



**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: 34,5 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] 8 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] 10 marks

### Question 2.1 [maximum 3 marks] 3 marks

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

The appropriate date for determining the COMI of a debtor is the date of the commencement of the foreign proceeding. The appropriate date for determining whether an establishment exists is also the date of the commencement of the foreign proceeding. However, the Second Circuit of Appeals in the US judgment of *Morning Mist Holdings Ltd v Kryz (Matter of Fairfield Sentry Ltd)* approached the date for the determination of the debtor’s COMI based on the debtor’s activities at or around the time the Chapter 15 petition is filed.

If the COMI of the debtor moves closely, timing-wise, to the commencement of the foreign proceeding, then the evidential threshold will be higher to establish that the COMI is readily ascertainable by third parties such as creditors of the debtor.

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

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

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

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

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

Statement 1: Article 30(c) which provides that if, after the recognition of a foreign non-main proceeding, another foreign non-main proceeding is recognised, the court shall grant, modify or terminate relief for the purpose of facilitating coordination of the proceedings.

Statement 2: Article 32 (i.e. the Hotchpot Rule), which provides that without prejudice to secured claims or rights in rem, a creditor who has received part payment in respect of its claim in a proceeding pursuant to a law relating to insolvency in a foreign State may not receive a payment for the same claim in a proceeding under the enacting State relating to insolvency regarding the same debtor, so long as the payment to the other creditors of the same class is proportionately less than the payment the creditor has already received.

Statement 3: Centre of Main Interests (COMI). COMI is not defined in the Model Law. Under Article 16(3) of the Model Law, in the absence of proof to the contrary, the debtor’s registered office, or habitual residence in the case of an individual, is presumed to be the debtor’s COMI.

### **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 in the *IBA* case considered whether it should exercise its power to grant the indefinite Moratorium Continuation having regard to the fact that doing so would:

- (a) prevent the English creditors from enforcing their English law rights in accordance with the Gibbs Rule; and/or
- (b) prolong the stay after the Azeri reconstruction has come to an end.

In relation to (a), the Court of Appeal found that the indefinite stay was not necessary to protect the interests of the creditors and that in any case, it would not have been an appropriate way of achieving such protection for the creditors. The Court found on the evidence that the creditors did not need any further protection.

In relation to (b), the Court of Appeal found that once the foreign proceeding has come to an end and the foreign representative no longer holds office, there would be no more scope for further orders in support of the foreign proceeding to be made. Thus, any relief (including a moratorium) under the Model Law should 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**.

The court in the enacting State must ensure that any relief granted under Articles 19 or 20 must be consistent with the domestic insolvency proceedings pursuant to Article 29(a)(i) of the MLCBI.

Under Article 18, the duty of information that the foreign representative has towards the court in the enacting State is the duty to promptly inform the Court of the enacting State of (a) any substantial change in the status of the recognised foreign proceeding or the status of the foreign representative's appointment; and (b) any other foreign proceedings 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 mark**

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

The Model Law expedites and simplifies the process required to recognise foreign proceedings and provides a clear framework for the foreign representative to obtain recognition.

Access and co-ordination may provide the foreign representative with access to the courts of State A. This makes available various reliefs such as a moratorium in the interim and also allows the courts of State A to determine what co-ordination or other relief would be suitable for optimal disposition of the insolvency. This is because, under Article 9, access granted to the foreign representative is standing in the courts of State A, without the need to meet any formal requirements such as licenses or going through consular action.

The foreign representative will also be able to access certain tools available to a local insolvency office-holder in State A. For instance, the foreign representative may exercise powers to allow for the examination of witnesses, taking of evidence, or delivery of information concerning the debtor's assets, liabilities and affairs. This can then aid in any clawback or antecedent actions subsequently commenced.

Recognition would also be facilitated by certain presumptions under Article 16 of the Model Law that the State A's courts may rely on. For instance, as to the COMI of the debtor. This has the potential of easing the evidential burden of the foreign representative when bringing a recognition application. The court would also be entitled to presume that documents submitted



in support of the application for recognition are authentic, whether or not they have been legalised.

For full marks on this question, the following should be addressed:

- Opening domestic insolvency proceedings (Article 11 MLCBI): The foreign representative is further specifically entitled to apply for the opening of domestic insolvency proceedings in State A, as reflected in Article 11 of the MLCBI. Whether or not the foreign representative would wish to do this will depend on what the requirements are for opening such domestic proceedings. Can these requirements be met? On the other hand, it will depend on what the foreign representative believes he/she can get in terms of (interim) relief for the foreign proceedings in State B. In other words, are domestic insolvency proceedings really needed, or just additional time and costs that should be avoided?
- Cooperation: Similar to access rights, the cooperation provisions in the MLCBI (articles 25-27) also operate independently of recognition and it is not a prerequisite to the use of the cooperation provisions that recognition of the foreign proceedings is obtained in advance. Courts in State A can freely cooperate with the foreign representative without having to worry whether the status in State B of the foreign representative can be recognised in State A.
- Save Time & Costs: The key benefits of both the access provisions and the cooperation provisions are that they save time and therefore also costs, as a result of which value destruction can be avoided and value enhancement is being promoted.

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

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

Article 15 of the MLCBI sets out the supporting documents which must accompany an application for recognition. These are:

- (a) a certified copy of the decision commencing the foreign proceeding and appointing the foreign representative; or
- (b) a certificate from the foreign court affirming the existence of the foreign proceeding and of the appointment of the foreign representative; or
- (c) in the absence of (a) and (b) above, any other evidence acceptable to the court of the existence of the foreign proceeding and of the appointment of the foreign representative.

The application must also be accompanied by a statement identifying all foreign proceedings in respect of the debtor that are known to the foreign representative.

If any of the documents are not in the official language of State A, the courts of State A may also require a translation of the documents supplied in support of the application for recognition.

Article 17(1)(d) also provides that the application must be submitted to a competent court as defined at Article 4 of the MLCBI.

The Court of State A would also consider whether there are any grounds to invoke the public policy exception under Article 6 of the MLCBI. The threshold in considering whether the public

policy exception is “manifestly” (see the *Agrokor* case) and the public policy exceptions should be interpreted restrictively and should only apply in exceptional circumstances concerning matters of fundamental importance for the State A.

The Court will also exercise judicial scrutiny in determining whether the foreign proceeding opened in State B is a foreign main proceeding or a foreign non-main proceeding, as at the date of the commencement of the foreign proceedings.

A foreign main proceeding is defined at Article 2 as one that was opened in the centre of main interests of the company. The Court of State A is entitled to rely on the presumption at Article 16(3) of the MLCBI that in the absence of proof to the contrary, the court will assume that the debtor’s registered office is presumed to be the centre of the debtor’s main interests (COMI). The two key factors in determining COMI is the location of the central administration of the debtor and whether it is readily ascertainable as such by creditors of the debtor. There are various other factors as well (such as the location of the debtor’s books and records, the location of the debtor’s primary banks, the location from which contracts (for supply) were organised, etc.). In addition, while a COMI can move, if the move is close in proximity to the commencement of the foreign proceedings, more evidence may be required particularly to show that the COMI is readily ascertainable by third parties.

A foreign non-main proceeding is defined at Article 2 as one, other than a foreign main proceeding, taking place in a State where the debtor has an establishment within the meaning of sub-paragraph (f) (i.e. any place of operations where the debtor carries out a non-transitory economic activity with human means and goods or services).

For full marks, you should also make reference to art. 1(2) and art. 3.

### **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.

At the request of the foreign representative, if the court considers that relief is urgently needed to protect the assets of the debtor or the interests of the creditors, pre-recognition relief may be granted from the filing of the recognition application until the application is decided upon pursuant to Article 19 of the MLBCI. Such relief includes:

- (a) staying execution against the debtor’s assets;
- (b) entrusting the administration or realisation of assets located in State A to the foreign representative in order to protect and preserve the value of assets that, by their nature or because of other circumstances, are perishable, susceptible to devaluation or otherwise is in jeopardy;
- (c) suspending the right to transfer, encumber or otherwise dispose of any assets of the debtor;
- (d) providing for the examination of witnesses, taking of evidence or the delivery of information concerning the debtor’s assets, affairs, rights, obligations or liabilities;
- (e) granting any additional relief that may be available to a local insolvency practitioner under the laws of the State.

The pre-recognition relief will terminate (unless extended) when the application for recognition is decided upon. The court may also refuse to grant relief if the relief would interfere with the administration of a foreign main proceeding.

As for post-recognition reliefs, if the foreign proceeding is a foreign main proceeding, then the reliefs listed at Article 20(1) will automatically kick in. However, under Article 20(3) of the

MBCLI, the stay of any commencement or continuation of individual actions or proceedings concerning the debtor's assets, rights, and obligations would not be affected to the extent necessary to preserve a claim against the debtor.

If the foreign proceeding is a foreign main proceeding or a foreign non-main proceeding, then the post-recognition reliefs listed at Article 21(1) of the MBCLI are available where necessary to protect the assets of the debtor or the interests of creditors and at the request of the foreign representative. Under Article 21(2) of the MBCLI, the court has a discretionary power to hand over all or a part of the debtor's assets located in State A to the foreign representative, provided that the court is satisfied that the local creditors' interests are adequately protected. Under Article 21(4) of the MBCLI, the court must also be satisfied that the relief should not interfere with the administration of another insolvency proceeding, such as the main proceeding.

For full marks on this question, reference should also be made to the following:

1. Adequate protection: Pursuant to Article 22 of the Model Law any interim relief under Article 19 of the Model Law or any post-recognition relief under Article 21 of the Model Law require the court in State A to be satisfied that the interests of the creditors and the other interested persons, including the debtor, are adequately protected and any relief may be subject to conditions as the court considers appropriate.
2. Existing international obligations of State A: Based on Article 3 of the Model Law, the court in State A should again verify that there are no existing international obligations of State A (under a treaty or otherwise) that may conflict with granting the requested relief under the implemented Model Law in State A.
3. Public policy exception: The court in State A should, based on Article 6 of the Model Law, also again verify that the relief application is not manifestly contrary to public policy of State A.

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

The reliefs which the court of the enacting State can grant are not unlimited, even though Article 21 of the MBCLI is drafted broadly. One of the reliefs which the English Court has determined it did not have jurisdiction to grant is the indefinite continuation of the automatic moratorium, which is similar to an indefinite worldwide freezing order. That is because the power of the foreign representative terminates upon the foreign proceeding also terminating.

Here it should be noted that art. 21 provides for different types of protection leaving the freezing order unwarranted.

#### **QUESTION 4 (fact-based application-type question) [15 marks in total] 10 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]; 8 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]. 2 marks**

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

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

4.1.1

A "foreign proceeding" is defined at Article 2(a) of the MLCBI to be (a) a proceeding (including an interim proceeding); (b) that is either judicial or administrative; (c) that is collective in nature; (d) that is in a foreign state; (e) that is authorised or conducted under a law relating to

insolvency; (f) in which the assets and affairs of the debtor are subject to control or supervision by a foreign court; and (g) which proceeding is for the purpose of reorganisation or liquidation.

Each of these features of a “foreign proceeding” will be considered in turn.

In relation to (a) and (b), the bank is undergoing liquidation in Country A.

The proceeding satisfies the requirement at (c) for it to be collective in nature because it confers upon the liquidator powers to gather and deal with substantially all of the assets and liabilities of the bank in the liquidation proceeding. In this regard, the liquidator has the power to take over the management of the property and money of the bank, bring claims against parties believed to have caused its downfall. Further, upon entering liquidation, all money liabilities due to the bank are deemed to become due and the bank’s property and funds are alienated. Public encumbrances and restrictions on disposal of bank property are also terminated, as are the offsetting of counter-claims.

In relation to the requirement at (d) that the proceeding must be in a foreign state, in this case, the liquidation is proceeding in Country A.

In relation to the requirement at (e) that proceeding must be authorised or conducted under a law relating to insolvency, it is also apparent that the proceeding was commenced under the Law of Country A on Banks and Banking Activity. Even though this statute appears to be one that generally deals with all banks and banking activities, under the UNCITRAL Guide to Enactment and Interpretation, it was clarified that the MLCBI acknowledges the fact that liquidation might be conducted under law that is not labelled as insolvency law (such as company law) but which nevertheless deals with or addresses insolvency or severe financial distress. The LBBA in this case, specifically provides that a “troubled” bank when classified as insolvent can be liquidated under Article 77 of the LBBA.

In relation to the requirement at (f) that the assets and affairs of the debtor are subject to control or supervision by a foreign court, the level of court supervision required under the MLCBI is relatively low and court supervision can be potential, rather than actual and can be indirect rather than direct. On the facts, there may be an issue as to whether the liquidation in Country A is subject to control or supervision by a foreign court since the DGF is a governmental body takes with providing deposit insurance to bank depositors in Country A. DGF is also independent (as addressed at articles 3(3) and 3(7) of the DGF law) which confirms that neither public authorities nor the NB have any right to interfere in the exercise of its functions and powers.

In relation to the requirement at (g) for proceedings to be for purposes of reorganisation or liquidation, the English court in the case of *Agrokor* held that where the purpose of the relevant law was to protect the stability of the economic system against systemic shocks by enabling the restructuring of companies of systemic importance that get into financial difficulty, and, if a restructuring failed, by transforming it into a bankruptcy proceeding, the foreign proceeding could be considered to be for the purposes of reorganisation or liquidation. In this case, the DGF’s powers include those related to early detection and intervention. Under Article 34 of the DGF Law, once a bank has been classified as insolvent, the DGF will also begin the process of removing it from the market which would also serve the purpose of protecting the stability of the economic system against systemic shocks.

**For full mark more elaboration on the term “foreign court” is needed as well as a discussion on whether this proceeding is administrative.**

#### 4.1.2



“Foreign representative” has the following elements: (a) a person or body, including one appointed on an interim basis; (b) authorised in a foreign proceeding; and (c) to administer the reorganisation or liquidation of the debtor’s assets or affairs or to act as representative of the foreign proceeding.

The English cases of *Candey Ltd v Crumpler and another (as joint liquidators of Peak Hotels and Resorts Ltd (in liquidation))* [2020] EWHC Civ 26 and *Brian Glasgow (the Bankruptcy Trustee of Harlequin Property (SVG) Ltd) v ELS Law Ltd and others* [2017] EWHC 3004 (Ch) confirmed that the foreign representative need not have been authorised by the foreign court, or need not be an officer of the court.

As such, even though the Liquidator was not court-appointed, this does not disqualify the Liquidator from being recognised as a foreign representative under the MLCBI.

What is required to show that the Liquidator is a foreign representative under Article 15 of the MBCLI is either a certified copy of the decision appointing the representative, a certificate affirming the appointment or other evidence of that appointment that is acceptable to the receiving court.

**This answer is inadequate. It lacks a discussion whether Ms G and DGF are administrating, how they are appointed and the factual evidence supporting this.**

**\* End of Assessment \***