



**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 mark: 24 out of 50 marks (**Course Leader: mark adjusted upwards to 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]**

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]

### 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 the COMI of debtor or whether an establishment exists is the date at which the foreign proceedings commenced. A COMI can move throughout the life cycle of an entity, however, if the COMI move is in close proximity to the commencement date then evidencing the COMI will prove difficult particularly as the COMI should be readily ascertainable by 3<sup>rd</sup> parties such as creditors.

For full marks on this question, it should be noted that the date is not explicitly mentioned in the MLCBI and different jurisdictions have different approaches to this.

**Question 2.2 [maximum 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 deals with two or more foreign non-main proceedings whereby the courts must grant, modify or terminate the relief granted so that it is consistent

Statement 2: Article 32 is the hotchpotch rule and does not impact secured claims. It deals with unsecured claims where they may claim in two separate proceedings in order to better benefit from a higher rate of return. In this scenario the practitioner should account for prior distributions and adjust the % distribution being made to that creditor accordingly.

Statement 3: Article 16 contains a rebuttal presumption that if the COMI is not in the same location as the debtors registration then the party alleging the COMI is in a different jurisdiction to that of the registration will need to evidence to the court why the COMI is not in the registration jurisdiction.

**Question 2.3 [2 marks] ½ mark**

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 judge in the *IBA* case determined that the indefinite moratorium continuation could not be used to bypass the Gibbs Rule and that as there were opposing creditors to the moratorium continuation, they should be given the benefit of the Gibbs Rule.

**For full marks this answer should be more elaborate and include the appellate court's consideration of the prolonging of the azeri reconstruction.**

**Question 2.4 [2 marks] 0 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**.

Article 20 sets out that following the recognition of a foreign main proceeding there are 3 automatic effects including: i) a stay or continuation of individual proceedings against the

debtor; ii) a stay of execution against the debtors assets; and iii) suspending the right to transfer, encumber or dispose of assets.

Article 25 sets out that the court in the enacting state is entitled communicate directly with and request information from the foreign representative and can also directly request assistance from the foreign representative.

The correct answers are art. 29 and art. 18.

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

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

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

#### **Question 3.1 [maximum 4 marks] 2 marks**

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

Article 9 sets out that a foreign representative has standing in the enacting state court without the need for a recognition order. the benefit of this standing is that it saves time and expense for the foreign representative potentially avoiding any value in the estate being eroded. It may also help identify additional realizations to bolster the estate. The access right also improve transparency between the two proceedings helping to avoid creditor concerns.

Co-ordination rights assist the representatives in determining creditor rights and claims across both proceedings avoiding creditors duplicating claims and benefiting from double dipping.

For full marks on this question, reference should also be made to art. 11, art. 25-27 and an overall conclusion that access and coordination rights are time and cost presuming.

#### **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.

Article 15 of the Model Laws sets out that the foreign representative must be able to evidence the foreign proceeding to the court for recognition either by a certified copy of the decision to appoint, a certificate from the foreign court affirming the foreign proceeding or any other available evidence to prove the existence of the foreign proceeding to the court. Additionally, the foreign representative must identify to the court all foreign proceedings in respect of the debtor.



In certain circumstances the recognition may be denied on the basis of a reciprocity requirement such as that of South Africa.

Additionally, a court may deny recognition if the court considers that an application made is either not full and frank in its disclosures or if it is made for alternative motives it could be considered an abuse of process and be denied.

The answer should also include:

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]

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.

Article 19 of the model laws allows for the court, in the interest of creditors, to provide interim relief on the making of a recognition application. The interim relief is made in order to provide a moratorium over the debtors assets in order to preserve value. Article 19 allows the court to:

- Provide a stay of execution over the debtors assets;
- Appoint an appropriate trustee over the debtors assets to preserve value, the trustee can be either the foreign representative or another person of the courts choosing;
- The court can also provide certain of the relief granted under article 21 such as suspending the right to transfer or encumbrance the debtors assets, and to make investigations into the debtors historic affairs.

Article 20 deals with post recognition relief automatic consequences which allow time for the foreign representative to organise an orderly proceeding. An additional relief provided by

Article 20 that is not available in pre-recognition relief is the stay of commencement of proceedings against the debtor by individuals.

Article 21 deals with post recognition relief that the court at its discretion can provide. The relief that is available to the foreign representative is extensive and the court may grant any additional relief to the foreign representative that would also be available to a domestic office holder. However, any relief granted must not interfere with the conduct of any other insolvency proceedings including the main proceeding and any other foreign proceedings.

The answer should also include the following:

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

#### **Question 3.4 [maximum 1 mark] 0 marks**

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

The Court needs to satisfy itself that the relief granted does not interfere with the administration of another insolvency proceeding. The relief granted under article 19 would interfere with State A's proceeding and should therefore be appropriately adjusted under Article 21.

For full marks it should be considered, that art. 21 does provide for a different form for protection making the freezing order un-warranted.

#### **QUESTION 4 (fact-based application-type question) [15 marks in total] 10,5 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] 10,5 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 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]. 3,5 marks**

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

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

Question 4.1.1

Article 2(a) sets out the elements that define a foreign proceeding. In considering whether the Liquidation of the Bank is a foreign proceeding, the Liquidation proceeding must at a minimum meet the requirements of these elements.

Additionally, consideration should be given to Article 1 and whether the Liquidation of the Bank would be considered as excluded from the model laws given the Liquidation process is conducted under a special regulatory regime in Country A. In this case Article 1 is unlikely to impact any decision on whether recognition would be granted as the Model Laws also set out that the court should be careful not to limit the right of the foreign proceeding to seek assistance or recognition just because it is subject to a special regulatory regime.

Under Article 2(a) the Bank's Liquidation should be considered a foreign proceeding on the following basis:

The foreign proceeding is either judicial or administrative. In this case as the appointment mechanism is set out in Article 77 of the LBBA on the basis that the NB has revoked the Banks licence the DGF is automatically appointed as Liquidator. As an administrative proceeding it would meet this requirement.

The foreign proceeding is collective in nature, on appointment the DGF is granted extensive powers. These powers extend to the powers to dispose of the Bank's assets in order to realize monies to satisfy claims made in the Liquidation proceeding. These powers vest in an authorized officer per Article 48(3) of the DGF Law. a discussion on the authorized person being considered a foreign representative will follow.

Country A is a foreign state or jurisdiction from England per the facts laid out above meeting this requirement.

The liquidation proceeding is conducted under the LBBA and the DGF Law. these strictly laws relating to insolvency (for example the Insolvency Act 1986 of England and Wales). However, as per the Agrokor case the Model Law does not specifically require that the law be labelled as "insolvency law". The requirement that the proceeding be authorised or conducted under a law relating to insolvency is satisfied if insolvency is one of the grounds upon which the proceedings could be commenced. As set out above in the facts of the case, the Affidavit sets out a deficiency of \$823 million, showing the Bank to be insolvent.

The requirement for court supervision or control is a difficult requirement to meet based on the facts set out above. The appointment of both the Provisional Administrator and the Liquidator is subject to the DGF Law and the LBBA rather than through the powers of the court. Additionally, the facts of the case do not mention whether the proceedings undertaken to date in respect of the Bank have been brought before the court in Country A. therefore it is challenging to confirm whether or not the proceedings are subject to court supervision or control, however, as per the Agrokor case the level of court supervision required by the Model Laws can be considered as potential for the court to supervise rather than to have been involved already. As the DGF Law and LBBA are established laws in Country A, these proceedings would have standing in that jurisdiction and therefore should meet the threshold for the purposes of Article 2(a).

Finally, the requirement that the proceedings are for the purpose of reorganization or Liquidation is met as "the NB classified the Bank as insolvent pursuant to article 76 of the LBBA." Additionally, the NB has revoked the Banks licence to operate and the appointment of the Liquidator under the DGF Law will oversee the disposal of the Banks assets in order to make distributions to creditors, however those creditors will not be satisfied in full due to the deficiency in the Banks accounts.

In summary, the English courts would be justified in considering the Liquidation of the Bank a foreign proceeding under Article 2(a) of the model laws.

For full marks on this question there should be a more elaborate discussion on what the requirements of art. 2(a) does entail. I.e what is meant by collectivity and an "administrative procedure" and not just sum up the fact and a conclusion. The answer regarding "law of insolvency" is a good example on how the answer should be over all.

#### Question 4.1.2

Article 2(d) sets out the elements that must be met for a foreign appointee to be considered a foreign representative. In reference to the Bank's proceeding and the appointee Ms. G who is bringing the recognition application the following assessment can be made.

Ms G is appointed under Article 48(3) of the DGF law as the fund's authorised person. Ms. G was appointed by resolution of the DGF board of directors per resolution 1513.

Ms. G's appointment would therefore satisfy the requirement for the foreign representative to be a person or body and to be authorised in foreign proceeding which she is under the DGF Laws.

Additionally, the DGF Laws set out a number of extensive powers that the DGF has at its disposal to manage the business and affairs of the Bank in either reorganising or liquidating the Bank. As these powers are conferred to Ms. G as the representative of the DGF per Article 48(3) Ms. G has the power to administer the Liquidation of the Bank. Additionally, though not seemingly required by the Model Laws, Ms. G is noted as having "*...high professional and moral qualities, impeccable business reputation, complete higher education in the field of economics, finance or law...and professional experience necessary.*" This should give the English courts confidence that Ms. G is an acceptable representative given her professional background to administer the Liquidation.

In summary Ms. G should meet the model laws requirements as a foreign representative.

The answer should also include a discussion whether DGF is also to be considered a foreign representative and how the delegation effects this. Also, the independence of the DGF should be noted.

**\* End of Assessment \***