



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

37,5 marks out of 50

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

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

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

Question 1.1

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

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

Question 1.2

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

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

Question 1.3

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

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

Question 1.4

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

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

Question 1.5

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

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

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

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

Question 1.6

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

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

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

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

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

Question 1.7

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

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

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

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

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

Question 1.8

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

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

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

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

(d) None of the above.

Question 1.9

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

(a) Enforcement of insolvency-related judgments.

(b) An indefinite moratorium continuation.

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

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

Question 1.10

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

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

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

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

(d) All of the above.

QUESTION 2 (direct questions) [10 marks in total] 9 marks

Question 2.1 [maximum 3 marks] 2 marks

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

The Model Law does not define the COMI of a debtor; however, in Article 16 paragraph 3 it is presumed to be where the debtors registered office is situated.

There are a number of factors which in totality would allow a Court to determine the true COMI of a debtor if the assumption under Article 16 was rebutted, such as, location of administrative function, location of employees, location of principal assets and operations, the governing law of contracts.

The location of the debtors COMI must be ascertainable by the creditors of the debtor.

The appropriate date for establishing both the COMI of the debtor and whether an establishment exists is the date of commencement of the foreign proceedings and the appointment of the foreign representative.

For full marks on this question it should be mentioned that due to the missing explicit mention of date different jurisdictions have take different approaches.

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 – Coordination of more than one foreign proceeding. Paragraph 3 addresses the concurrence of two foreign non-main proceedings.

Statement 2 – Article 32 – Rule of payment in concurrent proceedings – the hotch potch rule. This does not prejudice secured claims.

Statement 3 – Article 16 – Presumptions concerning recognition. Paragraph 3 contains the rebuttable presumption that the debtor’s registered office is presumed to be the centre of its main interests.

Question 2.3 [2 marks] 2 marks

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

In *Bakhshiyeva v Sberbank of Russia*, the debtor sought to use an Azerbaijani restructuring procedure to restructure debts governed by English law.

The English Court did recognise the proceedings as foreign main proceedings and the automatic relief provided under Article 20 of the Model Law came into force as long as the foreign proceeding were in existence.

To ensure that no English debtor could enforce in the UK post the restructuring the debtor sought further relief under Article 21 of the Model Law for an indefinite moratorium. This went to the English Court of Appeal who considered two issues with this application:

1. An indefinite moratorium would outlive the restructuring procedure – resulting in a stay on any enforcement even after a successful restructuring. The Model Law indicates that for relief to be available that the foreign proceedings must be in existence, therefore when the foreign proceedings come to an end so to should the relief provided under the Model Law.
2. The CofA also considered the Gibbs Rule. The English creditors had not agreed to participate in the Azerbaijani restructuring nor had they submitted to the jurisdiction of the Azerbaijani court. Therefore the CofA found that the Gibbs Rule was applicable and that the English Law creditors could not be discharged/restructured by the

Azerbaijani proceeding. The CofA commented that a parallel scheme could have been proposed in the UK to compromise the UK creditors.

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**.

Section One – if a foreign main proceeding is recognised after a domestic proceeding has already been opened, under Article 29 (a) the Court must consider the relief requested under Article 21 and ensure that any relief provided is consistent with the domestic proceedings.

Article 20 is not applicable if domestic proceedings have already been opened.

Section 2 – under Article 18 of the Model Law the foreign representative is obliged to inform the court in the enacting state of any substantial information in relation to the foreign proceedings which may affect the court's ruling on the recognition and the relief granted.

The foreign representative is also obligated to inform the Court of any other foreign proceedings they are aware of either pre or post recognition.

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?

The MLCBI has a number of objectives including the fair and efficient administration of cross border insolvencies that protects the interests of all creditors and other interested parties, including the debtor.

One of the methods to achieve this objective (and others) is to allow a foreign representative of foreign proceedings access to the enacting state's Court, in this situation the Court of State A. This means that the foreign representative is not required to meet the formal requirements such as licences.

Under Article 9 of the Model Law the foreign representative of State B is entitled to apply directly to the Court of State A prior to recognition.

Under Article 11 of the Model Law the foreign representative of State B is also entitled to commence proceedings State A subject to conditions for the proceedings being otherwise met.

The foreign representative can also apply to the Court of State A for recognition of foreign proceedings as either main or non-main proceedings.

The direct access to the Court of State A could be of great benefit to the foreign representative in the administration of the foreign proceedings and may save both time and expense, which could ultimately protect the value of the estate.

For full marks reference should also be made to art. 25-27 on coordination rights.

Question 3.2 [maximum 5 marks] 2 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.

Assuming that the requirements to qualify as a ‘foreign proceeding’ and ‘foreign representative’ are met, under Article 15 of the Model Law a foreign representative may apply to the enacting Court for recognition of a foreign proceeding. The application for recognition must include the following:

- Proof of foreign proceedings and the appointment of the foreign representative; this can be in the following forms:
 - A certified copy of the Order commencing the foreign proceeding and appointing the foreign representative; or
 - A certificate from the foreign court confirming the existence of the proceeding and the representative’s appointment; or
 - If neither of the above are available, another form of acceptable evidence to prove the existence of the proceeding and the appointment of the foreign representative.
- A statement identifying all other foreign proceedings in relation to the debtor known in the foreign representative’s knowledge.
- Potentially a translated version of the documents into the language of the enacting court.

The requirements under the Model Law are intentionally simplistic and allow for a flexible approach to the provision of evidence.

The Model Law makes no provision for the Court of the enacting state to consider whether the foreign court was correct in its decision to commence the foreign proceedings.

Under Article 16 of the Model Law there are three presumptions the enacting court is able to rely on:

- That the proceeding is a foreign proceeding and the representative is a foreign representative under the meaning in Article 2 of the Model Law if the evidence provided under Article 15 indicates so.
- That the documents provided as part of the application are authentic, whether or not they have been legalised.
- Unless rebutted, that the location of the debtor's registered office or habitual resident (individual) is the centre of the debtor's main interests.

The purpose of these presumptions is to speed up and simplify the recognition process in an attempt to avoid any devaluation of assets.

To be recognised as a foreign main proceeding the Court must be satisfied that the foreign proceedings have been commenced in the jurisdiction in which the debtor has its COMI. If the debtor's registered office is in jurisdiction of the foreign proceedings, Article 16 of the Model Law allows for the presumption that this is the COMI of the debtor.

If a party rebuts the assumption, that the location of the registered office is not in fact the COMI of the debtor, it is for that party to provide evidence to the court as to the true location of the COMI of the debtor. It is then for the court to determine the location of the COMI.

For full marks on this question, reference should be made to art. 1(2) exclusions, art. 3 (restrictions) and art. 6 public policy (restrictions).

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.

The foreign representative can make an application to the Court of State A for recognition. Post application but prior to recognition, the State B foreign representative can apply for certain interim relief under Article 19 of the Model Law.

The types of interim relief that may be available to the foreign representative are; a stay of execution against the debtor's assets in State A, and permission for the foreign representative to administer or realise assets located in State A. This may be very useful to the foreign representative of State B if there are able to demonstrate to the Court of State A that urgent relief is required to protect the assets of the debtor and/or the interests of the creditors.

Any interim relief provided under Article 19 of the Model Law terminates when a decision is handed down in the recognition application.

If the recognition application is successful, the proceedings will be recognised as either foreign main proceedings or foreign non-main proceedings.

If the proceedings in State B are recognised as foreign main proceedings then the relief provided in Article 20 of the Model Law automatically apply without any further applications to

the Court in State A. If concurrent domestic proceedings were in existence Article 20 would not apply; however, in this situation we are assuming no concurrent proceedings.

The automatic relief provided under Article 20 is as follows:

1. No commencement or continuation of individual actions or individual proceedings concerning the debtor's assets, rights obligations or liabilities;
2. Execution against the debtor's assets is stayed; and
3. The right to transfer, encumber or otherwise dispose of the any assets of the debtor is suspended.

If the State B proceedings were recognised as foreign non-main proceedings, the foreign representative would not be entitled to the automatic relief under Article 20 of the Model Law; however, they would be able to apply to the Court of State A for relief under Article 21 of the Model Law.

Article 21 of the Model Law provides a foreign representative of a non-main proceeding with the right to apply for the reliefs provided automatically in Article 20.

In addition, Article 21 also provides foreign representatives, of both main and non-main proceedings, with the right to apply to the Court of State A for additional relief as set out below:

- Providing for the examination of a witness, the taking of evidence of the delivery of information concerning the debtor;
- Entrusting the administration or realisation of the debtor's assets located in State A to the foreign representative;
- Extending any relief granted under Article 19 para 1 of the Model Law and
- Granting any additional relief that may be available to the foreign representative of State B under the laws of State A.

To successfully obtain these additional reliefs from the court of State A, the foreign representative must demonstrate that the relief is necessary to protect the assets of the debtor or the interests of the creditors.

For full marks on this question, reference should also be made to art. 22 on adequate protection, art. 3 on restrictions and art. 6 on public policy.

Question 3.4 [maximum 1 mark] 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?

All relief granted under Article 19 of the Model Law terminates when the application for recognition is decided upon, unless extended under Article 21 paragraph 1(f).

To successfully obtain relief under Article 21 the foreign representative must demonstrate the relief is necessary to protect the assets of the debtor or the interests of the creditors. The recognition of the proceedings should provide the foreign representative with the protection and authority required to deal with the assets and protect the interests of creditors without the need for a WFO.

QUESTION 4 (fact-based application-type question) [15 marks in total] 11,5 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]; 7,5 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 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

As per Article 2(a) of the Model Law:

‘Foreign proceeding’ means a collective judicial or administrative proceeding in a foreign State, including an interim proceeding, pursuant to a law relating to insolvency in which proceeding the assets and affairs of the debtor are subject to the control or supervision by a foreign court, for the purposes of reorganisation or liquidation.

The Bank is located in Country A, the foreign State which has not adopted the Model Law.

The Bank was subject to a series of procedures over a certain timeframe, as set out below:

- 19 January 2015 – Classified as troubled by the National Bank
- 17 September 2015 – Classified as insolvent by the National Bank under Article 76 of the LBBA
- 17 September 2015 – DGF resolved to withdraw the Bank from the market and appoint an interim administrator – provisional administration
- 17 December 2015 Banking licence formally revoked by the National Bank
- 18 December 2015 – DGF commence the liquidation of the Bank

To determine whether the liquidation of the Bank is a ‘foreign proceeding’ it must meet all of the following elements of the definition:

1. It is a judicial or administrative proceeding pursuant to a law relating to insolvency.
2. It involves creditors collectively.
3. The affairs and assets are under the control of the Court or other authorised body.
4. The purpose is the reorganisation or liquidation.

First element: It is a judicial or administrative proceeding pursuant to a law relating to insolvency.

Based on the information provided neither the provisional administration nor the liquidation involved the Court of Country A and therefore the proceedings could not be defined as judicial in nature.

An administrative proceeding is a legal process that does not involve the decision of a judge and is often carried out by a government office/body. The Deposit Guarantee Fund (DGF) is a governmental body in Country A. The DGF appointed the interim administrator and commenced the liquidation proceedings. Both proceedings are therefore likely to be considered as administrative proceedings.

The law commencing the interim administration and the liquidation is not directly an insolvency law, but the wording of the Model Law is wide enough to allow for other non-insolvency law to be included as long as it can be shown the law incorporates provisions to deal with insolvency or severe financial distress. Both the Law of Country A on Banks and Banking Activity (LBBA)

and the DGF Law contain with provisions that deal with insolvency and severe financial distress and therefore would be viewed as laws relating to insolvency.

Second element: It involves creditors collectively.

The powers of the liquidator are set out in the DGF Law, indicating that the liquidation in Country A is an orderly regime governed by law.

The powers of the liquidator include the power to compile a register of creditor claims and seek to satisfy those claims. This indicates that the process seeks to involve all creditors and does not exclude any specific class of creditors or that a special duty is owed to any class above any other.

Third element: The affairs and assets are under the control of the Court or other authorised body.

The liquidation of the Bank results in the DGF having extensive powers as liquidators, including but not limited to, the power to take steps to find, identify and recover property belonging to the Bank and dispose of the Bank's assets.

The control and supervision are by the DGF and there appears to be little or no Court involvement. However, based on the description of the DGF it is likely that it would be viewed as an authorised body and whilst the DGF can delegate some of its liquidators' powers to an authorised representative, certain powers remain vested in the DGF and under its control.

Fourth element: The purpose is the reorganisation or liquidation.

The purpose of the Bank's liquidation is to enact its orderly wind down post its removal from the market. The liquidator is realising assets, agreeing claims and distributing any realisations, if available.

Given that the Bank's liquidation appears to satisfy the four elements of the definition set out in Article 2(a) of the Model Law, it seems likely that the Bank's liquidation would qualify as a foreign proceeding.

Great answers on the facts of the case. However for full marks on the question the interpretation of the requirement in art. 2(a) should be discussed more elaborately. I.e. what does collectivity or law of insolvency mean in the Guide to Enactment.

4.1.2

As per Article 2(d) of the Model Law:

'Foreign representative' means a person or body, including one appointed on an interim basis, authorised in a foreign proceeding to administer the reorganisation or the liquidation of the debtor's assets or affairs or to act as a representative of the foreign proceeding.

The Applicants in this scenario are Mrs , in her capacity as authorised officer of the DGF in respect of the Bank's liquidation and the DGF itself.

Taking the applicants in turn, Mrs G's appointment was pursuant to a Decision of the Executive Board of Directors of the DGF. The Model Law does not specify that the foreign representative

must be authorised by the foreign court and therefore appointments made by special agencies, such as the DGF, are included within the definition.

Mrs G's appointment delegates to her all liquidation powers set out in the DGF Law, with the exclusion of certain powers which remain vested in the DGF. The exclusion of certain powers may limit Mrs G's ability to meet the definition of 'authorised to administer the liquidation of the debtor's assets or affairs' as one specific power that is excluded is the power to sell the Bank's assets.

The second Applicant is the DGF, which is appointed as the liquidator. The definition of foreign representative includes both 'person' and 'body'. The definition of 'body' taken from Black's law dictionary is 'an artificial person created by legal authority'. The DGF is a government body and should be found to sit within this definition.

The application for recognition is a joint application and whilst through delegation the powers of the Bank's liquidator have been split between Mrs G and the DGF – together Applicants meet the definition of a foreign representative under Article 2 (d) of the Model Law.

A bit more on the requirements and the independence of the DGF should be mentioned to receive full marks on this question.

*** End of Assessment ***