



**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: 202122-525.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: 32,5 out of 50**

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

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

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

#### **Question 1.1**

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

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

**(d) All of the above.**

#### **Question 1.2**

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

- (a) The existence of a statutory basis in national (insolvency) laws for co-operation and co-ordination of domestic courts with foreign courts or foreign representatives.**
- (b) The difficulty of agreeing multilateral treaties dealing with insolvency law.
- (c) The practical problems caused by the disharmony among national laws governing cross-border insolvencies, despite the success of protocols in practice.

**(d) None of the above.**

### Question 1.3

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

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

### Question 1.4

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

- (a) The *locus standi* access rules.
- (b) The public policy exception.
- (c) The safe conduct rule.
- (d) The “hotchpot” rule.

### Question 1.5

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

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

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

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

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

### Question 1.6

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

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

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

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

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

### Question 1.7

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

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

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

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

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

### Question 1.8

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

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

- (b) For a corporate debtor, the Model Law does contain a rebuttable presumption that the debtor's registered office is its COMI.
- (c) While (for purposes of the Model Law) the COMI of a debtor can move, the closer such COMI shift is to the commencement of foreign proceedings, the harder it will be to establish that the move was "ascertainable by third parties".
- (d) None of the above.

### **Question 1.9**

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

- (a) Enforcement of insolvency-related judgments.
- (b) An indefinite moratorium continuation.
- (c) Both (a) and (b).
- (d) Neither (a) nor (b).

### **Question 1.10**

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

- (a) The UNCITRAL Guide of Enactment and the Practice Guide.
- (b) The UNCITRAL Guide of Enactment and the Legislative Guide – Parts One, Two, Three and Four.
- (c) The UNCITRAL Guide of Enactment and the Judicial Perspective.
- (d) All of the above.

## **QUESTION 2 (direct questions) [10 marks in total] 7 marks**

### **Question 2.1 [maximum 3 marks] 1 mark**

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

To determine COMI under the Model Law, two key factors are required to be established, being the location where the central administration of the debtor takes place and whether it can be readily ascertainable as such by creditors of the debtor. Therefore, the appropriate date for determining the COMI, or whether an establishment exists, is the date or commencement of the foreign proceeding. As the COMI of a debtor can move, and if the move is in a close proximity (timing-wise) to the commencement of the foreign proceedings,

the evidence is harder to establish as the requirement is that the COMI must be readily ascertainable by third parties (i.e. creditors of the debtor).

An establishment exists in any place of operations where the debtor carries out a non-transitory economic activity with human means and goods or services (as defined in the Model Law). Some examples include:

- Location of the debtor's books and records;
- Location where financing was organised or authorised;
- Location of where the cash management system was run;
- Location in which the debtor's principal assets or operations are found; and
- Location of the debtor's primary bank.

**It should be mentioned here that the date is not explicitly mentioned in the MLCBI and slightly different approaches have been taken in different jurisdictions.**

### **Question 2.2 [maximum 3 marks] 2 marks**

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

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

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

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

Statement 1: Article 30(d) of the Model Law; A concurrent foreign non-main proceeding whereby the court must grant, modify or terminate relief to facilitate co-ordination of the proceedings.

Statement 2: Article 32 of the Model Law; the hotchpot rule in accordance with Article 32 does not affect secured claims.

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

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

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

The English Court of Appeal upheld the decision in the court that it should not exercise its power to grant the indefinite Moratorium Continuation due to the main question raised which surrounded the fact that the English court lacked jurisdiction to grant the indefinite

Moratorium Continuation requested by Ms Gunel Bakhshiyeva (the “**Foreign Representative**”).

Accordingly, the English Court of Appeal viewed that the IBA case did not contain an issue of jurisdiction (being that the court had no power to deal with and decide the dispute), however the real issue was whether as a matter of settled practice the court should not exercise its power to grant the indefinite Moratorium Continuation where to do so would:

- in substance prevent the English creditors (i.e. the two creditors who contested the Moratorium Continuation, being the “**Challenging Creditors**”) from enforcing their English law rights in accordance with the Gibbs Rule. The Court of Appeal held that an English court could only properly grant the indefinite Moratorium Continuation if it satisfied two conditions: first, the stay would have to be necessary to protect the interests of IBA’s creditors and, secondly, the stay would have to be an appropriate way of achieving such protection. The Court of Appeal held that neither of these conditions had been satisfied.
- Prolong the stay after the Azeri reconstruction has come to an end. According to the Court of Appeal, that once the foreign proceeding has come to an end and the Foreign Representative no longer holds office, there is no scope for further orders in support of the foreign proceeding to be made and any relief previously granted under the Model Law should terminate. The Court of Appeal further held that had the Model Law ever contemplated the continuance of relief after the end of the relevant foreign proceeding, it would have (or should have) addressed the question explicitly and provided the appropriate mechanisms for that purpose.

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

In terms of relief, what should the court in an enacting State, where a domestic proceeding has already been opened in respect of the debtor, do after recognition of a foreign main proceeding? In your answer you should **mention the most relevant article of the MLCBI**.

Article 29(b) of the MLCBI is most relevant whereby domestic proceedings exist after recognition of a foreign main proceeding. A court in an enacting State should review the relief granted under either article 19 or article 21 and shall be modified or terminated if inconsistent with the domestic insolvency proceeding. For a foreign main proceeding, the same applies to any automatic relief that had been granted.

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 18 of the MLCBI is most relevant. Article 18 requires the foreign representative, from the time of filing the recognition application for the foreign proceeding, to inform the court in the enacting State of:

- any substantial change in the status of the recognised foreign proceeding or the status of the foreign representative’s appointment; and
- any other foreign proceeding regarding the same debtor that becomes known to the foreign representative.

#### **QUESTION 3 (essay-type questions) [15 marks in total] 6,5 marks**



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

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

**Question 3.1 [maximum 4 marks] 1,5 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?

Model Law aims to provide solutions including co-ordinating proceedings that take place concurrently. The objective is to enable the courts and representatives of State A and State B to be efficient and achieve the best results.

The foreign representative could benefit from a facilitated uniform approach under the UNCITRAL Guide of Enactment, including the solution of access / co-ordination, which allows the foreign representative to access the courts of State A which thereby permits State B to seek “breathing space”, which provides State B with time to determine the co-ordination between State A and State B (or if other relief is required between the two States).

Further, the access granted under Model Law can benefit the foreign representative due to many jurisdictions not having a framework for co-operation and co-ordination between judges. Model Law will assist in filling the gap in legislation and achieving the results required.

**For full marks there should be made reference to art. 9, 11 and 25-27.**

**Question 3.2 [maximum 5 marks] 2,5**

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.

In order for a recognition application to be successful, the various applicable article sections have been listed below:

**Article 6** of the MLCBI - Public Policy Exception; grounds in State B to deny a request for recognition if it is contrary to the public policy rules of State B.

**Article 15** of the MLCBI - sets out that the recognition application must include certain items such as:

- Certified copy of the decision/court/any other evidence to commence the foreign proceeding and appointing the foreign representative.
- A statement identifying all other known foreign proceedings in respect of State A (the debtor).
- Translated copies of any documents (if applicable).

**Article 16** of the MLCBI – Presumptions concerning recognition; provided the court decision/appointment documentation includes that the foreign proceeding is a proceeding within article 2(a) and 2(d), then the court is entitled to also presume the same.

Further COMI is fundamental (even though not defined under article 2) as evidence is required to be given as to the location of the central administration of State A and if such is readily ascertainable by the creditors of State A.

**Article 17** of the MLCBI - Decision to recognise a foreign proceeding; includes various elements that involve grounds for granting recognition to State A to be either fully or partially lacking or have ceased to exist, then the recognition can be modified or terminated.

**Article 28** of the MLCBI - Restrictions on the foreign main proceedings in State A will not prevent the commencement of domestic insolvency proceedings in State B, so long as the debtor has assets in this State.

State B has the ability to adopt a more restrictive test, whereby the debtor must have an establishment in State B before domestic insolvency proceedings can be opened.

Generally, a domestic insolvency proceeding would be limited to the assets in State B, and it may be useful to include foreign assets in State A if foreign proceedings are not available. This is possible under article 28 of the MLCBI, which allows for an extension of domestic proceedings to include foreign assets subject to the extension being necessary to implement co-operation and co-ordination under articles 25-27 of the Model Law, and any foreign assets should be administered under the domestic law of State B.

**For full marks, the following should also be addressed:**

1. Exclusions: If the debtor is an entity that is subject to a special insolvency regime in State B, the foreign representative should first of all check if the foreign proceedings regarding that type of a debtor are excluded in State A based on Article 1(2) of the implemented Model Law in State A.
2. Restrictions;- Existing international obligations of State A: Based on Article 3 of the Model Law, the court in State A should also check if there are no existing international obligations of State A (under a treaty or otherwise) that may conflict with granting the recognition application under the implemented Model Law in State A.
3. Judicial scrutiny: While the court in State A is able to rely on the rebuttable presumptions set forth in Article 16 of the Model Law, in the context of Article 17 of the Model Law the court will have to assess whether either the COMI or at least an establishment of the debtor is located in State B where the foreign proceedings were opened. If the COMI of the debtor is in State B the foreign proceedings should be recognised as foreign main proceedings and if only an establishment of the debtor is in State B the foreign proceedings should be recognised as foreign non-main proceedings. Without a COMI or at least an establishment of the debtor in State B, recognition cannot be granted by the court in State A.

### **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.

Pursuant to Article 19 of the MLCBI, when relief is required urgently to safeguard assets, the court may grant provisional relief from the time of filing the application until the application is decided upon. Relief encompasses a stay against the assets, or entrusting an administrator, in the enacting State containing the assets.

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

Pre- and post-recognition limitations include:

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

Reference here should also be made to art. 22 on adequate protection, art. 3 on restrictions and art. 6 on public policy.

#### **Question 3.4 [maximum 1 mark] ½ mark**

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

A worldwide freezing order pre-recognition for interim relief (article 19) is unlikely to continue as it is dependant on the court's discretionary power to provide any post-recognition relief (article 21) and the court must be satisfied that the interests of the debtor's creditors and other interested parties are sufficiently protected.

As an example, in IBA, the relief under article 21 was denied for a Moratorium Continuation as the judge noted that a permanent stay could not be deployed as the way around Gibs Rule.

#### **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]**; and

The definition of a "foreign proceeding" under article 2(a) of the MLCBI means a collective judicial or administrative proceeding in a foreign State, including an interim proceeding, pursuant to a law relating to insolvency in which proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganisation or liquidation.

To better determine whether the Bank's liquidation comprises of a foreign proceeding under article 2(a) of the MLCBI, a table has been created below to break-down the elements of the 'foreign proceeding' definition to arrive at the conclusion that the Bank does comprise of a foreign proceeding due to all elements of the definition being satisfied under the MLCBI:

<b>Elements of a 'foreign proceeding' under 2(a) of the MLCBI</b>	<b>Definition of the elements</b>	<b>Facts from case</b>	<b>Conclusion</b>
Collective judicial or administrative proceeding with its basis in insolvency-related law of the enacting State	One court has suggested that in the context of corporate insolvencies, the "proceeding" was "a statutory framework that constrains a company's actions and that regulates the final distribution of a company's assets".	The facts of the case show that a collective judicial proceeding is in place and is pursuant to a law relating to insolvency due to the NB's decision as classifying	This requirement has been met as the Bank's powers and ability to operate have been

	<p>A "collective" insolvency proceeding is based on achieving a coordinated, global solution for all stakeholders of an insolvency proceeding. It must also be for the purpose of liquidation or reorganisation.</p> <p>Further, a key consideration is whether all of the substantial assets and liabilities of the debtor are dealt with in the proceeding. A proceeding, however, should not be considered to fail the test of being collective purely because a particular class of creditors rights is unaffected by it.</p> <p>In terms of a liquidation adhering to the MLCBI requirement that the foreign proceeding be "pursuant to a law relating to insolvency" to acknowledge the fact that liquidation might be conducted under law that is not labelled as insolvency law (i.e. company law), but deals with insolvency or severe financial distress.</p>	<p>the Bank as insolvent and consequently, under Article 77 of the LBBA, the DGF acquires the full powers of a liquidator under the law of Country A, which were ultimately delegated to Ms G.</p>	<p>constrained via the appointment of DGF (and consequently, via their representative, Ms G) as liquidator results in the powers of the Bank's management and control bodies being terminated; 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.</p> <p>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.</p>
<p>Involvement of creditors collectively</p>	<p>Courts have identified "collective" proceedings as having various characteristics, including:</p> <ul style="list-style-type: none"> <li>• Imposition of an orderly regime that affects the rights and obligations of all creditors and all of the assets of the debtor.</li> </ul>	<p>The facts from the question state that the DGF has extensive powers (which has been granted to Ms G) to compile a register of creditor claims and to seek to satisfy those claims. Further on 7</p>	<p>This requirement has been met. From the reading of the question, even though there is no mention of creditor actions</p>



	<ul style="list-style-type: none"> <li>• All creditors need not receive a share of the distribution by addressing potential distribution to other creditors, a foreign representative could acknowledge their overall duty to creditors in general.</li> <li>• Interested parties should not be able to individually enhance their position by exploiting some fortuitous circumstance which may yield an unfair advantage.</li> <li>• Creditor participation must be a reality.</li> <li>• Creditors should also have the opportunity to seek appellate review of the proceeding.</li> <li>• Adequate notice should be provided to creditors, including general unsecured creditors, under the applicable foreign law.</li> </ul>	<p>September 2020, the DGF resolved to approve an amended list of creditors' claims totalling ~US\$1.113 billion within an affidavit that shows the Bank's current, estimated deficiency exceeding US\$823 million. As a result, a determination was made on 14 December 2020 to extend the Bank's liquidation 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.</p>	<p>or preferential creditor treatment, it is shown that creditors are being dealt with in a holistic manner as a creditor amount has been determined (via creditor claims, showing creditor involvement and participation being a reality) and placed in an affidavit to increase the Bank's liquidation to an indefinite date (causing an affect on the rights and obligations of the creditors against the Bank).</p>
<p>Control or supervision of the assets and affairs of the debtor by a court or another official body</p>	<p>The MLCBI 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.</p> <p>Control or supervision should be formal in nature, it may be potential rather than actual.</p> <p>Courts have indicated that control or supervision may be exercised not only directly by the court, but also indirectly by an insolvency representative where, for example, the insolvency representative itself is subject to control or supervision by the court or other regulatory authority.</p>	<p>Facts from the question state that Ms G is the authorised officer of DGF in respect of the liquidation of the Bank.</p> <p>Ms G was appointed pursuant to the decision of the Executive Board of Directors of the DGF, No 1513 (Resolution 1513) as a leading bank liquidation professional and has been delegated all liquidation powers in respect of the Bank set out in the DGF Law, including the authority to sign all</p>	<p>This requirement has been met as the powers conferred to Ms G by the DGF (via article 48(3) of the DGF Law and who also has control and supervision over the Bank's liquidation) to act on their behalf and is accountable to the DGF for her actions and may</p>

	<p>Courts have confirmed that both the assets and affairs of the debtor must be subject to control to meet the definition.</p>	<p>agreements related to the sale of the bank's assets in the manner prescribed by the DGF Law.</p> <p>Even though Ms G is excluded from making claims for damages against 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, the powers remain vested in the DGF, who is also an applicant before the English court to obtain the recognition.</p>	<p>exercise the powers delegated to her by the DGF in pursuance of the bank's liquidation.</p>
<p>Reorganisation or liquidation of the debtor as the purpose of the proceeding</p>	<p>Under the MLCBI, some types of proceeding that may satisfy certain elements of the 'foreign proceeding' definition may nevertheless be ineligible for recognition because they are not for the stated purpose of reorganisation or liquidation. This may include proceedings that are designed to prevent dissipation and waste, or to prevent detriment to investors, rather than to liquidate or reorganise the insolvent entity in which the powers conferred, and the duties imposed, upon the foreign representative are more limited than the powers or duties typically associated with liquidation or reorganisation or are limited to doing no more than preserving assets.</p>	<p>Facts from the questions which are relevant toward this requirement include that the NB classified the Bank as insolvent and on the same day, the DGF passed a resolution commencing the process of withdrawing the Bank from the market and appointing an interim administrator. Furthermore, the NB formally revoked the Bank's banking licence three months later and resolved that it be liquidated, whereby the DGF initiated the liquidation procedure and appointed Ms C as the first of the DGF's authorised persons to whom</p>	<p>Given the Bank was shown to be removed from the market and placed in a formal insolvency proceeding, it has satisfied the requirement of entering a foreign proceeding for the purposes of liquidation and not for the purpose of asset preservation / limiting losses to the Bank's stakeholders.</p>

		powers of the liquidator were delegated.	
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Ok answer, however it should be noted that this is an *administrative* procedure and not judicial for full marks.

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

The definition of a "foreign representative" under article 2(d) of the MLCBI is where a person or body, including one appointed on an interim basis, is 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. The Applicants fall within the description of a foreign representative for the following reasons:

a.) The MLCBI does not specify that the foreign representative must be authorised by a foreign court and can include appointments that might be made by a special agency other than the court. The insolvency appointment was made pursuant to the NB’s decision as classifying the Bank as insolvent and consequently, under Article 77 of the LBBA, the DGF acquires the full powers of a liquidator under the law of Country A, which were ultimately delegated to Ms G.

b.) The courts have indicated that the focus is upon the authorisation being provided "in the context of" or "in the course of" the proceeding, rather than upon the body providing the authorisation (which might include the court, the law or even appointment by the debtor itself, i.e. by the board of directors of the debtor). In this case, Ms G was appointed by the DGF pursuant to a Decision of the Executive Board of the Directors of the DGF, No 1513 (Resolution 1513).

c.) The MLCBI does not define the words "person" or "body", however courts have found that a foreign representative might be a firm of accountants, if otherwise qualified, on the basis that a firm can constitute a "person" as required by article 2(d) and a "body" has been interpreted as meaning "an artificial person created by a legal authority" (per Black's law dictionary). Following the facts of the question, Ms G is a person who is a “leading bank liquidation professional” who was appointed by the DGF as an authorised person under article 35(1) of the DGF Law to have “...high professional and moral qualities, impeccable business reputation, complete higher education in the field of economics, finance or law...and professional experience necessary”. Further, the DGF is a governmental body of Country A which has the responsibility of withdrawing insolvent banks from the market and winding down their operations via liquidation (i.e. a body that has legal authority).

d.) The foreign representative must have the power to administer the reorganisation or liquidation of the debtor's assets or affairs at the time of the application for recognition. The facts of the question provide that DGF, as liquidator, has extensive powers, including the powers of sale, distribution and the power to bring claims for compensation against persons for harm inflicted on the insolvent bank. Further powers include:

- the power to exercise management powers and take over management of the property (including the money) of the bank;
- the power to take steps to find, identify and recover property belonging to the bank;

- the power to dispose of the bank's assets; and
- the power to exercise "such other powers as are necessary to complete the liquidation of a bank".

Ok, but it should be discussed whether Ms G also has the power to be considered to administer the proceedings.

**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.

**\* End of Assessment \***