



SUMMATIVE (FORMAL) ASSESSMENT: MODULE 2A

THE UNCITRAL MODEL LAWS RELATING TO INSOLVENCY

This is the **summative (formal) assessment** for **Module 2A** of this course and is compulsory for all candidates who **selected this module as one of their compulsory modules from Module 2**. Please read instruction 6.1 on the next page very carefully.

If you selected this module as **one of your elective modules**, please read instruction 6.2 on the next page very carefully.

The mark awarded for this assessment will determine your final mark for Module 2A. In order to pass this module, you need to obtain a mark of 50% or more for this assessment.

INSTRUCTIONS FOR COMPLETION AND SUBMISSION OF ASSESSMENT

Please read the following instructions very carefully before submitting / uploading your assessment on the Foundation Certificate web pages.

1. You must use this document for the answering of the assessment for this module. The answers to each question must be completed using this document with the answers populated under each question.
2. All assessments must be submitted electronically in MS Word format, using a standard A4 size page and a 11-point Arial font. This document has been set up with these parameters – **please do not change the document settings in any way. DO NOT** submit your assessment in PDF format as it will be returned to you unmarked.
3. No limit has been set for the length of your answers to the questions. However, please be guided by the mark allocation for each question. More often than not, one fact / statement will earn one mark (unless it is obvious from the question that this is not the case).
4. You must save this document using the following format: **[student ID.assessment2A]**. An example would be something along the following lines: 202122-336.assessment2A. **Please also include the filename as a footer to each page of the assessment** (this has been pre-populated for you, merely replace the words “studentID” with the student number allocated to you). Do not include your name or any other identifying words in your file name. **Assessments that do not comply with this instruction will be returned to candidates unmarked.**
5. Before you will be allowed to upload / submit your assessment via the portal on the Foundation Certificate web pages, you will be required to confirm / certify that you are the person who completed the assessment and that the work submitted is your own, original work. Please see the part of the Course Handbook that deals with plagiarism and dishonesty in the submission of assessments. **Please note that copying and pasting from the Guidance Text into your answer is prohibited and constitutes plagiarism. You must write the answers to the questions in your own words.**
- 6.1 If you selected Module 2A as one of your **compulsory modules** (see the e-mail that was sent to you when your place on the course was confirmed), the final time and date for the submission of this assessment is **23:00 (11 pm) GMT on 1 March 2022**. The assessment submission portal will close at 23:00 (11 pm) GMT on 1 March 2022. No submissions can be made after the portal has closed and no further uploading of documents will be allowed, no matter the circumstances.
- 6.2 If you selected Module 2A as one of your **elective modules** (see the e-mail that was sent to you when your place on the course was confirmed), you have a **choice** as to when you may submit this assessment. You may either submit the assessment by **23:00 (11 pm) GMT on 1 March 2022** or by **23:00 (11 pm) BST (GMT +1) on 31 July 2022**. If you elect to submit by 1 March 2022, you **may not** submit the assessment again by 31 July 2022 (for example, in order to achieve a higher mark).
7. Prior to being populated with your answers, this assessment consists of **12 pages**.

ANSWER ALL THE QUESTIONS

Total marks: 36,5 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] 6 marks

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

Question 1.1

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

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

Question 1.2

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

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

The correct answer is D

Question 1.3

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

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

Question 1.4

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

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

Question 1.5

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

- (a) The foreign main proceedings in South Africa will not be recognised in the UK because the UK is not a designated country under South Africa’s principle of reciprocity, but the foreign non-main proceedings in Brazil will be recognised in the UK despite Brazil not having implemented the Model Law.
- (b) Both the foreign main proceedings in South Africa and the foreign non-main proceedings in Brazil will not be recognised in the UK because the UK has no principle of reciprocity and Brazil has not implemented the Model Law.

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

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

Question 1.6

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

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

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

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

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

Question 1.7

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

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

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

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

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

Question 1.8

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

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

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

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

(d) None of the above.

Question 1.9

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

(a) Enforcement of insolvency-related judgments.

(b) An indefinite moratorium continuation.

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

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

Question 1.10

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

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

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

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

(d) All of the above.

QUESTION 2 (direct questions) [10 marks in total] 8 marks

Question 2.1 [maximum 3 marks] 2 marks

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

The appropriate date for determining the COMI or establishment of a debtor is the date of commencement of the foreign proceeding. This is so taking into consideration the evidence required in supporting an application for recognition (Article 15) and the decision commencing the foreign proceeding and appointing of foreign representative. Further, it is also because where business activity of the debtor ceases upon commencement of foreign proceeding, all that may exist at the time of application for recognition to indicate debtor’s COMI and/or establishment is the foreign proceeding and the activity of the foreign representative. Using the date of commencement of foreign proceeding is a clear test which will provide certainty in determining COMI in all insolvency proceedings. While the COMI of a debtor may change, if such a change is within a close timing to the commencement of the foreign proceedings, the appropriate evidence will be harder to establish.

For full marks it should be mentioned that the date is not explicitly mentioned in the MLCBI and courts in different jurisdictions therefore might take slightly different approaches.

Question 2.2 [maximum 3 marks] 2 marks

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

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

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

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

Statement 1 is related to Article 31(c) which in effects provides that should there be two concurrent foreign non-main proceedings, the Court must grant, modify or terminate relief for the purpose of facilitating co-ordination of the proceedings. There are no provisions within the Model Law relating to rule of preference between concurrent foreign non-main proceedings.
30 (c)

Statement 2 is related to the hotchpot rule, set out in Article 32. This hotchpot rule intends to avoid a scenario where a creditor might obtain more favourable treatment than the other creditors within the same class by obtaining payment of the same claim in insolvency proceedings in different jurisdictions. This rule does not affect the ranking of claims established under the law of the enacting State, thereby not affecting secured claims.

Statement 3 is related to Article 31 which provides a rebuttable presumption of insolvency in recognition of a foreign main proceeding being proof that the debtor is indeed insolvent, for the purposes of opening a domestic insolvency proceeding for the debtor in the enacting S.
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 Court of Appeal upheld the decision that the Court should not exercise its power to grant indefinite Moratorium Continuation because:

- (a) The Court held that the based on the evidence before the Court, it was satisfied that (i) the stay was not necessary to protect the interests of IBA’s creditors and (ii) the stay was not an appropriate way of achieving such a protection. Therefore, the conditions to grant an indefinite Moratorium Continuation were not satisfied. In substance, such indefinite Moratorium Continuation would prevent the challenging creditors from enforcing their English law rights pursuant to the Gibbs Rule.
- (b) Granting of such indefinite Moratorium Continuation would prolong the stay after the Azeri reconstruction has come to an end. The Court opined 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 to be made in relation to the foreign proceeding and any relief previously granted under the Model Law should also terminate.

Question 2.4 [2 marks] 2 marks

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

After recognising a foreign main proceeding and there is an ongoing domestic proceeding, the Court of the enacting State will give primacy to the domestic proceeding in accordance with Article 29 of the MLCBI.

Pursuant to Article 18 of the MLCBI, the foreign representative in the foreign main proceeding is required to promptly inform the Court in the enacting States of the following, from the time of filing the recognition application:

- (a) Any substantial change in the status of the recognised foreign proceeding or status of the foreign representative's appointment; and
- (b) Any other foreign proceeding regarding the same debtor that is made known to the foreign representative.

QUESTION 3 (essay-type questions) [15 marks in total] 8,5 marks

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

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

Question 3.1 [maximum 4 marks] 2 marks

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

The access for foreign representatives are provided for under Articles 9 to 14 of the MLCBI. Access and co-ordination rights in State A can benefit the foreign representative in the following manner:

- (a) Access to/standing before the Court of State A, without the need to meet formal requirements such as licenses or consular action. Consequentially, permitting the foreign representative to seek temporary moratorium (breathing space).
- (b) The Court of State A is able to determine what coordination between the jurisdiction of State A and B or any other relief is warranted to ensure optimal disposition of the insolvency of the Debtor.
- (c) The foreign representative will also benefit from the principle of non-discrimination, pursuant to Article 13, which ensures that foreign creditors are afforded the same rights as local creditors. In other words, the claim of the foreign creditor in State B shall not be

given a lower priority than that of general unsecured claims solely because the creditor is a foreign creditor.

- (d) The foreign representative will obtain timely notice of the events taking place in State A, pursuant to Article 14.
- (e) The “safe-conduct” rules, pursuant to Article 10, ensures that the Court in State A does not assume jurisdiction over all the assets of the Debtor on the sole ground that the foreign representative has made an application for recognition, when the foreign representative does so.

Reference should also be made to art. 11, art. 25-27 and an explanation why these can be used prior to and finally and overall conclusion that these rights are time and costs reserving.

Question 3.2 [maximum 5 marks] 2,5 marks

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

- (a) Pursuant to Article 15 of the MLCBI, an application for recognition shall be supported by:
 - (i) a certified copy of the decision of the foreign proceeding in State B and the appointment of the foreign representative.
 - (ii) A statement identifying all foreign proceedings in respect of the Debtor that are known to the foreign representative.
 - (iii) A translated copy of the abovementioned supporting documents in the official language of State A, if the languages of State A and B are different.
- (b) Pursuant to Article 16, the Court in State A is entitled to make the following presumptions in the recognition application which include:
 - (i) Presumption that the supporting documents submitted are authentic, whether or not they have been legalised.
 - (ii) In the absence of proof to the contrary, the Debtor’s registered office is presumed to be the COMI of the Debtor.
- (c) Pursuant to Article 17, the recognition application filed by the foreign representative must be decided at the earlier possible time and recognition can be modified or terminated if it is established that the grounds of granting recognition were fully or partially lacking or have ceased to exist.
- (d) In the event that Article 15(2) has been met and in the absence of public policy grounds (Article 6) warranting a denial of the recognition application in State A, the application shall be granted as a matter of course.
- (e) As a general rule of the public policy exception, it should rarely be the basis for refusing the recognition application even though, it may be a basis for limiting the nature of relief accorded.
- (f) The Court of State A would also consider if there is any abuse of process and if the foreign representative has satisfied its obligation of full and frank disclosure before the Court. While the MLCBI does not contain a provision in relation to abuse of process, the Court of State A has the discretion to determine what amounts to abuse of process.
- (g) The foreign representative, from the filing of the recognition application, has a continuous/ongoing full and frank disclosure obligation, where the foreign representative

is expected to promptly inform the Court of State A of any substantial changes in the status of the foreign proceeding/its own appointment as representative under proceeding of State B.

Reference should also be made to art. 1(2) on exclusions, art. 3 on restrictions and a more elaborate answer on the judicial scrutiny in art 16/17.

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.

- (a) The Court in State A is entitled to grant interim relief upon the recognition application pursuant to Article 19 where relief is urgently needed to protect the assets of the Debtor or the interest of the State B creditor, from the time of filing of the recognition application until the application is decided upon. The interim relief includes:
- (i) Stay of execution against the Debtor's assets.
 - (ii) Entrusting the administration of part or all of the Debtor's assets in State A to the foreign representative, in order to protect and preserve the value of the assets, by their nature or because of other circumstances, are perishable, susceptible to devaluation or jeopardy.
 - (iii) Any of the post-recognition relief provided under Article 21.
- (b) Article 20 provides for automatic mandatory relief if the foreign proceeding in State B qualifies as a foreign main proceeding. The automatic mandatory relief includes:
- (iv) Stay of commencement or continuation of individual actions or individual proceedings concerning the Debtor's assets, rights, obligations or liabilities.
 - (v) Stay of execution against the Debtor's assets.
 - (vi) Suspending the right to transfer, encumber or otherwise dispose of any assets of the Debtor.
- (c) Exceptions to automatic mandatory relief includes enforcement of claims by secured creditors in State A, initiation of court action for claims that arose after the recognition of foreign main proceeding or the completion of an open financial-market transactions.
- (d) Article 20(3) provides that automatic stay and suspension do not affect the right to commence individual actions to the extent necessary to preserve a claim against the Debtor.
- (e) Article 20(4) provides that the automatic stay and suspension do not affect the right to request the commencement of certain domestic insolvency proceeding.
- (f) Article 21 sets out the court's discretionary power to grant post-recognition relief where necessary to protect the assets of the Debtor or the interest of creditors and at the request of the foreign representative. These relief includes:
- (i) Stay of commencement or continuation of individual actions or individual proceedings concerning the Debtor's assets, rights, obligations or liabilities, to the extent they have not been automatically stayed under Article 20(1)(a).
 - (ii) Stay of execution against the Debtor's assets to the extent they have not been automatically stayed under Article 20(1)(b).
 - (iii) Suspending the right to transfer, encumber or otherwise dispose of any assets of the Debtor to the extent of right which has not been automatically suspended under Article 20(1)(c).

- (iv) Examination of witnesses, the taking of evidence or delivery of information concerning the Debtor's assets, rights, obligations or liabilities.
 - (v) Extending any interim relief granted under Article 19(1).
 - (vi) Granting any additional relief that may be available to a domestic liquidator/office holder under the law of State A.
- (g) Article 21(2) provides the Court of State A with discretionary power to hand over all or part of the Debtor's assets located in State A to the foreign representative, at the request of the foreign representative, if the Court is satisfied that the interests of the local creditors in State A are adequately protected.
 - (h) If the proceeding at State B is not a foreign main proceeding, Article 21(4) provides that the Court must be satisfied that the relief granted is in relation to, under the law of State A, assets that should be administered in the foreign non-main proceeding in State B or concerns information required in the proceeding of State B. The Court must be satisfied that the relief granted should not interfere with the administration of another insolvency proceeding.
 - (i) In granting any form of pre and post-recognition relief, the Court in State A must be satisfied that the interests of the Debtor's creditors and other interested parties are adequately protected. Therefore, the Court is afforded powers to subject reliefs to any conditions that the Court deem fit (Article 22(2)).
 - (j) Further, at the request of the foreign representative or an affected person, the Court in State A may further modify or terminate the relief (Article 22(3)).

Reference should also be made to art. 3 and art. 6 for full marks on this question.

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?

This is so because the post-recognition relief granted under Article 21 of the MLCBI is discretionary in nature and the Court may find that the facts of the case post recognition may no longer be suitable for the freezing order to continue, taking into consideration the interests of creditors and the debtor. It is also because once recognition is given, the relief granted should be in relation to liabilities and assets of the debtor at the enacting State only and should not be binding to all jurisdictions/worldwide.

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

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] 14 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
- 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]. 5 marks

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

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

Answer for Question 4.1.1

Pursuant to Article 2(a) of the MLCBI, "foreign proceeding" is defined as a collective judicial or administrative proceeding in a foreign State, including 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.

In order for the Bank's liquidation to be eligible for recognition of MLCBI, the proceeding must satisfy all of the elements of the abovementioned definition. These elements are set out below and will be discussed under 3 separate paragraphs (a), (b) and (c) below. Note that these elements are to be considered as a whole and the separate elements of the definition of Article 2(a) are cumulative in effect. The Court will assess the elements on a factual basis and pursuant to Article 8, the elements should be interpreted and applied in view of their international origin.

- A proceeding
- That is either judicial or administrative;
- That is collective in nature;
- That is authorised or conducted under a law relating to insolvency;
- In which the assets and affairs of the debtor (i.e. the Bank) are subject to control or supervision of a foreign court; and
- Which proceeding is for the purpose of reorganisation or liquidation.

(a) Judicial or administrative proceeding, which is collective in nature, with its basis in insolvency-related law of Country A

The requirement of judicial or administrative proceeding can be one or the other and need not be both. The United States Court in the case of *Irish Bank Resolution Corporation (IBRC) Limited*, suggested that the hallmark of “proceeding” was “a statutory framework that constrains a company’s actions and that regulates the final distribution of a company’s assets”. The US Court found that a winding up directed by the IBRC was a proceeding and that majority of tasks undertaken by the special liquidator and the Minister of Finance were administrative in nature. In applying this to the facts of Question 4, it can be said that there is indeed an administrative proceeding since the liquidation proceeding of the Bank is directed by the National Bank and is governed by the law of Country A i.e. the Banks and Banking Activity (LBBA) which empowers the DGF with powers of a liquidator.

The GEI explains that in evaluation whether a proceeding is collective under MLCBI, a key consideration is whether substantially all of the assets and liabilities of the Debtor Bank are dealt with in the proceeding, subject to local priorities and statutory exception, and to local exclusions relating to rights of secured creditors. In applying this to the facts, under the liquidation, the Liquidator of the Bank i.e. the DGF has the power/duty to inter alia, compile a register of creditor claims and seek to satisfy those claims. Therefore, it is reasonable to state that the Liquidation proceeding of the Bank is collective in nature.

The MLCBI does not require “insolvency-related law” as a label, it is sufficient if the law deals with or addresses insolvency or severe financial distress. The Liquidation proceeding of the Bank is pursuant to the provisions of the LBBA which empowers the DGF with powers of a liquidator in accordance to the DGF Law. The DGF is responsible for amongst others, withdrawing insolvent banks from the market and winding down their operations via liquidation. Therefore, it can be said that the LBBA Law and DGF Law are clearly insolvency-related law.

(b) Control or supervision of the assets and affairs of the Debtor Bank by a court or another official body

The US Court in the case of *Betcorp Limited* stated that control or supervision may be exercised not only directly by the Court, but also indirectly by an insolvency representative who is in turn subject to control or supervision by the Court or other regulatory authority.

The English Court in the *Angkor DD* case established that the level of court supervision required under the MLCBI is relatively low and such control can be (i) potential rather than actual and (ii) indirect rather than direct.

On the facts, the liquidation of the Bank is managed by the Liquidator i.e. the DGF which is a governmental body of Country A which is given powers by the NB which is a regulatory body which derived its power from the Law of Country A on LBBA. The power of the liquidator under the DGF Law includes inter alia, power to exercise management

powers and take over management of the property (including the money) of the Bank and power to dispose of the Bank's assets. In exercising these powers, the Liquidator would definitely need to take "control or supervision of the assets and affairs" of the Bank.

(c) Reorganisation or liquidation of the Debtor Bank as the purpose of the proceeding

Based on the facts, the purpose of the proceeding is undoubtedly for the liquidation of the Bank as the NB was satisfied that the Bank is insolvent. That is the basis as to which the DGF was automatically appointed as the Liquidator of the Bank under Article 77 of the LBBA.

Therefore, having satisfied the elements of a "foreign proceeding" as discussed above, I am of the view that the Bank's liquidation is indeed a "foreign proceeding" within the definition of Article 2(a).

Great answer, for full marks on this question – more reference to the facts of the case should be made, i.e. the independence of the DGF and a bit more elaboration on the interpretation of key concepts.

Answer for Question 4.1.2

Pursuant to Article 2(d) of the MLCBI, "foreign representative" is defined as a person or body, including one appointed on an interim basis, authorised in a foreign proceeding to administer the reorganisation or liquidation of the debtor's assets or affairs or to act as a representative of the foreign proceeding.

A person or body, including one appointed on an interim basis

- (a) The representatives in question at the point of the recognition application before the UK Court are (i) DGF being the formally appointed Liquidator of the Bank and (ii) Ms G who is the authorised person under the DGF Law.
- (b) While "person" and "body" are not specifically defined, the Black's law dictionary defines "body" as "an artificial person created by a legal authority".
- (c) As the definition of "foreign representative" encompasses a body, DGF being the body who is automatically the liquidator of a bank on the date it receives confirmation of the NB's decision to revoke the Bank's license (as per Article 77 of the LBBA) bearing statutory powers, should be recognised a foreign representative.
- (d) Ms G, who is the authorised person is defined 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 2(1)(17) of the DGF Law). In other words, Ms G is delegated with powers of a liquidator (save for certain powers as set out under the DGF Law) under Article 48(3) and 35(1) of the DGF Law should also be recognised as a foreign representative under Article 2(d).

Authorised in a foreign proceeding

- (e) Having satisfied the pre-requisite of Article 2(a), the Liquidation proceeding of the Bank at Country A would be recognised as a foreign proceeding, as discussed at Answer 4.1.1 above. Consequentially, DGF and Ms G who are the appointed liquidator (Article 77 LBBA) and authorised officer (Article 48(d) DGF Law) respectively will be regarded as representatives "authorised in a foreign proceeding".
- (f) The JP has explained that since MLCBI does not specify that the foreign representative needs to/must be appointed or authorised by a foreign court, the definition is sufficiently broad to include representatives appointed or authorised by a special agency other than the Court.

- (g) Accordingly, both Ms G who is the authorised person of the DGF and DGF being the liquidator, despite not being appointed by the Court of Country A, can be regarded as foreign representative.

To administer the liquidation of the debtor's assets or affairs or to act as a representative of the foreign proceeding

- (h) In order to fall within the definition of Article 2(d), the representative must have power to administer the liquidation of the Bank's assets and affairs.
- (i) On the facts, it is clear that DGF being the Liquidator are empowered with statutory powers to administer the Bank's assets and affairs as set out under the insolvency law of Country A. Such statutory powers, save for certain powers, are then further delegated to Ms G as the authorised officer under Resolution 1513. Therefore, there are sufficient grounds to argue that both DGF and Ms G are foreign representative as both bear the power to administer the liquidation of the Bank's assets and affairs.

*** End of Assessment ***