



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: 32 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] 7 marks

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

Question 1.1

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

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

Question 1.2

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

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

Question 1.3

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

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

Question 1.4

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

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

Question 1.5

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

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

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

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

Question 1.6

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

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

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

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

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

Question 1.7

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

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

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

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

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

Question 1.8

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

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

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

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

(d) None of the above.

Question 1.9

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

(a) Enforcement of insolvency-related judgments.

(b) An indefinite moratorium continuation.

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

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

Question 1.10

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

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

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

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

(d) All of the above.

QUESTION 2 (direct questions) [10 marks in total] 5 marks

Question 2.1 [maximum 3 marks] 1 mark

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

The appropriate date for determining the COMI of a debtor or whether an establishment exists is obviously the “date of commencement of the foreign proceedings” The COMI may be shifted by the debtor in a date near (before) the commencement of proceedings, but then that shifting of the COMI just before the appropriate date may not actually result in recognition of the changed location as COMI (as the shift may be for an ulterior motive) as the COMI shall be ascertainable only by the third parties (creditors) of the corporate debtor.

The answer is not obvious since the date is not explicitly mentioned in MLCBI and there are slight difference in different jurisdictions, i.e. in the practice of the US. This should be mentioned in the answer to full marks on the question.

Question 2.2 [maximum 3 marks] 1 mark

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- The Article 30(c) provides the guidance in case of two concurrent foreign non-main proceedings

Statement 2- The provision is the “Anti Discriminatory Principle” and the relevant article is Article 13 of MLCBI **The correct answer is art. 32**

Statement 3- The provision is the “Presumption of Rebuttal” and the relevant article is Article 31 of the MLCBI **The correct answer is 16(3)**

Question 2.3 [2 marks] 2 marks

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

In the *IBA* case Justice Hildyard did not grant the indefinite Moratorium Continuation to the Azeri Representative on support of Pan Ocean Case and concluded that since the Model Law , Principal of Modified Universalism were totally opposite to the provisions of Gibbs Law and since the Gibbs law is still relevant and cannot be overridden by Model Law and Modified Universalism and that *IBA* could have even submitted a scheme of arrangement in England as well, there is no jurisdiction of the English courts to grant the indefinite Moratorium Continuation.

This decision was upheld by the English Court of Appeal. The issue as per the court of appeal was not whether the English courts has the jurisdiction or not but that whether by granting the indefinite moratorium would result in :-

- a) Preventing the English Creditors from enforcing their English Law rights under the Gibbs Law
- b) Prolonging the stay now that the Azeri Resolution Plan has been approved

Thereby the court of appeal inquired in both (a) and (b) above and was of the view that indefinite moratorium (Stay) was necessary only when it would have protected the interests of the *IBA* creditors and also where stay was the only method available to protect their interest. Since *IBA* creditors had an opportunity to file the “super scheme of arrangement” in England to settle their dues, ye they did not availed of the same , it implies that a stay is not necessary.

Similarly since a resolution plan is already in place and the proceedings have already elapsed in Azerbaijan, there is no point granting an indefinite moratorium.

Therefore the England court of appeal upheld the decision of the court to not to grant indefinite moratorium in the *IBA* case.

Question 2.4 [2 marks] 1 mark

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**.

On recognition of foreign main proceedings there are some automatic reliefs as per Paragraph 1 of Article 20 of MLCBI which come into force:-

- a) Stay of the commencement or continuation of individual actions or individual proceedings concerning the debtors assets, rights, obligations or liabilities
- b) Stay of execution against the debtors assets
- c) Suspension of the right to transfer , encumber or otherwise dispose of any asses of the debtor

However the courts of the enacting state under the provisions of paragraph 2 of Article 20 of MLCBI may modify or terminate the automatic stay or suspension as per paragraph 1 of Article 20 if in the view of the court the automatic suspension is against the interest of the corporate debtor or the various stakeholders of the same.

The correct answer is art. 29 on concurrent proceedings

As per Article 18 of the MLCBI, it is the duty of the foreign representative to properly inform the courts of the enacting state about :-

- a) Any important change in the status of the foreign proceedings
- b) Any change in the status of the foreign representative himself
- c) Any other foreign proceedings that may have been filed against the corporate debtor that has come to light to the foreign representative

In nutshell the foreign representative has an obligation of a frank disclosure before the court of the enacting state and a violation of the same is an abuse of the provisions and spirit of MLCBI

QUESTION 3 (essay-type questions) [15 marks in total] 10 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] 4 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 and Coordination rights as conferred by MLCBI to a foreign representative before the court of enacting state are very beneficial for the foreign representative and thereby to the entire insolvency proceedings.

- A) Ever prior to filing recognition application in state A , the foreign representative of foreign proceedings in state B is entitled under the principle of "Locus-Standi" to Standing before the courts in State A. Article 9 of MLCBI gives a direct access to the

foreign representative to the proceeding in the court of state A. Article 11 gives the foreign representative the right to request the court of state A to initiate a domestic insolvency proceedings

- B) Article 10 of MLCBI as per “safe conduct” principles assures the foreign representative that the court of the enacting state (State A) will not assume jurisdiction and control of the assets of the corporate debtor on the sole ground that the foreign representative has approached the court of State A for any relief and help
- C) Article 13 of MLCBI ensures no discrimination to the foreign creditors viz-a-viz creditors of State A and the access given to the Foreign representative does not affect the ranking of the claims in the State A
- D) Timely notice to the Foreign representative shall be given under Article 14 in case local proceedings in State A are started somehow by the local creditors. Also under Article 27 there will be a coordination of con-current proceedings between State A and the foreign representative in case there exists a concurrent proceedings in State A and State B
- E) Article 27 provides for rights of coordination for the administration and supervision of the assets of the corporate debtor in State A.
- F) All the rights to communicate with the courts of State A by any means possible is also provided to the foreign representative

These rights to access and coordination ensures that the insolvency process are transparent and there is saving of precious time and somehow the deterioration in the value of asset is prevented to some extent

Question 3.2 [maximum 5 marks] 2,5 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.

Assuming that the foreign proceedings opened in State B are recognised in State A, there needs to the following more issues /factors to be taken into account by the courts in State A:-

- a) To check whether COMI of the corporate debtor exists in State B. There various characteristics that identifies/declares a particular state as the COMI state as enlisted in MLCBI. This is necessary to ascertain whether the recognised proceeding is Main/ Non-main
- b) The Courts of State A must be satisfied that indeed the foreign proceedings have commenced and that the foreign representative have indeed been appointed. These evidential requirements are spelled out in Article 15 of the MLCBI. Following evidences need to be provided by the foreign representative before the proceedings are recognised:-
 - (i) A certificate copy of the decision commencing the foreign proceedings and appointing the foreign representative
 - (ii) Certificate from foreign court affirming the existence of the foreign proceedings and appointment of foreign representative
 - (iii) Or any other document that establishes the existence of the foreign proceedings and the representative.
- c) The recognitions are subject to the “Public Policy Exceptions” and sometimes the recognition may not be granted because there are provisions of safe guarding the

- interests of the creditors and public interest of the enacting state and thereby the foreign proceedings may not be recognised by enacting state (State A)
- d) If the State A has provisions of “reciprocity” within its laws then it will only recognise foreign proceedings in the states with which it has a reciprocity agreement.

Similarly the Foreign representative may be not recognised as the foreign representative in case he fails to submit any document proving his appointment as the foreign representative. Also if the court of the enacting state (State A) are of the view that the foreign representative has somehow abused the process and not shared complete and upto date information with the courts of the enacting state (State A) then too the courts of the enacting state may deny recognition to the foreign representative and also may be to the foreign proceedings

For full marks on the question the following should also be addressed along with more on the judicial scrutiny of establishing the debtor’s COMI:

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.

Question 3.3 [maximum 5 marks] 3 marks

As far as relief is concerned, briefly explain (with reference to the relevant MLCBI articles) what pre- and post-recognition relief can be considered in the context of the MLCBI, as well as any restrictions, limitations or conditions that should be considered in this context. For purposes of this question, it can be assumed that there is no concurrence of proceedings.

The Article 19 of the MLCBI deals with the Pre-Recognition Interim relief, while Article 20 of MLCBI deals with the Automatic Relief when a foreign main proceeding is recognised, whereas Article 21 deals with the Appropriate Relief in case of recognition of foreign proceedings. Relief as provided under Article 20 and 21 is balanced by the provisions of Article 22 of the MLCBI

Article 19 reliefs are of provisional nature and are granted as an interim measure by the enacting state on the request of the foreign representative with an aim to protect the assets of the debtor or interests of the creditors. These reliefs may be in the nature of :-

- a) Stay of execution against the assets of the corporate debtor
- b) Entrusting the administration or realisation of all or part of the debtors assets located in the enacting state to the foreign representative of the foreign proceedings
- c) Suspending the rights to transfer, encumber or dispose of the assets of the debtor
- d) Examining and investigating in whatever ways possible to ascertain the assets, rights , obligations and liabilities of the CD
- e) Granting any other relief as deemed fit by the Courts of the enacting state

Reliefs under Article 19 can be given even if the foreign proceedings are main/non-main The reliefs under Article 19 may be not granted by the courts of the enacting state if the reliefs granted are interfering or an hinderance to a foreign main proceedings underway

Article 20 provisions trigger automatically if the foreign main proceedings are recognised and it includes :-

- i) Stay of the commencement or continuation of individual actions or individual proceedings concerning the debtors assets/rights/obligations. This implies that enforcement of Arbitration awards/agreements are suspended.
- ii) Stay of execution against the assets of the corporate debtor
- iii) Suspending the rights to transfer, encumber or dispose of the assets of the debtor

The paragraph 2 of Article 20 goes on to give powers to the courts of the enacting state to modify or terminate the automatic stay or suspension as provided for in the Article 20.

Article 21 provisions trigger when a foreign proceedings main/non-main are recognised and provides the court in the enacting state with discretionary powers to protect the interests of the assets of the CD **and the interest of the creditors by giving or denying the various reliefs as contemplated in Article 20 and Article 21.**

Paragraph 2 of the Article 21 also provides the courts of enacting state with a power to hand over all or any of the assets of the CD located in the enacting state to the foreign representative if the court is satisfied that the local creditors in the enacting state are adequately protected and such relief should not interfere in the smooth administration of any other insolvency proceedings

Actually it is Article 22 that gives guidance to the courts to use its discretionary powers to grant/dent relief in Article 19 and 21 so as to balance the interests of all the persons effected by an insolvency proceedings

For full marks on this question, reference should also be made to art. 3 and art. 6

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 worldwide freezing order as granted pre-recognition under Article 19 of MLCBI may result in interference of any other foreign Insolvency proceedings and therefore the freezing is unlikely to continue post recognition ex-article 21 MLCBI.

It should be mentioned that art. 21 provides for other form for protection and therefore the freezing order is un-warranted.

QUESTION 4 (fact-based application-type question) [15 marks in total] 10 marks

Read the following facts very carefully before answering the questions that follow.

(1) Background

The Commercial Bank for Business Corporation (the Bank) has operated since 1991. The Bank's registered office is situated in Country A, which **has not** adopted the MLCBI. As of 13 August 2015, the Bank's majority ultimate beneficial owner was Mr Z, who held approximately 95% of the Bank's shares through various corporate entities (including some registered in England).

The Bank entered provisional administration on 17 September 2015 and liquidation on 17 December 2015. Investigations into the Bank have revealed that it appears to have been potentially involved in a multi-million dollar fraud resulting in monies being sent to many overseas companies, including entities incorporated and registered in England.

Proceedings were issued in the High Court of England and Wales (Chancery Division) against various defendants on 11 February 2021 (the English Proceedings).

An affidavit (the Affidavit) sets out a detailed summary of the legislation of Country A's specific insolvency procedure for Banks. The procedure involves initial input from the National Bank (the NB) and at the time that the Bank entered liquidation, followed a number of stages:

Classification of the bank as troubled

The NB may classify a bank as "troubled" if it meets at least one of the criteria set down by article 75 of the Law of Country A on Banks and Banking Activity (LBBA) or for any of the reasons specified in its regulations.

Once declared "troubled", the relevant bank has 180 days within which to bring its activities in line with the NB's requirements. At the end of that period, the NB must either recognise the Bank as compliant, or must classify it as insolvent.

Classification of the bank as insolvent

The NB is obliged to classify a bank as insolvent if it meets the criteria set out in article 76 of the LBBA, which includes:

- (i) the bank's regulatory capital amount or standard capital ratios have reduced to one third of the minimum level specified by law;
- (ii) within five consecutive working days, the bank has failed to meet 2% or more of its obligations to depositors or creditors; and
- (iii) the bank, having been declared as troubled, then fails to comply with an order or decision of the NB and / or a request by the NB to remedy violations of the banking law.

The NB has the ability to classify a bank as insolvent without necessarily needing to first go through the troubled stage. Article 77 of the LBBA accordingly provides that a bank can be liquidated by the NB directly, revoking its licence.

Provisional administration

The Deposit Guarantee Fund (DGF) is a governmental body of Country A tasked principally with providing deposit insurance to bank depositors in Country A. However, the Affidavit explained that the DGF is also responsible for the process of withdrawing insolvent banks from the market and winding down their operations via liquidation. Its powers include those related to early detection and intervention, and the power to act in a bank's interim or provisional administration and its ultimate liquidation.

Pursuant to article 34 of the DGF Law, once a bank has been classified as insolvent, the DGF will begin the process of removing it from the market. This is often achieved with an initial period of provisional administration. During this period:

- (i) the DGF (acting via an authorised officer) begins the process of directly administering the bank's affairs. Articles 35(5) and 36(1) of the DGF Law provide that during provisional administration, the DGF shall have full and exclusive rights to manage the bank and all powers of the bank's management.

- (ii) Article 36(5) establishes a moratorium which prevents, *inter alia*: the claims of depositors or creditors being satisfied; execution or enforcement against the bank's assets; encumbrances and restrictions being created over the bank's property; and interest being charged.

Liquidation

Liquidation follows provisional administration. The DGF is obliged to commence liquidation proceedings against a bank on or before the next working day after the NB's decision to revoke the bank's licence.

Article 77 of the LBBA provides that the DGF automatically becomes liquidator of a bank on the date it receives confirmation of the NB's decision to revoke the bank's licence. At that point, the DGF acquires the full powers of a liquidator under the law of Country A.

When the bank enters liquidation, all powers of the bank's management and control bodies are terminated (as are the provisional administrators' powers if the bank is first in provisional administration); all banking activities are terminated; all money liabilities due to the bank are deemed to become due; and, among other things, the DGF alienates the bank's property and funds. Public encumbrances and restrictions on disposal of bank property are terminated and offsetting of counter-claims is prohibited.

As liquidator, the DGF has extensive powers, including the power to investigate the bank's history and bring claims against parties believed to have caused its downfall. Those powers include:

- (i) the power to exercise management powers and take over management of the property (including the money) of the bank;
- (ii) the power to compile a register of creditor claims and to seek to satisfy those claims;
- (iii) the power to take steps to find, identify and recover property belonging to the bank;
- (iv) the power to dismiss employees and withdraw from/terminate contracts;
- (v) the power to dispose of the bank's assets; and
- (vi) the power to exercise "such other powers as are necessary to complete the liquidation of a bank".

The DGF also has powers of sale, distribution and the power to bring claims for compensation against persons for harm inflicted on the insolvent bank.

However, article 48(3) of the DGF Law empowers the DGF to delegate its powers to an "authorised officer" or "authorised person". The "Fund's authorised person" is defined by article 2(1)(17) of the DGF Law as: "*an employee of the Fund, who on behalf of the Fund and within the powers provided for by this Law and / or delegated by the Fund, performs actions to ensure the bank's withdrawal from the market during provisional administration of the insolvent bank and/or bank liquidation*".

Article 35(1) of the DGF Law specifies that an authorised person, must have: "...*high professional and moral qualities, impeccable business reputation, complete higher education in the field of economics, finance or law...and professional experience necessary.*" An authorised person may not be a creditor of the relevant bank, have a criminal record, have any obligations to the relevant bank, or have any conflict of interest with the bank. Once

appointed, the authorised officer is accountable to the DGF for their actions and may exercise the powers delegated to them by the DGF in pursuance of the bank's liquidation.

The DGF's independence is addressed at articles 3(3) and 3(7) of the DGF Law which confirm that it is an economically independent institution with separate balance sheet and accounts from the NB and that neither public authorities nor the NB have any right to interfere in the exercise of its functions and powers.

Article 37 establishes that the DGF (or its authorised person, insofar as such powers are delegated) has extensive powers, including powers to exercise managerial and supervisory powers, to enter into contracts, to restrict or terminate the bank's transactions, and to file property and non-property claims with a court.

(2) The Bank's liquidation

The Bank was formally classified by the NB as "troubled" on 19 January 2015. The translated NB resolution records:

"The statistical reports-based analysis of the Bank's compliance with the banking law requirements has found that the Bank has been engaged in risky operations."

Those operations included:

- (i) a breach, for eight consecutive reporting periods, of the NB's minimum capital requirements;
- (ii) 10 months of loss-making activities;
- (iii) a reduction in its holding of highly liquid assets;
- (iv) a critically low balance of funds held with the NB; and
- (v) 48% of the Bank's liabilities being dependent on individuals and a significant increase in "adversely classified assets" which are understood to be loans, whose full repayment has become questionable.

Despite initially appearing to improve, by September 2015 the Bank's financial position had deteriorated further with increased losses, a further reduction in regulatory capital and numerous complaints to the NB. On 17 September 2015, the NB classified the Bank as insolvent pursuant to article 76 of the LBBA. On the same day, the DGF passed a resolution commencing the process of withdrawing the Bank from the market and appointing Ms C as interim administrator.

Three months later, on 17 December 2015, the NB formally revoked the Bank's banking licence and resolved that it be liquidated. The following day, the DGF initiated the liquidation procedure and appointed Ms C as the first of the DGF's authorised persons to whom powers of the liquidator were delegated. Ms C was replaced as authorised officer with effect from 17 August 2020 by Ms G.

Ms G's appointment was pursuant to a Decision of the Executive Board of the Directors of the DGF, No 1513 (Resolution 1513). Resolution 1513 notes that Ms G is a "leading bank liquidation professional". It delegates to her all liquidation powers in respect of the Bank set out in the DGF Law and in particular articles 37, 38, 47-52, 521 and 53 of the DGF Law, including the authority to sign all agreements related to the sale of the bank's assets in the manner prescribed by the DGF Law. Resolution 1513 expressly excludes from Ms G's authority the power to claim damages from a related party of the Bank, the power to make a claim against a non-banking financial institution that raised money as loans or deposits from individuals, and the power to arrange for the sale of the Bank's assets. Each of the excluded powers remains vested in the DGF as the Bank's formally appointed liquidator.

On 14 December 2020, the Bank's liquidation was extended to an indefinite date, described as arising when circumstances rendered the sale of the Bank's assets and satisfaction of creditor's claims, no longer possible.

On 7 September 2020, the DGF resolved to approve an amended list of creditors' claims totalling approximately USD 1.113 billion. The Affidavit states that the Bank's current, estimated deficiency exceeds USD 823 million.

QUESTION 4.1 [maximum 15 marks]

Prior to any determination made in the English Proceedings, Ms G, in her capacity as authorised officer of the Deposit Guarantee Fund (or DGF) of Country A in respect of the liquidation of the Commercial Bank for Business Corporation (the Bank), together with the DGF (the Applicants), applied for recognition of the liquidation of the Bank before the English court based on the Cross-Border Insolvency Regulations 2006 (CBIR), the English adopted version of the MLCBI.

Assuming you are the judge in the English court considering this recognition application, you are required to discuss:

- 4.1.1 whether the Bank's liquidation comprises a "foreign proceeding" within the meaning of article 2(a) of the MLCBI [maximum 10 marks]; and 6 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 As given in the narration above, the Authorised officer of DGF (the applicant) has filed before the courts of England for recognition of the liquidation proceedings of the Bank in Country A (which has not adopted MLCBI) based on CBIR. The English proceedings were also initiated in Feb 2021.

The fact that country A has not adopted MLCBI will not be a deterrent in recognizing the liquidation proceedings in Country A because England has no principle of "reciprocity" in its insolvency laws and therefore even if Country A may not recognise any proceedings initiated in England, England on the contrary due to its CBIR has the jurisdiction to recognise the insolvency proceedings in country A.

It has been mentioned in the narrative that Mrs G is a person who is of impeccable record and character , therefore it can be assumed and established that Mrs G as a person qualifies to be the authorised officer of the liquidator of the bank (ie DGF) as per the laws of country A. Therefore the application filed by Mrs G can be considered.

Before we analyse the issue of recognition of the liquidation proceedings in Country A , let us first ascertain the COMI of the Bank. The registered office of the bank is in Country A , but there are certain entities owning the shareholding of the bank which are located in England, therefore partial ownership of the bank is with England Based entities. However despite this the last registered address near to the stage of initiation of the proceedings in country A was in Country A, therefore the COMI of the bank is in country A. However by virtue of the shareholding being held by the English entities and by virtue of the fact that bank has to recover sizable amount of monies from some English entities, the English law (using the Gibbs Law) are certainly entitled to a proceeding to be initiated in England as well. Since the COMI is in country A, the proceedings in Country A shall be recognised as the foreign main proceedings.

Now we should see the facts from the prism of Article 2(a) of MLCBI. The liquidation proceedings of the bank in country A shall be recognised if it fulfils the important elements as per Article 2(a) of MLCBI, which are :-

- a) **A Proceeding**- The Liquidation proceeding is a Proceeding , therefore the condition is fulfilled
- b) **That is either judicial or administrative**- The liquidation proceedings is a culmination of various steps taken by the National Bank of country the statutory provisions of LBBA, wherein first the bank was declared “troubled”, thereafter efforts were made to revive the same. On failure of bank being revived, it was declared as Insolvent under Section 76 of the LBBA. Immediately thereafter DGF swung into action was appointed an interim administrator under the LBBA laws of Country A.
On failure of the administration process, the NB revoked the banking license and thereafter DGF triggered the liquidation process of bank, and was conferred all the powers of a liquidator by the virtue of LBBA. The law is very clear that there will be no interference in the working of DGF , therefore the DGF may be deemed to be the liquidator being appointed under a law and administrative in nature.
All the possible efforts were made (including moratorium as per DGF rules) during administration (on basis of prevailing banking laws of country A) by the administrator (a body created by banking laws of country A) to revive the bank and only on failure of the same was the liquidation proceeding initiated,
Therefore the liquidation proceedings of the bank in country A can be deemed to be Judicial and Administrative.
- c) **That is collective in nature** – Yes the liquidation proceedings is for the entire assets of the bank , and the proceedings are relating to the debtors and creditors of the bank only, therefore it qualifies to be termed as collective in nature
- d) **That is in a foreign state**- Yes the liquidation proceedings are underway in Country A , which a country foreign to England, thereby fulfilling this condition of the Article 2(a)
- e) **That is authorised or conducted under laws relating to insolvency**- The liquidation proceedings are authorised under the various sections of LBBA (the laws of banking in country A) and the DGF Laws (laws for Deposit Guarantee) of Country A. These laws contain the provisions of administration and liquidation of troubled/insolvent banks. Therefore it can be concluded that the liquidation proceedings are being conducted or authorised under the insolvency laws of country A
- f) **In Which the assets and affairs of the debtor are subject to control or supervision of foreign courts**- Herein the assets and affairs of the bank are not under the control or supervision of the courts of country A. However the assets and affairs are under the control of DGF (Deposit Gurantee Fund) which has been created by LBBA (banking laws of Country A), therefore DGF becomes a creation of a law and

works under its own set of recognised Laws (DGF ACT). DGF is further controlled by NB (national Bank) of Country A. National Bank of any country, is considered an independent autonomous statutory institution wherein it itself is a deemed interpreter/enforcer/implementor of the banking laws of the country. Therefore NB can be given an equivalent status of a COURT and since DGF is a subset of the institutional mechanism at the disposal of NB and created by the various laws, therefore the control of affairs of the bank by DGF can be considered to be a control of NB itself, implying that the assets and affair of the bank are controlled by a COURT (as NB is deemed to be equivalent to a court). Therefore this criteria of the Article 2(a) is also satisfied

- g) **Which Proceeding is for the purpose of reorganisation or liquidation-** Yes, indeed the liquidation proceedings is for the liquidation of the assets of the bank, thereby reorganizing the financial system of country A.

Therefore we can say that all the conditions of Article 2(a) of the MLCBI are being fulfilled and as a judge in the English Court, I shall surely “recognise” the liquidation proceedings of the bank in country A as FOREIGN MAIN PROCEEDINGS

For full marks on this question, I need a more elaborate explanation of the requirements of art 2(a) and how these are interpreted – also in general. I.e. what is meant by “law of insolvency”, “collectivity” etc with reference to the Guide to Enactment, case law or other material.

4.1.2 It has been mentioned in the narrative that Mrs G is a person who is of impeccable record and character, therefore it can be assumed and established that Mrs G as a person qualifies to be the authorised officer of the liquidator of the bank as per the laws of country A. Therefore the application filed by Mrs G can be considered.

Now let us evaluate whether the criteria of ‘foreign representative’ as per Article 2(d) of MLCBI are fulfilled:-

- a) A person or body, including one appointed on an interim basis- The liquidator of the bank is DGF and Mrs G is its authorised officer to whom the powers of liquidation are delegated by DGF. Since the article permits a “body” to be a foreign representative as well, therefore in this case DGF being a recognised statutory body fulfils the criteria of the Article 2(a)
- b) Authorised in a foreign proceedings – The DGF is authorised by the LBBA Act of Country A and also has DGF laws whereby it is authorised to conduct liquidation and Mrs G its authorised officer fulfils the criteria of authorised officer as per the DGF Act. Therefore this condition is also fulfilled
- c) To Administer the reorganization or liquidation of the debtors assets or affairs or to act as representative of the foreign proceedings- The DGF is administering the assets and affairs of the bank vide its power derived from the LBBA and the DGF act. The main mandate of these laws is to enable DGF to reorganize or liquidate and take full control of the assets and affairs of the bank. Therefore this part of the condition of the Article is fulfilled.

More so, the Article 2(d) of MLCBI does not specify that “the foreign representative must be authorised by the foreign court”, therefore although DGF is not authorised by the courts of country A, still it would not be disqualified to be the foreign representative to the foreign main proceedings in country A

Therefore as a judge in the English Courts, I will recognise DGF as the foreign representative of the foreign main proceedings of the bank in country A.

For full marks on this question it should be discussed if both DGF and Ms G could be considered foreign representatives and the effect of delegation.

*** End of Assessment ***