not inconsistent with or does not prejudice local proceedings.

**The correct answer is art. 29 (a) on concurrent proceedings**



A foreign representative has a duty to keep the court informed about any material developments concerning the debtor. Such developments may relate to change of status of the foreign representative or a change of status of the debtor such as a approval of a restructuring plan or termination of the foreign insolvency proceedings. Article 18 of the MLCBI requires the foreign representative to inform the court promptly of any substantial change in the status of the foreign representative's appointment and any other foreign proceeding regarding the debtor that that the foreign representative becomes aware of. The notification allows the court to determine whether it is necessary to make any adjustments to orders made.]

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

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

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

#### **Question 3.1 [maximum 4 marks] 3 marks**

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

[Access rights are key to cross boarder insolvency proceedings. There are three elements of access. The first relates to access rights by the foreign representative to the courts where the application for recognition is to be made. The second element of access is in article 11 of the MLCBI which allows the foreign representative to commence proceedings if the conditions for commencing the proceedings are met. The third element of access is by virtue of article 12 which allows the foreign representative to participate in local proceedings, following recognition of the foreign proceedings. The first element of the access rights is the most critical for a foreign representative, prior to making a recognition application. Article 9 of the MLCBI provides for the right of direct access and states that a foreign representative is entitled to apply directly to the court. This article allows foreign representatives direct access to courts, that is to have *locus standi* in the jurisdiction where the application for recognition is to be made, without the need for licensing and qualification requirements or consular support. This provision enables the foreign representative to easily and quickly access courts for purposes of making a recognition application as well as seeking any interim or urgent relief. It is envisaged that access rights preserve value of the debtor's estate by eliminating unnecessary delays.

Coordination rights are provided for in articles 29 and 30 of the MLCBI. Article 29 provides for coordination of a local proceeding and foreign proceeding while article 30 provides for coordination of more than one foreign proceeding. The coordination provisions espouse the modified universalism approach to cross boarder insolvencies whereby there might be multiple proceedings against the debtor. The objective of the coordination principles is to ensure consistency of relief granted]

**For full marks on this question reference should be made to art. 25-27- on coordination rights.**

### **Question 3.2 [maximum 5 marks] 3 marks**

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

[Article 15 of the MLCB sets out the requirements for an application for recognition of foreign proceedings. These include a certified copy of the decision commencing the foreign proceeding and appointing the foreign representative; a certificate from the court affirming the existence of the foreign proceeding and of the appointment of the foreign representative; a statement identifying all foreign proceedings in respect of the debtor; and any translations and may be required.

Article 16 permits the court to make certain presumptions about the foreign proceeding, the appointment of the foreign representative, the documents submitted and the centre of main interests of the debtor.

The court is not required to assess the merits of the foreign proceedings, that is to determine as to whether they were properly or correctly commenced or not.

The court is also not required to consider issues of reciprocity.

The key issues for the court to determine are:

- a) the center of main interests of the debtor (COMI). This is critical for the determination as to whether the foreign proceedings are main or non- main proceedings. Article 17 (2) provides for the recognition of the foreign proceedings as either main or non- main proceedings.
- b) the nature of relief that may be granted. Article 19 provides for interim relief and article 20 provides for the effects of recognition that include automatic stay, in cases of foreign main proceedings.
- c) The existence of other proceedings (local or foreign) in respect of the debtor, may limit the nature of relief that may be granted. For example, automatic stay in article 20 may not be granted if it is not consistent with or may prejudice local proceedings
- d) Public policy exception. This is provided for in article 6 of the MLCBI. The article does not define the nature and scope of the public policy exception but the use of the word “manifestly” is an indicator of the consideration that should be made by court. The expectation is that courts should invoke this rule in matters that would lead to an absurdity in the domestic context such as where local/ domestic creditors would be prejudiced.]

Reference should also be made to art. 1(2) exclusions and art. 3 (restrictions)

### **Question 3.3 [maximum 5 marks] 2 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.

[Pre recognition relief is provided for in article 19 of the MLCBI. This is urgent relief and provisional in nature. It is discretionary and terminates when the application for recognition is

decided. It includes staying execution against the debtor's assets, entrusting the administration or realization of all or part of the debtor's assets or to protect and preserve the assets.

Post recognition relief is provided for in articles 20 and 21. The relief in article 20 is automatic and applies to recognition of foreign main proceedings. It includes stay of commencement or continuation of actions or proceedings against the debtors, execution against the debtor's assets, and suspension of rights to transfer, encumber or otherwise dispose of any assets of the debtor. It is important that this relief does not affect the right to commence actions or proceedings to the extent necessary to preserve a claim of a debtor.

Further discretionary relief that may be granted to the extent that it may be necessary to protect the assets of the debtor or the interests of creditors, is provided for in article 21 and includes staying the commencement or continuation of actions or proceedings against the debtor; execution against the debtor's assets; suspending the right to transfer, encumber or otherwise dispose of the debtor's assets; examination of witnesses; entrusting the administration or realization of all or part of the debtor's assets to the foreign representative or any other person designated by court; and any other relief.]

**For full marks reference should be made to art. 22 on adequate protection, art. 6 on public policy and art. 3 on restrictions in international law.**

#### **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?

[The objective of the relief in article 19 is to protect the assets of the debtor and interests of creditors as a whole. A worldwide freezing order may be necessary to achieve this objective. It is important to understand that the relief is urgent and granted prior to granting a recognition order. On the contrary, relief under article 21 is discretionary and only granted following making a recognition order. A worldwide freezing order is not necessary due to the need to balance interests of local and foreign creditors. The court must determine appropriate relief that relates to the assets of the debtor in a particular jurisdiction.]

#### **QUESTION 4 (fact-based application-type question) [15 marks in total] 2 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
- 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.

[4.1.1 This bank's liquidation is not a foreign proceeding within the meaning of article 2(a) of the MLCBI. Although liquidation is specifically mentioned in article 2(a) as one of the proceedings that may be recognised, there are other criteria that need to be met. There are that the proceeding should be collective judicial or administrative pursuant to the law relating to insolvency in which the assets and affairs of the debtor are subject to control or supervision by a foreign court.

In this case, the liquidation is not a collective proceeding. There is nothing in the facts that indicates participation of other creditors. Articles 34-36 of the DGF Law point to a unilateral process that excludes other creditors.

The LBBA and DGF Law are not insolvency laws. They contain for processes similar to insolvency process but there are aspects of these processes that are fundamentally different from insolvency processes.

Lastly, there is nothing in the facts that indicates the proceedings are subject to control or supervision by a court. Both the NBA and the DGF are acting pursuant to powers granted by statute.

This is wrong and resembles several misunderstandings. The answer should be along the following:

### **Recognition of the Bank's liquidation under the CBIR**

1. In order to be recognised, the Bank's liquidation must meet the definition of "*foreign proceeding*" set out in article 2(a) of the MCBI.
2. Here reference can also be made to paragraphs 6.4.1 and 6.4.2 of the Guidance Text and in particular the *Agrokor* case discussed there.

### **"Collective proceeding"**

3. UNCITRAL's guide for judiciary, "The Model Law on Insolvency: The Judicial Perspective" (2013) explains the requirement for proceedings to be "*collective*":

"The UNCITRAL Model Law was intended to apply only to particular types of insolvency proceedings. The Guide to Enactment and Interpretation indicates that the notion of a "*collective*" insolvency proceeding is based on the desirability of achieving a coordinated, global solution for all stakeholders of an insolvency proceeding. It is not intended that the Model Law be used merely as a collection device for a particular creditor or group of creditors who might have initiated a collection proceeding in another State, or as a tool for gathering up assets in a winding up or conservation proceeding that does not also include provision for addressing the claims of creditors. The Model Law may be an appropriate tool for certain kinds of actions that serve a regulatory purpose, such as receiverships for such publicly regulated entities as insurance companies or brokerage firms, provided the proceeding is collective as that term is used in the Model Law."

4. The Guide to Enactment and Interpretation of the UNCITRAL Model Law (2014) explains that when:

"evaluating whether a given proceeding is *collective* for the purpose of the Model Law, a key consideration is whether substantially all of the assets and liabilities of the debtor are dealt with in the proceeding, subject to local priorities and statutory exceptions, and to local exclusions relating to the rights of secured creditors. A proceeding should not be considered to fail the test of collectivity purely because a class of creditors' rights is unaffected by it."

5. Based on the facts provided the understanding is that *all* of the Bank's creditors are entitled to claim in the liquidation and that their claims are met from available assets, according to the statutory order of priorities. Consequently, the conclusion can be reached that the Bank's liquidation is a "*collective proceeding*".

### **"Judicial or administrative" and "subject to the control or supervision by a foreign court"**



6. The collective proceeding, must be “*judicial or administrative*” where “*the assets and affairs of the debtor are subject to control or supervision by a foreign court*”.
7. The term “*foreign court*” is defined at article 2(e) of the MLCBI and means: “*a judicial or other authority competent to control or supervise a foreign proceeding*”.
8. The Guide to Enactment notes: “87) *A foreign proceeding that meets the requisites of article 2, subparagraph (a), should receive the same treatment irrespective of whether it has been commenced and supervised by a judicial body or an administrative body. Therefore, in order to obviate the need to refer to a foreign non-judicial authority whenever reference is made to a foreign court, the definition of “foreign court” in subparagraph (e) includes also non-judicial authorities.*”
9. In ***Re Sanko Steamship Co Ltd*** [2015] EWHC 1031 (Ch) Simon Barker QC, noted that a foreign proceeding may be recognised where the control or supervision of the proceeding is undertaken by a non-judicial administrative body.
10. The Guide to Enactment states: “74) *The Model Law specifies neither the level of control or supervision required to satisfy this aspect of the definition nor the time at which that control or supervision should arise. Although it is intended that the control or supervision required under subparagraph (a) should be formal in nature, it may be potential rather than actual. As noted in paragraph 71, a proceeding in which the debtor retains some measure of control over its assets, albeit under court supervision, such as a debtor-in-possession would satisfy this requirement. Control or supervision may be exercised not only directly by the court but also by an insolvency representative where, for example, the insolvency representative is subject to control or supervision by the court. Mere supervision of an insolvency representative by a licensing authority would not be sufficient.*”
11. In this case the DGF has control of all of the Bank’s assets and overall control of the liquidation.
12. 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.
13. 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.
14. Taking these factors into account, the Bank’s liquidation is *administrative*. The assets and affairs of the Bank are subject to the control of the DGF, an official body which exercises its powers in the liquidation free from intervention by government or the NB and which should be considered, for the purposes of the definition set out in article 2(e) of the MLCBI, as a “*foreign court*”.

**“Pursuant to a law relating to insolvency”**

15. The Guide to Enactment provides at paragraph 48:

“Acknowledging that different jurisdictions might have different notions of what falls within the term “insolvency proceedings”, the Model Law does not define the term “insolvency”. However, as used in the Model Law, the word “insolvency” refers to various types of collective proceedings commenced with respect to debtors that are in severe financial distress or insolvent.”

- Further explanation is provided at paragraph 73:

“This formulation is used in the Model Law to acknowledge the fact that liquidation and reorganization might be conducted under law that is not labelled as insolvency

law (e.g. company law), but which nevertheless deals with or addresses insolvency or severe financial distress. The purpose was to find a description that was sufficiently broad to encompass a range of insolvency rules irrespective of the type of statute or law in which they might be contained and irrespective of whether the law that contained the rules related exclusively to insolvency.”

16. Article 76 of the LBBA clearly set out Country A’s specific insolvency procedures for insolvent banks. The Bank’s liquidation was commenced pursuant to those provisions and in my judgment should be considered by this Court as being “*pursuant to a law relating to insolvency*”.

***“In which proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganisation or liquidation”***

17. Having determined that the DGF falls within the definition of “*foreign court*”, I am satisfied, that by virtue of the legislative provisions set out above, it has control of all of the Bank’s assets and affairs for the purposes of administering the Bank’s liquidation.

4.1.2 Article 2(a) of the MLCBI defines a foreign representative as a person or body, including one appointed on an interim basis, authorised in a foreign proceeding to administer the reorganisation or the liquidation of the debtor’s assets or affairs or to act as a representative of the foreign proceeding. Article 2(a) does require the foreign representative to be appointed by court. This position is confirmed by Article 17 which provides the factors to take into account when recognising a foreign proceeding that include in subsection (1)(b), a requirement for the foreign representative to be a person or body within the meaning of article 2(d). DGF as liquidator is eligible for recognition as foreign representative. However, Ms. G. appears to have limited roles and powers and therefore she would not be in position to exercise all powers of a foreign representative if recognised as such. The instrument appointing her excludes powers to claim for damages and claim from other creditors. For example, Ms. G.’s ability to pursue actions under article 23 would be limited.]

Again, this answer is inadequate. It should be explained and discussed what is meant by authorised, administer and applying the right facts to these requirements.

**\* End of Assessment \***