INSOL INTERNATIONAL

FOUNDATION CERTIFICATE

IN INTERNATIONAL INSOLVENCY LAW

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: 30 out of 50 marks

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

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

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

Question 1.1

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

(a) The Model Law provides effective mechanisms for dealing with cases of cross-border insolvency so as to promote a number of objectives, including the protection and maximisation of trade and investment.

(b) The Model Law provides effective mechanisms for dealing with cases of cross-border insolvency so as to promote a number of objectives, including the fair and efficient administration of cross-border insolvencies that protects the interests of all creditors and other interested persons, not including the debtor.

(c) The Model Law is a substantive unification of insolvency law so as to promote co-operation between courts of the enacting State and foreign States and facilitation of the rescue of financially troubled businesses.

(d) All of the above.

Question 1.2

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

(a) The existence of a statutory basis in national (insolvency) laws for co-operation and co-ordination of domestic courts with foreign courts or foreign representatives.

(b) The difficulty of agreeing multilateral treaties dealing with insolvency law.

(c) The practical problems caused by the disharmony among national laws governing cross-border insolvencies, despite the success of protocols in practice.

(d) None of the above.

Question 1.3

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

(a) The registered office of the debtor is not in the jurisdiction where the foreign proceedings were opened, but the debtor has an establishment in the jurisdiction of the enacting State.
(b) The registered office of the debtor is in the jurisdiction of the enacting State, but the debtor has an establishment in the jurisdiction where the foreign proceedings were opened.

(c) The debtor has neither its COMI nor an establishment in the jurisdiction where the foreign proceedings were opened.

(d) The debtor has neither its COMI nor an establishment in the jurisdiction of the enacting State.

Question 1.4

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

(a) The *locus standi* access rules.

(b) The public policy exception.

(c) The safe conduct rule.

(d) The "hotchpot" rule.

Question 1.5

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

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

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

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

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

Question 1.6

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

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

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

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

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

Question 1.7

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

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

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

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

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

Question 1.8

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

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

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

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

(d) None of the above.

Question 1.9

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

(a) Enforcement of insolvency-related judgments.

(b) An indefinite moratorium continuation.

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

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

Question 1.10

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

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

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

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

(d) All of the above.

QUESTION 2 (direct questions) [10 marks in total] 3 marks

Question 2.1 [maximum 3 marks] 1 mark

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

The appropriate date for determining COMI for applications for recognition in accordance with article 15 is the date of the commencement of the foreign proceeding, this ensures a consistent approach and methodology given that a debtors COMI can move. Although, should the debtor move its COMI shortly before the commencement of proceedings it may be harder to establish appropriate evidence to determine the COMI as in particular there is a requirement that the debtors COMI be readily ascertainable by third parties of the debtor, such as its creditors.

In this answer you should also mention that it is not explicitly mentioned in the MLCBI and different jurisdiction 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 relates to Article 30 (coordination of more than one foreign proceeding)

Statement 2 relates to Article 32 (Rule of payment in concurrent proceedings)

Statement 3 relates to Article 31 (presumption of insolvency) – For the purposes of opening local/domestic insolvency proceedings for the debtor in the enacting state Article 31 provides for a rebuttable presumption that the recognition of a foreign main proceeding is proof that the debtor is insolvent. The correct is art 16(3)

Question 2.3 [2 marks] 0 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 main consideration by the English Court of Appeal in the IBA case was whether the Gibbs Rule could be formally observed by accepting the continuation of the rights which English law confers without being in contravention of the rights exercised by Model Law and the principles of modified universalism it gives effect to.

Ultimately, Justice Hildyard denied the relief requested in the Moratorium Continuation Application as in his opinion a permanent stay (as was sought in the application) could not be deployed as a work around of the Gibbs Rule.

You make reference to the first instance judgment.

Question 2.4 [2 marks] 0

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**.

Assuming the concurrent domestic insolvency proceedings and foreign proceedings both existed at the time of the application for recognition of the foreign proceedings in the enacting state (Article 29(a)). Any relief granted either in an interim basis based on Article 19, or post-recognition based on Article 21, must be consistent with the domestic insolvency proceedings.

Per article 26, a domestic insolvency office-holder is mandated to co-operate and can communicate directly with the foreign courts or foreign representatives.

The correct answers are 29(a) and art. 18

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

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

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

Question 3.1 [maximum 4 marks] 3 marks

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

As State A has implemented Model Law the foreign representative can benefit from the access rights that provide standing before courts in the enacting State (without the need for separate proceedings to achieve such standing – Article 9). Although, such access does not automatically provide the foreign representative with any other rights or powers.

Cross-border co-operation is dealt with in Articles 25-27 of the Model Law and helps to fill gaps in jurisdictions which lack a legislative framework for co-operation and co-ordination between judges in different jurisdictions. The foreign representative will also benefit from Article 27 which provides an indicative list of the types of co-operation that are authorised by Model Law which includes (but is not limited to) the appointment of a person or body to act at the direction of the court. Co-ordination of the administration and supervision of the debtor's assets and affairs. Approval or implementation by courts of agreements concerning the co-ordination of proceedings.

The overall objective of co-operation as dealt with in articles 25-27 is to help promote consistency of treatment of stakeholders across different jurisdictions, which should enhance both transparency and predictability in cross-border insolvency cases. It should also assist in the avoidance of traditional time-consuming and cost-inefficient processes and procedures such as letters rogatory and requests for consular assistance.

With regards to co-ordination, the foreign representative will benefit from Chapter V of the Model Law which provides for a hierarchy of proceedings in case more then one insolvency proceeding is opened in respect of a debtor. If the foreign proceeding opened in state B is a foreign main proceeding and the recognition order to be sought from State A is to be a foreign non-main proceeding, primacy would be given to the foreign main proceedings (State B proceeding) in this case (per Article 30(a) and (b)). Were both proceedings foreign non main proceedings then neither of the proceedings will be treated preferentially (Article 30(c)).

For full marks, the answer should also include art 11.

Question 3.2 [maximum 5 marks] 1 mark

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.

The evidential requirements for recognition of a foreign proceeding are set forth in Article 15 of the Model Law, as detailed in Article 15 a foreign representative's application for recognition should include:

A certified copy of the decision commencing the foreign proceeding and appointing the foreign representative (in this case this would be the order from State B's proceedings); or

A certificate from the foreign court (State B) affirming the existence of the foreign proceedings and the appointment of the foreign representative; or

In the absence of evidence referred to in the two points above, any other evidence acceptable to the court of the existence of the foreign proceeding and the appointment of the foreign representative.

In addition, in their application for recognition in State A the foreign representative should include a statement identifying all foreign proceedings in respect of the debtor that are known to the foreign representative (in this case State B's proceedings and any other proceedings that are not referenced in the question).

The foreign representative should also bear in mind that the documents provided may need to be translated in the official language of State A.

Per Article 17, an application for recognition of a foreign proceeding must be decided upon at the earliest possible time and recognition can be modified or terminated if it is shown that the grounds for granting it were fully or partially lacking or have ceased to exist. For example were the foreign representative obtain recognition in State A then subsequently the proceedings in State B end the court in State A may dismiss an application for continuation of recognition on the basis that once the foreign proceeding ends (State B) the recognition terminates as well (State A).

Reciprocity is also a consideration a foreign representative should take into account when considering an application. As in this scenario the Model Law of State A does not include a reciprocity provision this should not have an effect.

The foreign representative has an obligation to full and frank disclosure to the court in the enacting state (State A). Therefore, the foreign representative should ensure that any application is factually accurate and is made for appropriate motives. If for example, the foreign representative were to falsely claim the COMI of a debtor is in State A when it is not the court of State A could consider this an abuse of process based on their domestic law (if applicable) which would likely affect the recognition application.

For full marks, the answer should include the following:

1. Exclusions: If the debtor is an entity that is subject to a special insolvency regime in State B, the foreign representative should first of all check if the foreign proceedings regarding that type of a debtor are excluded in State A based on Article 1(2) of the implemented Model Law in State A.
2. Restrictions;- Existing international obligations of State A: Based on Article 3 of the Model Law, the court in State A should also check if there are no existing international obligations of State A (under a treaty or otherwise) that may conflict with granting the recognition application under the implemented Model Law in State A.

3. Judicial scrutiny: While the court in State A is able to rely on the rebuttable presumptions set forth in Article 16 of the Model Law, in the context of Article 17 of the Model Law the court will have to assess whether either the COMI or at least an establishment of the debtor is located in State B where the foreign proceedings were opened. If the COMI of the debtor is in State B the foreign proceedings should be recognised as foreign main proceedings and if only an establishment of the debtor is in State B the foreign proceedings should be recognised as foreign non-main proceedings. Without a COMI or at least an establishment of the debtor in State B, recognition cannot be granted by the court in State A.
4. Public policy exception: Finally, the court in State A should also ensure based on Article 6 of the Model Law that the recognition application is not manifestly contrary to public policy of State A.

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.

Were the foreign representative to make an application for recognition in State A, per the Article 19 of the Model Law, prior to a decision on the recognition application the court of State A could grant urgently needed interim relief upon application for recognition. This could include (but is not limited to) a stay of execution against the debtor's assets, or suspending the right to transfer, encumber or otherwise dispose of any of the assets of the debtor.

Article 21 of the Model Law 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. Examples of the relief that may be granted include (but are not limited to), staying the commencement or continuation or individual actions or individual proceedings concerning the debtor's assets, rights, obligations or liabilities, to the extent they haven't been (automatically) stayed under Article 20(1)(b).

Whilst Article 21 provides a wide remit to the relief the court of State A could grant it is not unlimited. For example the English court has determined certain limits to the appropriate relief under the Model Law it believes it is able to grant. One such example is in the case of Rubin v Eurofinance SA the English Supreme court concluded that the enforcement of an insolvency-related in personam default judgement is not covered by the Model Law, and, in this specific case recognition and enforcement of the default judgement would have amounted to creating a new rule which does not yet exist and that is a matter for parliament rather then judge-made law.

Should the foreign representative's recognition application be successful they will obtain standing to initiate actions under the law of State A to avoid or otherwise render ineffective legal acts detrimental to the creditors of the debtor, in accordance with Article 23. Another consequence of recognition per Article 24 is the right of the foreign representative to intervene in any local proceedings in State A in which the debtor is a party (assuming the foreign representative meets the local requirements for this).

A key consideration for the court, as set out in Article 22, is that the court must be satisfied when in granting pre or post recognition relief the interests of the debtor's creditors and other interested parties are adequately protected. Further, the court may, at the request of the

foreign representative or an affected person further modify or terminate relief previously granted.

For full marks, the following should also be included:

1. 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.
2. 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] 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?

A worldwide freezing order is a rather blanket approach and can have significant impact on the debtor's ability to function (if business operations remain ongoing) and is therefore only suitable in specific circumstances. Whilst it may be granted in accordance with article 19 it may be that once the court is further apprised of the facts of the case having approved the recognition order they may deem that the worldwide freezing order is not in the best interests of the debtors' creditors and other interested parties and does not provide adequate protection. The court may, in accordance with article 21 then modify or terminate the relief granted previously.

In addition, a pre recognition worldwide freezing order would assist in preventing the dissipation of assets, however, it may be that specific powers granted to the foreign representative post recognition will be sufficient without the need for the worldwide freezing order to remain in place.

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]

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]**. 4 mark

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
In accordance with determining whether the Bank's liquidation comprises' s a foreign proceeding I will be determining whether it satisfies all of the elements of the definition of a foreign proceeding per Article 2, subparagraph (a), being:

1. A judicial or administrative proceeding with its basis in insolvency-related law of the enacting state;
2. Involvement of creditors collectively;
3. Control or supervision of the assets and affairs of the debtor by a court or another official body; and
4. Reorganisation or liquidation of the debtor as the purpose of the proceeding.

I note that courts have confirmed that the characteristics and definitions above are cumulative and should be considered as a whole in determining whether the Bank's liquidation comprises

a foreign proceeding. Therefore, whilst I will first assess these points individually below in relation to the Bank's specific circumstances my final conclusion will take all of the factors into account.

1. The legislation that governs the Bank's liquidation is administrative in nature in that per LBBA once a bank is classified as troubled (Article 75) and assuming it cannot bring its activities in line with the NB's requirement it is classified as insolvent. At such time the DGF is tasked with beginning the process of removing the Bank from the market (pursuant to article 34), which is often achieved with an initial period of provisional administration. Article 35(5) established 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. These measures are akin to the interim relief that a court may provide under Article 19 of the Model Law.

   In addition, the powers that are granted to the DGF upon them becoming liquidators of the Bank are akin to the powers that the court may grant to a foreign representative pursuant to Article 21, in the case of DGF the extensive powers bestowed to them are similar to the types of relief that would be available in liquidation proceedings under common law, including the power to compile a register of creditor claims and to seek to satisfy those claims, as well as the power to dispose of the Bank's assets.

2. In respect of whether Country A's proceedings involve creditors collectively, the courts in relation to Model Law have identified collective proceedings as having various characteristics and whether substantially all of the assets and liabilities of the Bank are dealt with in the proceeding (subject to local priorities and statutory exceptions).

   From the description of Country A's insolvency legislation is appears this criteria is met as the powers bestowed to DGF (as liquidator) include the powers to take over management of the Bank's property, including the money of the Bank, further they have the power to dispose of the Fund's assets. Based on the wording it appears this relates to all of the Bank's property and assets and there do not appear to be any assets carved out or excluded. In addition, it does not appear that any class of creditor would benefit to the detriment of another class in relation to asset realisations.

3. Control of the Bank's liquidation is controlled by DGF, who have the ability to delegate their powers to an "authorised officer" or "authorised person", such an individual must meet a number of criteria relating to professional and moral qualities, education and experience. From the information provided DGF is a government entity and per DGF law (articles 3(3) and 3(7)) is an economically independent institution from the NB such that neither the public authorities nor the NB have the right to interfere in the exercise of its functions and powers.

   In respect of Model Law, Courts have indicated that control or supervision may be exercised not only directly by the court, but also indirectly by an insolvency representative where itself is subject to control or supervision by the court or regulatory authority. In the Bank's instance it is questionable whether this criteria is met as from the information provided it does not appear the court in Country A has any direct or indirect control of the liquidation of the Bank. Particularly, as the GEI (paragraph 74) suggest that mere supervision of an insolvency practitioner by a licensing authority would not be sufficient, which appears to be applicable to the Bank's circumstances in that the DGF do not appear to have to report or be supervised by the Court and instead are allowed to conduct the liquidation of the Bank as they see fit (within the scope of the relevant legislation).

4. With regards to the purposes of the proceedings involving the Bank, the proceedings appear to result in the complete liquidation of the Bank and its assets and distribution of the proceeds of the assets and asset sales to investors and does not relate to a branch entity but to the entire Bank. In addition the powers bestowed to the DGF are not more limited then the powers or duties typically associated with liquidation or reorganisation under Model Law.

In conclusion, whilst the Bank's liquidation satisfies several of the criteria per Article 2, it does not satisfy, or at least there is significant doubt as to whether it satisfies the requirement in relation to control or supervision by the foreign court. Therefore at this time I conclude that the Bank's liquidation does not comprise a "foreign proceeding" within the meaning of article 2(a) of the Model Law.

For full marks on this question, what is meant by "insolvency law" should also be addressed. Regarding the DGF as a foreign court se below:

1. The Guide to Enactment notes: *"87) A foreign proceeding that meets the requisites of article 2, subparagraph (a), should receive the same treatment irrespective of whether it has been commenced and supervised by a judicial body or an administrative body. Therefore, in order to obviate the need to refer to a foreign non-judicial authority whenever reference is made to a foreign court, the definition of "foreign court" in subparagraph (e) includes also non-judicial authorities."*
2. In ***Re Sanko Steamship Co Ltd*** [2015] EWHC 1031 (Ch) Simon Barker QC, noted that a foreign proceeding may be recognised where the control or supervision of the proceeding is undertaken by a non-judicial administrative body.
3. The Guide to Enactment states: *"74) The Model Law specifies neither the level of control or supervision required to satisfy this aspect of the definition nor the time at which that control or supervision should arise. Although it is intended that the control or supervision required under subparagraph (a) should be formal in nature, it may be potential rather than actual. As noted in paragraph 71, a proceeding in which the debtor retains some measure of control over its assets, albeit under court supervision, such as a debtor-in-possession would satisfy this requirement. Control or supervision may be exercised not only directly by the court but also by an insolvency representative where, for example, the insolvency representative is subject to control or supervision by the court. Mere supervision of an insolvency representative by a licensing authority would not be sufficient."*
4. In this case the DGF has control of all of the Bank's assets and overall control of the liquidation.
5. 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.
6. 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.
7. Taking these factors into account, the Bank's liquidation is *administrative.* The assets and affairs of the Bank are subject to the control of the DGF, an official body which exercises its powers in the liquidation free from intervention by government or the NB and which should be considered, for the purposes of the definition set out in article 2(e) of the MLCBI, as a "*foreign court*".

4.2.2

Article 2, subparagraph d, defines a foreign representative as a person or body, authorised in a foreign proceeding to administer the reorganisation or the liquidation of the debtor's assets or affairs or to act as a representative of the foreign proceeding.

With regards to the Bank's liquidation the DGF's initial appointment as the body to carry out the Bank's liquidation is defined in article 34 of the DGF law and as previously referenced the DGF have the ability to delegate their powers to an "authorised officer" or "authorised person", in this case Ms G. The MLCBI does not define the words "person" or "body" given Ms G is a "leading bank liquidation professional" she has the requisite experience and qualification to constitute a "person". In addition, whilst the DGF's primary function is to provide deposit insurance to bank depositors in Country A, the DGF is also responsible for the withdrawing of insolvent bank's from the market and for their liquidation. Therefore, whilst liquidating banks is not the DGF's primary function assuming they have liquidated banks previously they would have the required experience and skilled employees to constitute a "body".

In addition, per the MLCBI the foreign representative must have the power to administer the reorganisation or liquidation of the debtor's assets or affairs at the time of the application for recognition. The liquidation powers delegated to Ms G are broad, including the authority to sign all agreements relating to the sale of the Bank's assets, however, the DGF retained some powers including the power to claim damages from a related party of the Bank. Therefore, it appears that neither Ms G or DGF in their individual capacity have sufficient powers to meet the criteria as a foreign representative, but together their powers would be sufficient to be recognised as a foreign representative.

I do not agree with your conclusion, but ok answer.

*** End of Assessment ***