



**SUMMATIVE (FORMAL) ASSESSMENT: MODULE 2A**

**THE UNCITRAL MODEL LAWS RELATING TO INSOLVENCY**

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

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

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

## **INSTRUCTIONS FOR COMPLETION AND SUBMISSION OF ASSESSMENT**

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

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

## **ANSWER ALL THE QUESTIONS**

**Total marks: 34 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]**

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] 8 marks

### Question 2.1 [maximum 3 marks] 2 marks

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

The appropriate date for determining the COMI, or whether an establishment exists is the date at which a foreign legal action is initiated. The main criteria of COMI under the MLCBI are that it has to be a main place where the debtor’s affairs are managed from, and this has to be easily determinable by creditors. It is possible for a debtor’s COMI to move but if the change of COMI is done very close to the initiation of the foreign legal action, it will be much more difficult to demonstrate the requisite proof for this, specifically, the criteria that the COMI must be easily determinable by creditors and other stakeholders.

Other possible dates that courts have made reference to for the determination of COMI or whether an establishment exists for a debtor includes also recognition application date, court hearing date to decide on application and a reference date determined by the operational history of the debtor.

For full marks, you should also mention that the date is not set in MLCBI which is why there are slightly different approaches in different jurisdictions. One should also mention when to determine if the business has ceased.

**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, specifically article 30 (c) states “If, after recognition of a foreign non-main proceeding, another foreign non-main proceeding is recognized, the court shall grant, modify or terminate relief for the purpose of facilitating coordination of the proceedings.”

Statement 2 – Article 32 – Rule of payment in concurrent proceedings, also known as the hotchpot rule. To the extent that secured creditors claims are paid in full, these claims are not affected by this provision.

Statement 3 – Article 16 – Presumptions concerning recognition, specifically article 16(3) of MLCBI states “In absence of proof to the contrary, the debtor’s registered office, or habitual residence in the case of an individual, is presumed to be the centre of the debtor’s main interest”.

**Question 2.3 [2 marks] 1 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.**

For the English Court of Appeal (“ECA”) to grant the indefinite Moratorium Continuation, the ECA must be satisfied of the following 2 requirements:

- 1) The stay is required to protect creditors’ interests
- 2) The stay be an would have to be a suitable way to protect creditors’ interests.

The ECA held that none of the above has been satisfied. Additionally, the insolvency proceeding had accomplished what it set out to do since IBA has already continued normal business operations, extending the further would not have satisfied the above requirements. Granting the stay would have prevented the English creditors from exercising their rights in accordance with the Gibbs Rule and be contrary to English law.

For full marks, it should also be mentioned that a continuation of the stay would mean a prolonging of the restructuring proceeding in Azeri which was not dealt with or presumed in the MLCBI and though could not be granted.

**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**.

Pursuant to Article 29 – Coordination of a proceeding under the enacting state and a foreign proceeding

“(a) when the proceeding in the enacting state is taking place at the time the application for recognition of the foreign proceeding is filed —

(i) any relief granted under Article 19 or 21 must be consistent with the proceeding in the enacting state; and

(ii) if the foreign proceeding is recognised in enacting state as a foreign main proceeding, Article 20 does not apply;”

The enacting state courts should consider if the relief granted in the recognition of a foreign main proceeding are consistent with the local proceedings and modify where necessary.

Pursuant to Article 18 – Subsequent information

“From the time of filing the application for recognition of the foreign proceeding, the foreign representative must inform the Court promptly of —

(a) any substantial change in the status of the recognised foreign proceeding or the status of the foreign representative’s appointment; and

(b) any other foreign proceeding or proceeding regarding the same debtor that becomes known to the foreign representative.”

The foreign representative has an ongoing duty of informing the court of any material changes in the status of his or her appointment and if there are any other foreign proceeding against the same debtor to the foreign representative’s knowledge.

### **QUESTION 3 (essay-type questions) [15 marks in total] 9,5 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] 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 access rights granted to the State B’s representative in article 9 of the Model Law provide State B’s representative standing in State A’s courts without having the foreign proceeding in State B recognized in State A. Article 11 of the Model Law also grants State B’s representative standing to initiate insolvency actions in State A, assuming the relevant criterion for such action are fulfilled.

Additionally, the access rights provided to State B’s representative also promote collaboration and coordination by providing State B’s representative direct channels to communicate with State A’s court. This is further enhanced by recognition of the foreign proceedings that enables



State A's court to provide State B's representative with more timely and relevant reliefs as required, allowing more favourable returns and outcomes to be established. This collaboration and coordination are not subject to recognition and the Model Law does not prescribe the relevant efforts required for all scenario and only serves as a methodological approach and guideline to facilitate such efforts. The Model Law also lists some probable methods of collaboration and coordination.

In order to achieve the most optimal results in a cross-border insolvency, a foreign representative should utilize the relevant access rights and recognition as well as the coordination tools made available by the Model Law. There are also anti-discrimination principles set out in the Model Law to facilitate fair treatment of creditors and interested parties local and foreign alike, being one of the key objectives that Model Law aims to achieve to collaboration and coordination.

**For full marks it reference should be made to art. 25-27 and an overall conclusion that access rights are time and cost preserving.**

### **Question 3.2 [maximum 5 marks] 4 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.

In accordance with article 17 (1)(a) and (b) of the MLCBI, State A's court will have to first review if State B's foreign proceeding and the foreign representative fall within the meaning as set out in article 2 of the MLCBI. State A's court in this scenario may depend on the assumptions as defined in article 16(1) of the MLCBI.

Assuming definitions as set out in article 2 of the MLCBI are met for State B's foreign proceeding and foreign representative, State A's courts have to assess if there are reasons to invoke the public policy exception of article 6 of MLCBI.

Public policy exception and its restrictive application pursuant to article 6 of the Model Law provides State A's court with the ability to reject applications that are manifestly contrary to public policy of State A. Scenarios where such public policy exception clauses have been invoked may include instances where the relief sought was contrary to laws of the enacting state.

In addition to the above, State A's courts need to review if criterions set out in article 17(1)(c ) and (d) of MLCBI are fulfilled:

17(1)(c) – requirements set out in paragraph 2 of article 15 must be met.

17(1)(d) – application has been submitted to State A's courts.

Pursuant to paragraph 2 of article 15, the application for recognition needs to be accompanied by a certified copy of the decision initiating litigation in State B and appointing a representative in State B or a certificate of State B's court confirming the existence of litigation in State B or appointment of representative in State B or any other evidence acceptable to the court. The court would also require the application to include a statement from State B's representative identifying all known foreign proceedings.

Pursuant to Article 17 of the MLCBI, if there appears to be a case of abuse of process, bad faith, fraud and improper purpose found, it is possible for a court to reject the recognition application. Some possible cause includes but is not limited to the following:

- The foreign representative was only appointed as a result of corruption.
- The primary incentive for the application is for improper purpose such as to indulge in forum shopping and frustration of process, making it difficult for foreign creditors to fill claims may also result in the recognition application being rejected by the courts.

When the requirements of paragraph 1 of Article 17 are met, pursuant to paragraph 2 of article 17, the courts also need to form an opinion on whether the debtor's centre of main interests is in State B where the recognition will be a foreign main proceeding. Otherwise, if State B only has an establishment, then it will be recognized as a foreign non-main proceeding. If the debtor has neither its centre of main interests nor an establishment in State B, the proceeding will not be recognized as it does not fall under the definition of a foreign main proceeding nor a foreign non-main proceeding.

Pursuant Article 18 of the MLCBI, State B's representative also has the ongoing duty of information to the courts of State A from the time of the recognition application. State B's representative will need to inform State A's courts if there are any change in the status of State B's representative appointment or any change in State B's proceeding. If there are any new known foreign proceeding that State B's representative becomes aware of, State B's representative also has the duty to inform State A's court of the same.

Pursuant to Article 1(2), the courts may also need to consider if the debtor is from an industry to that is subject to special insolvency regime in the state (eg. Insurance / banks), which the MLCBI does not apply to.

**Question 3.3 [maximum 5 marks] 2 mark**

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 type of relief that may be granted pre-recognition pursuant to the MLCBI is governed by article 19.

Pre-recognition reliefs that may be provided on a provisional basis on the request of State B's representative pursuant to article 19 of the MLCBI are as follows:

- a) Staying execution
- b) Entrusting administration or realization of all or part of the debtor's assets located in State A to State B's representative, or another person designated by the court, in order to protect and preserve the value of assets that, by their nature or because of other circumstances, are perishable, susceptible to devaluation or otherwise be in jeopardy
- c) Any relief mentioned in paragraph 1 (c), (d) and (g) of article 21

The above reliefs would be terminated unless stated otherwise upon recognition of the foreign proceeding. Likewise, the reliefs may not be granted if the courts are of the view that granting such reliefs would obstruct the foreign main proceedings.

Subject to where the centre of main interest of the debtor is located, if it is in State B, the foreign proceeding will be recognized as a foreign main proceeding. If the debtor only has an establishment, it will be recognized as a foreign non-main proceeding. Different reliefs are available to a foreign main proceeding vis-à-vis a foreign non-main proceeding.

Pursuant to article 20 of the MLCBI, upon the recognition of a foreign main proceeding, the following become in effect:

- a) Commencement or continuation of individual actions or individual proceedings concerning the debtor's assets, rights, obligations or liabilities is stayed;
- b) Execution against the debtor's assets is stayed; and
- c) The right to transfer, encumber or otherwise dispose of any assets of the debtor is suspended.

In spite of the above, the rights of a creditor to initiate legal proceedings as required to preserve a claim would not be affected. Likewise, the right to request an initiation of legal action under State A or the right to file claims in such an action is also not affected.

Pursuant to article 21 of the MLCBI, upon the recognition of a foreign proceeding, the court may at the request of State B's representative, grant the following reliefs:

- a) Staying the commencement or continuation of individual actions or individual proceedings concerning the debtor's assets, rights, obligations or liabilities, to the extent they have not been stayed under paragraph 1 (a) of article 20;
- b) Staying execution against the debtor's assets to the extent it has not been stayed under paragraph 1(b) of article 20;
- c) Suspending the right to transfer, encumber or otherwise dispose of any assets of the debtor to the extent this right has not been suspended under paragraph 1 (c ) of article 20;
- d) Providing for the examination of witnesses, the taking of evidence or the delivery of information concerning the debtor's assets, affairs, rights, obligations and liabilities;
- e) Entrusting the administration or realization of all or part of the debtor's assets located in this State to the foreign representative or another person designated by the court;
- f) Extending relief granted under paragraph 1 of article 19;
- g) Granting any additional relief that may be available to a local representative appointed in State A.

In addition to the above, at the request of State B's representative, the court may entrust the distribution of all or part of the debtor's assets located in State A to State B's representative or another person designated by the court, provided that the court is satisfied that the interests of State A's creditors are adequately protected.

The courts of State A when granting reliefs pursuant to article 21 of the MLCBI to State B's representative under a foreign non-main proceeding, must be satisfied that the reliefs granted involves assets and information that are relevant to the foreign non-main proceeding and should be managed in the foreign non-main proceeding.

**For full marks the following should also be mentioned:**

1. **Adequate protection:** Pursuant to Article 22 of the Model Law any interim relief under Article 19 of the Model Law or any post-recognition relief under Article 21 of the Model Law require the court in State A to be satisfied that the interests of the creditors and the other interested persons, including the debtor, are adequately protected and any relief may be subject to conditions as the court considers appropriate.
2. **Existing international obligations of State A:** Based on Article 3 of the Model Law, the court in State A should again verify that there are no existing international obligations of State A (under a treaty or otherwise) that may conflict with granting the requested relief under the implemented Model Law in State A.

3. **Public policy exception:** The court in State A should, based on Article 6 of the Model Law, also again verify that the relief application is not manifestly contrary to public policy of State A.

**Question 3.4 [maximum 1 mark] ½ mark**

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

The relief provided under article 19 of MLCBI is meant to provide interim protection and prevent the loss of value of assets while the application of recognition of foreign proceeding is underway. If such relief is extended post-recognition, it may affect the ability of certain creditors to enforce their rights and would be contrary to what is stated in article 22 where the court may deny certain reliefs under article 19 or 21 if the courts believe that interests of creditors and interested persons are not adequately protected.

It should be mentioned that art. 21 provide a different form for protection leaving the continuation of the freezing order un-warranted.

**QUESTION 4 (fact-based application-type question) [15 marks in total] 8,5 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**]; **4,5 marks**

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 The definition of "foreign proceeding" within the meaning of article 2(a) of the MLCBI is set out as follows:

"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 control or supervision by a foreign court, for the purpose of reorganization or liquidation.

For the Bank's liquidation to comprise the meaning of article 2a of the MLCBI, it must satisfy all of the factors set out in the definition above.

**"A collective judicial or administrative proceeding in a foreign State"**

Given that the Bank has been placed in liquidation on 17 December 2015 following NB's decision to revoke the Bank's license pursuant to article 77 of the LBBA, the proceeding is one that is governed by LBBA and restricts the Bank's actions and rules the distribution of the Bank's assets. This power vests in DGF. The requirement of a judicial or administrative proceeding is fulfilled.

**"Collective"**

Whether or not the proceeding is a collective proceeding, the Bank's liquidation needs to have the following features:

1. All creditors' rights and obligations be impacted in an orderly manner if the assets of the Bank are realized for the benefit of all creditors as a whole, subject to Country A's law on preferential creditors and regulatory exclusions.
2. Not every creditor will receive a distribution as long as the Bank's liquidator considers all creditors' interest and acts in the interests of all creditors as a whole. Distribution of assets have to be based on Country A's law on preferential creditors and statutory exclusions. If the assets are charged to a specific creditor and all other creditors will not have any recovery, it does not mean the proceeding is not of a collective nature.



3. Creditors or other stakeholders should not have the opportunity to improve their position by leveraging certain scenarios and gain a better return.
4. All creditors must be entitled to a vote and an opportunity for their views to be heard and have the chance to decide on any scheme or distributions that may be proposed.
5. There should be proper notice given to all creditors under Country A's law.

Assuming the above are satisfied, then it can be said that the proceeding is Collective in nature and meets the definition of "foreign proceeding" pursuant to article 2a of the MLCBI. Further inquiry may be made to understand the process that is underway in Country A for the liquidation of the Bank.

**"Pursuant to a law relating to insolvency"**

To determine if the proceeding is pursuant to a law relating to insolvency, the liquidation of the Bank must be one that has already commenced and one that was granted on just and equitable grounds under Country A's regulation requirements. Given that the liquidation of the Bank formally commenced on 17 December 2015 pursuant to Country's A's regulations, this condition is satisfied. If the liquidation of the Bank in Country A is recognized as a foreign main proceeding, pursuant to article 31 of Cross-Border Insolvency Regulations 2006 (CBIR) states, "In absence of evidence to the contrary, recognition of a foreign main proceeding is, for the purpose of commencing a proceeding under British insolvency law, proof that the debtor is unable to pay its debts, or in relation to Scotland, is apparently insolvent within the meaning given to those expressions under British insolvency law.

**"The assets and affairs of the debtor are subject to control or supervision by a foreign court"**

Both the assets and affairs of the Bank must be subject to control in order to meet the definition. Given that the Bank's affairs and control has been taken over by DGF pursuant to article 35(5) and 36(1) of the DGF Law, and in turn certain specific powers are delegated to Ms G, it can be said that this requirement is satisfied.

**"For the purpose of reorganization or liquidation"**

To understand if the application is for the purposes of liquidation or reorganization, whether the foreign representative has the authority to liquidate and distribute assets to satisfy creditor claims is critical. If the application was made solely by Ms G, it could be said that this does not fulfil requirement 2 due to Ms G's lack of authority. However, given that the application was made with DGF as joint applicants, Ms G, together with DGF who the Bank's appointed liquidator is, they do have the necessary authority and thus this requirement is fulfilled.

Considering the above facts, the Bank's liquidation does classify as a "foreign proceeding" within the meaning of article 2(a) of the MLCBI.

For full mark on this question the answer should be more precise and elaborate on how the requirements are interpreted such as what is meant by "collective" and "foreign court supervision" - along these lines:

**"Collective proceeding"**

1. UNCITRAL's guide for judiciary, "The Model Law on Insolvency: The Judicial Perspective" (2013) explains the requirement for proceedings to be "collective":

"The UNCITRAL Model Law was intended to apply only to particular types of insolvency proceedings. The Guide to Enactment and Interpretation indicates that

the notion of a “collective” insolvency proceeding is based on the desirability of achieving a coordinated, global solution for all stakeholders of an insolvency proceeding. It is not intended that the Model Law be used merely as a collection device for a particular creditor or group of creditors who might have initiated a collection proceeding in another State, or as a tool for gathering up assets in a winding up or conservation proceeding that does not also include provision for addressing the claims of creditors. The Model Law may be an appropriate tool for certain kinds of actions that serve a regulatory purpose, such as receiverships for such publicly regulated entities as insurance companies or brokerage firms, provided the proceeding is collective as that term is used in the Model Law.”

2. The Guide to Enactment and Interpretation of the UNCITRAL Model Law (2014) explains that when:

“evaluating whether a given proceeding is *collective* for the purpose of the Model Law, a key consideration is whether substantially all of the assets and liabilities of the debtor are dealt with in the proceeding, subject to local priorities and statutory exceptions, and to local exclusions relating to the rights of secured creditors. A proceeding should not be considered to fail the test of collectivity purely because a class of creditors’ rights is unaffected by it.”

3. Based on the facts provided the understanding is that *all* of the Bank’s creditors are entitled to claim in the liquidation and that their claims are met from available assets, according to the statutory order of priorities. Consequently, the conclusion can be reached that the Bank’s liquidation is a “*collective proceeding*”.

#### **“Judicial or administrative” and “subject to the control or supervision by a foreign court”**

4. The collective proceeding, must be “*judicial or administrative*” where “*the assets and affairs or the debtor are subject to control or supervision by a foreign court*”.
5. The term “*foreign court*” is defined at article 2(e) of the MLCBI and means: “*a judicial or other authority competent to control or supervise a foreign proceeding*”.
6. 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.*”
7. 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.
8. 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.*”

9. In this case the DGF has control of all of the Bank's assets and overall control of the liquidation.
10. 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.
11. 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.
12. 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*".

***"Pursuant to a law relating to insolvency"***

13. The Guide to Enactment provides at paragraph 48:

"Acknowledging that different jurisdictions might have different notions of what falls within the term "insolvency proceedings", the Model Law does not define the term "insolvency". However, as used in the Model Law, the word "insolvency" refers to various types of collective proceedings commenced with respect to debtors that are in severe financial distress or insolvent."

Further explanation is provided at paragraph 73:

"This formulation is used in the Model Law to acknowledge the fact that liquidation and reorganization might be conducted under law that is not labelled as insolvency law (e.g. company law), but which nevertheless deals with or addresses insolvency or severe financial distress. The purpose was to find a description that was sufficiently broad to encompass a range of insolvency rules irrespective of the type of statute or law in which they might be contained and irrespective of whether the law that contained the rules related exclusively to insolvency."

14. Article 76 of the LBBA clearly set out Country A's specific insolvency procedures for insolvent banks. The Bank's liquidation was commenced pursuant to those provisions and in my judgment should be considered by this Court as being "*pursuant to a law relating to insolvency*".

4.1.2 The definition of "foreign representatives" within the meaning of article 2(d) of the MLCBI is set out as follows:

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

The foreign representative must have the power to administer the liquidation of the Bank's assets or affairs at the time of the application for recognition. If the application was made solely by Ms G, it could be said that this does not fulfil requirement 2 due to Ms G's lack of authority. However, given that the application was made with DGF as joint applicants, Ms G, together with DGF, do have the necessary authority and thus this requirement is fulfilled.

The MLCBI does not specify that the foreign representative needs to be authorized by Country A's courts so the authority as provided for by country A's local laws would suffice to provide DGF and Ms G the relevant authority required.

It should be noted that as Ms G is only delegated specific powers and not all powers that vests with DGF as the appointed liquidator of the Bank, Ms G on her own would not be considered as a foreign representative as Ms G's power excludes "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" and these are key powers that are crucial to the management and administration of the liquidation of the Bank. These powers vests with DGF and only DGF as the Bank's formally appointed liquidator would be considered as the foreign representative in this case.

Again, a more elaborate answer regarding the specific requirements in art. 2(d) and a more thoroughly reference to the fact is needed to receive full marks on this point.

**\* End of Assessment \***