



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: 42 marks out of 50

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

QUESTION 1 (multiple-choice questions) [10 marks in total] 9 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] 9 marks

Question 2.1 [maximum 3 marks] 3 marks

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

1. The date for determining COMI, or whether an establishment exists, is the date of commencement of the relevant foreign proceedings. Although the COMI of a debtor can move, if such a move takes place close to the commencement date of the foreign proceedings the evidence required to establish COMI, particularly whether the COMI was ascertainable by creditors, will be harder to establish.
2. The US has taken a slightly different approach, however, in that they the US courts have held that COMI should be determined based on the debtor's activities around the time the Chapter 15 Petition is filed in the US, not the date of commencement of foreign proceedings. The US Courts are permitted, however, to consider the period between the commencement of foreign proceedings and the filing of the Chapter 15 Petition to make sure that the debtor has not sought to manipulate its COMI in bad faith. The UK has recently followed the same approach in *Re Toisa Limited*.

Question 2.2 [maximum 3 marks] 3 marks

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

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

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

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

1. Statement 1 – Article 30(c) – concurrent foreign non-main proceedings - states that where there is more than one foreign non-main proceeding, neither (or none) of them is *a priori* treated preferentially. The Court must grant, modify or terminate relief for the purposes of facilitating co-ordination of the proceedings and ensuring equal treatment.
2. Statement 2 – Article 32, known as the hotchpot rule, prohibits a creditor who has received part payment in respect of its claim in a proceeding pursuant to a law relating to insolvency in a foreign State may not receive a payment for the same claim in a proceeding in the enacting State regarding the same debtor unless it results in the proportionate distribution to creditors of the same class. This does not apply to secured creditors.
3. Statement 3 – Article 16(3) – dealing with COMI - contains a rebuttable presumption that, in the absence of proof to the contrary, the debtor’s registered office, or habitual residence in the case of an individual, is presumed to be the centre of the debtor’s main interests.

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.**

1. In England and Wales the Gibbs Rule applies. The Gibbs rule states that the purported discharge or compromise of a debt in foreign proceedings does not, under the laws of England and Wales, discharge a debt which is governed by the laws of England and Wales. The exception is if the creditor files a proof of debt or equivalent in the foreign proceedings and thereby submits to the jurisdiction of the foreign proceedings.
2. In the *IBA* case a restructuring plan was undertaken in foreign proceedings in Azerbaijan and the Azeri representative sought an indefinite moratorium in England and Wales which would have prevented creditors with valid claims under the law of England and Wales, and who had not submitted their claims to the jurisdiction of the Azerbaijan proceedings, to ever be able to bring the claims in England and Wales.

3. The application for the indefinite moratorium was brought under Article 21 of the MLCBI which gives a Court in the enacting state (in this instance England and Wales) a discretion to grant relief following recognition of foreign proceedings.
4. The Court of Appeal concluded that such a moratorium was not appropriate as the foreign proceedings had (substantively) come to an end and it would prevent the creditors from ever bringing their claims in England and Wales. It was not justifiable in the circumstances to permanently deprive the creditors from exercising their legal rights.
5. There was also a strong implication that once the foreign proceedings ended and as such the foreign representative was no longer in office, there would have been no scope for further orders to be made in England and Wales and any relief granted under the Model Law should terminate.

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**.

1. Domestic insolvency proceedings can exist at the time of the application for recognition of the foreign main proceedings (Article 29(a)). Domestic insolvency proceedings in the enacting state will have supremacy over foreign main proceedings, provided the debtor has assets in the enacting State (Article 28).
2. The court of the enacting state must, after recognition of the foreign main proceeding, ensure that any post-recognition relief granted in accordance with Article 21 is consistent with the domestic insolvency proceedings. The automatic relief under Article 20 shall not be applied.
3. The foreign representative will have a continuing duty of disclosure to the enacting court. They must keep the court updated on developments, including any further foreign proceedings of which they become aware.

The correct answer for the latter is art. 18

QUESTION 3 (essay-type questions) [15 marks in total] 11 marks

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

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

Question 3.1 [maximum 4 marks] 3 marks

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

1. Access and co-ordination rights can be of great benefit to the foreign representative based in State B. Prior to making a formal recognition application, the foreign representative, in accordance with Article 9, can obtain standing to appear before the courts of State A and thus obtain access to these courts, initially perhaps to seek some temporary breathing space.
2. Such access also has the benefit that it allows the courts in State A to determine what co-ordination among the jurisdictions, or what other relief, is warranted to achieve the best disposition of the insolvent estate.
3. Article 11 also gives the foreign representative standing to request the commencement of a domestic insolvency in State A to enable further co-ordination between State A and State B in achieving the best outcome for the creditors.
4. Such access therefore saves time and expense which maximises value to the insolvent estate.
5. The foreign representative can also be re-assured that creditors in State B likewise have access to the Courts in State A and non-discrimination principles ensure that State B creditors would have the same rights as State A creditors and would benefit from timely notice of events taking place in State A.
6. The foreign representative could also seek co-ordination agreements which, whilst not required to be signed off by the courts, are often a matter into which the court will at least have come input.

For full marks on this question, reference should also be made to art. 25-27

Question 3.2 [maximum 5 marks] 4 marks

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

1. The foreign representative must ensure that the evidential requirements, set out in Article 15, are met. They must provide the court in State A with a certified copy of the decision commencing the State B proceeding and appointing the State B representative, or a certificate from the relevant court in State B affirming the existence of the proceedings and the appointment, or any other evidence the court of State A requires to be satisfied of the existence of the proceedings and the appointment.
2. The representative must further provide a statement identifying all the foreign proceedings in respect of the debtor that are known to them and any translations of documents which may be required by the court of State A (Article 15).
3. A restriction applied by the courts is that if the court grants recognition on grounds which it is later found were fully or partly lacking at the time of the grant, or at some point cease to exist, the court in State A can modify or terminate the recognition (Article 17). As

such it is important that the foreign representative provide full and complete information to the court in State A to avoid this situation.

4. A foreign representative in any event has an obligation to provide full and frank disclosure and if they do not do so, the court in State A may find it an abuse of process which could affect the recognition application and even exclude recognition completely.
5. Article 1(2) also permits an enacting state to exclude certain proceedings for the application of the implemented MLCBI at the outset. These exclusions often apply to entities such as banks, insurance companies, public utility companies etc. This can be for general policy reasons or because they are administered under a special regulatory regime. As such, even though the State B proceedings meet the requirements of 2(a) they may still be specifically excluded from recognition.
6. To similar effect article 3 expresses the principle of supremacy of international obligations of the enacting state of internal law, which would include the enacted provisions of the MLCBI. To the extent, therefore, that the recognition sought by the foreign representative would conflict with the obligations of a treaty to which State A was a party, recognition would be rejected.
7. State A may also reject recognition if such recognition would fall foul of public policy (Article 6). However, the public policy exception should only apply in exceptional circumstances concerning matters of fundamental importance to State A.
8. The foreign representative should check, before applying for recognition, whether State A has any existing cross-border assistance provisions which may achieve their desired result. Article 7 states that the MLCBI is not intended to displace any existing cross-border assistance.

For full marks on this question an explanation on the judicial scrutiny in art 16/17 should also be mentioned made

Question 3.3 [maximum 5 marks] 3 marks

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

1. Pre-recognition relief is available under Article 19 once an application for recognition has been filed in State A. Such relief will only be granted where it is urgently needed to protect the assets of the debtor or the interests of the creditors and the relief is of a provisional nature. The relief includes:
 - a. Staying execution against the debtor's assets (Article 19(1)(1));
 - b. Entrusting the administration or realisation of all or part of the debtor's assets located in State A to the State B foreign representative, or another person designated by the court, in order to protect and preserve the value of assets that are perishable, susceptible to devaluation or otherwise in jeopardy (Article 19(1)(b));
 - c. Any relief mentioned in paragraph 1(c), (d) and (g) of Article 21 (as to which see paragraphs 3 and 5(c), below) (Article 19(1)(c)).

2. A notable limitation to Article 19 relief, in addition to the requirement for the relief to be urgently needed, is that the court may refuse to grant such relief if it would interfere with the administration of a foreign main proceeding (Article 19(4)).
3. Post-recognition relief is available under Article 21. This is a discretionary power and upon recognition of the State B foreign proceedings, any relief granted under Article 19 will terminate unless it is specifically extended under Article 21. Such relief includes the relief below, the relief at (a)-(c) is only to the extent such relief has not be granted already in accordance with Article 20:
 - a. staying the commencement or continuation of individual actions/proceedings concerning the debtors assets, rights, obligations or liabilities (21(1)(a));
 - b. staying execution against the debtor's assets (21(1)(b); and
 - c. suspending the right to transfer/encumber/dispose of any of the debtor's assets 21(1)(c).
 - d. provision for the examination of witnesses, the taking of evidence, or the delivery in information concerning the debtor's assets, affairs, rights, obligations or liabilities (21(1)(d));
 - e. entrusting the administration or realisation of all or part of the debtor's assets located in State A to the foreign representative (21(1)(e);
 - f. extending relief granted under paragraph 1 of Article 19; and
 - g. Any additional relief available to an insolvency representative or equivalent in State A (21(1)(g)).
4. Relief under Articles 19 and 21 is discretionary. The Court will have regard to the provisions of Article 22. Under Article 22 the court must be satisfied that the interests of the debtor's creditors and any other interested parties are adequately protected. The court can impose conditions for the purposes of achieving this aim and can review the relief and any conditions granted upon the request of the foreign representative from State B and/or an affected person. Upon review the Court can modify or terminate the relief in order to protect the interests of the debtor's creditors and any other interested parties.
5. Article 20 provides for automatic mandatory relief in circumstances where the State B proceedings qualify as a foreign main proceeding. The automatic relief is the staying/suspension of:
 - a. individual actions/proceedings concerning the debtors assets, rights, obligations or liabilities (20(1)(a);
 - b. execution against the debtor's assets (20(1)(b); and
 - c. the right to transfer/encumber/dispose of any of the debtor's assets 20(1)(c).
6. The foreign representative will also obtain standing to participate in certain action in State A. These include standing to initiate action required to avoid or render ineffective legal acts that are detrimental to the debtor's creditors, meaning claw-back rights and the power to avoid antecedent transactions. Such standing is granted in accordance with Article 23.
7. The foreign representative will also gain the right (in accordance with Article 24) to intervene in any local proceedings in State A to which the debtor is a party. However, the foreign representative must still meet any local requirements in order to do so.

Again, reference here should also be made to art. 3 and art. 6

Question 3.4 [maximum 1 mark] 1 mark

Briefly explain why a worldwide freezing order granted as pre-recognition interim relief ex article 19 MLCBI, is unlikely to continue post-recognition ex article 21 MLCBI?

1. Such an order is an extreme measure and would have been granted only if urgent. Furthermore it would be expected that steps would have been taken simultaneously in the foreign jurisdictions to which the urgent relief was sought, at the same time as applying for recognition under article 21 in the enacting state such that it should no longer be needed.

QUESTION 4 (fact-based application-type question) [15 marks in total] 13 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]; 9 marks and

1. The first thing to check is whether this proceeding is excluded by virtue of Article 1(2) of the MLCBI as adopted by the CBIR. Assuming not then foreign proceeding must be:
 - a. a proceeding (including an interim proceeding);
 - b. that is either judicial or administrative;
 - c. that is collective in nature;
 - d. that is in a foreign state;
 - e. that is authorised or conducted under a law relating to insolvency;
 - f. in which the assets and affairs of the debtor are subject to control or supervision by a foreign court; and
 - g. which proceeding is for the purpose of reorganisation or liquidation.
2. Although the characteristics are cumulative and should be considered as a whole, for ease each of these are initially considered in turn and addressed below.

A Proceeding

3. There has been limited consideration as to what amounts to a proceeding. However, applying some of the considerations in the US case, Irish Bank Resolution Corporation (IBRC) Limited 538 B.R. 692, 697 (D. Del 2015) which considered that the hallmark of a proceeding was a statutory framework that constrains a company's action and that regulates the final distribution of a company's assets. This appears to have been met.
4. The LBBA clearly sets out a statutory framework that constrains the bank's actions. Under the LBBA the DGF does regulate the final distribution of assets and can take all steps necessary to withdraw insolvent banks from the market and wind down their operation via liquidation.

Judicial or Administrative in Nature

5. According to the Digest of Case Law on the UNCITRAL MLCBI, page 6 paragraph 4, several courts have discussed this requirement and suggested that only one of these characteristics is required. As such this criteria appears to be satisfied as this is an administrative procedure commenced by statutory bodies to liquidate the bank.

Collective in Nature

6. To be a collective proceeding the Guide to Enactment and Interpretation of the UNCITRAL Model Law on Cross-Border Insolvency (the "GEI") (as referenced at paragraph 5, page 6, of the UNCITRAL Digest of Caselaw under the MLCBI (February 2012)) indicates that the notion of a collective insolvency proceeding is based on the desirability of achieving a coordinated global solution for all stakeholders, not one group or class of creditors. It should also not be simply a matter of collecting the assets but should also provide for addressing the claims of creditors and making distributions. A key consideration will be whether substantially all of the assets and liabilities of the debtor are dealt with in the proceeding, subject to any local priorities and exceptions.

7. The LBBA permits the DGF to take steps to find, identify and recover property belonging to the bank, to dispose of the bank's assets, to compile a register of creditor claims and seek to satisfy those claims and to exercise such other powers as are necessary to complete the liquidation of the bank. There appears to be no territorial restrictions in relation to assets or creditors and this is further supported by Ms. G's attempt to seek recognition in England. As such this appears to be a proceeding which is collective in nature.

In a Foreign State

8. This condition is clearly satisfied as Country A is a foreign state.

Authorised or Conducted under a law Relating to Insolvency

9. Following the analysis set out *In the matter of Agrokor DD* [2017] EWHC 2791 (Ch) which considered this issue in relation to the Croatian regime, the Model Law does not require "insolvency law" as a label. It is sufficient if the relevant law, in this case the LBBA, addresses insolvency or severe financial distress. The requirement is satisfied if insolvency is one of the grounds on which the proceeding could be commenced, even if insolvency could not actually be demonstrated and there was another basis for commencing the proceeding.
10. The bank in this instance has been classed as insolvent under the LBBA which was the ground for commencing the liquidation proceeding and as such this element is satisfied. Even if the proceeding arguably commenced at the point of the administration, that was due to the bank being in serious financial distress which would also have been sufficient.

The Assets and Affairs of the Debtor are Subject to Control or Supervision by a Foreign Court

11. The fact that the primary powers for winding up the bank lie with two statutory bodies (the NB and the DGF) does not prevent this element from being met, providing there is still some degree of supervision by the Court. However, the Affidavit makes no reference at all to any supervision from the Court. As such this element, on its face, does not appear to be met but the Court may wish to seek further evidence on this matter before conclusively determining it.

The Proceeding is for the Purpose of Reorganisation or Liquidation

12. The purpose of the liquidation is precisely that, to wind down and liquidate the bank, as such this element is met.

Conclusion

13. As the relevant requirements for recognition of a foreign proceeding are considered on a collective basis and all appear to be met, aside potentially from the supervision of a court in Country A, it may be that the Court in England and Wales would recognise this as a foreign proceeding.
14. However, supervision of a court is an important safeguard and permits court to court engagement and cooperation and to that extent the Court in England may ultimately consider the absence of judicial supervision a reason not to recognise this as a foreign proceeding. The court would likely require definitive evidence of whether there is any Court supervision before determining whether to recognise this as a foreign proceeding.

Great answer, for full marks the following should have been considered:

1. 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.
2. 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.*”
3. In this case the DGF has control of all of the Bank’s assets and overall control of the liquidation.
4. 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.
5. 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.
6. Taking these factors into account, the Bank’s liquidation is *administrative*. The assets and affairs of the Bank are subject to the control of the DGF, an official body which exercises its powers in the liquidation free from intervention by government or the NB and which should be considered, for the purposes of the definition set out in article 2(e) of the MLCBI, as a “foreign court”.

4.1.2 whether the Applicants fall within the description of “foreign representatives” as defined by article 2(d) of the MLCBI [maximum 5 marks]. 4 marks

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

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

1. A person will be recognised as a foreign representative if they are 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 representative of the foreign proceeding. Under the MLCBI a foreign representative need not be authorised by the foreign court.
2. Assuming, therefore that this is a foreign proceeding it is likely that both Ms. G and the DGF would be recognised as foreign representatives. The DGF is a governmental body of Country A which has been appointed to administer the liquidation of the debtor’s assets or affairs. DGF has the full powers of a liquidator under the law of Country A.

3. Ms. G's status is not quite so clear cut as she has powers delegated to her by the DGF. However, these powers are lawfully delegated in accordance with article 48(3) of the DGF Law, she is therefore considered the Fund's authorised person and is a leading bank liquidation professional. Although she is excluded from exercising all of the DGF's powers by virtue of resolution 1513. The GEI has noted that the definition of a foreign representative is sufficiently broad to include appointments that might be made by a special agency other than the Court. As such an appointment by the DGF would probably suffice.
4. It would certainly seem, therefore, that one or both would be recognised. Most likely both.

For full marks on this question the split in power should be discussed in relation to the requirement of administer.

*** End of Assessment ***