



SUMMATIVE (FORMAL) ASSESSMENT: MODULE 2A

THE UNCITRAL MODEL LAWS RELATING TO INSOLVENCY

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

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

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

INSTRUCTIONS FOR COMPLETION AND SUBMISSION OF ASSESSMENT

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

1. You must use this document for the answering of the assessment for this module. The answers to each question must be completed using this document with the answers populated under each question.
2. All assessments must be submitted electronically in MS Word format, using a standard A4 size page and a 11-point Arial font. This document has been set up with these parameters – **please do not change the document settings in any way. DO NOT** submit your assessment in PDF format as it will be returned to you unmarked.
3. No limit has been set for the length of your answers to the questions. However, please be guided by the mark allocation for each question. More often than not, one fact / statement will earn one mark (unless it is obvious from the question that this is not the case).
4. You must save this document using the following format: **[student ID.assessment2A]**. An example would be something along the following lines: 202122-336.assessment2A. **Please also include the filename as a footer to each page of the assessment** (this has been pre-populated for you, merely replace the words “studentID” with the student number allocated to you). Do not include your name or any other identifying words in your file name. **Assessments that do not comply with this instruction will be returned to candidates unmarked.**
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- 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: 37 out of 50

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

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

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

Question 1.1

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

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

Question 1.2

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

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

Question 1.3

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

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

Question 1.4

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

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

Question 1.5

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

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

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

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

Question 1.6

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

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

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

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

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

Question 1.7

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

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

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

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

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

Question 1.8

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

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

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

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

(d) None of the above.

Question 1.9

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

(a) Enforcement of insolvency-related judgments.

(b) An indefinite moratorium continuation.

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

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

Question 1.10

When for the interpretation of the Model Law “its ~~original~~ international 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] 8,5 marks

Question 2.1 [maximum 3 marks] 2,5 marks

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

The MLCBI does not stipulate the date by reference to which the COMI or establishment should be determined. The Guide to Enactment at paragraph 159 explains that the appropriate date at which to determine the COMI or establishment is the date of commencement of the foreign proceeding.

The Guide to Enactment, paragraphs 81-82, explain that the phrase was adopted from the EU Convention on Insolvency Proceedings (now replaced by the European Insolvency Regulation (“EIR”)) and directs readers to the jurisprudence interpreting that phrase in the EC Regulation when considering the interpretation of the MLCBI. The recital to the Convention and the EIR jurisprudence (e.g. *Eurofood*) emphasise the need for the COMI to be “ascertainable by third parties” (see the MLCBI Judicial Perspective, paragraphs 95 et seq.). By virtue of this consideration, a broader timeframe than the date of commencement of the foreign proceeding may sometimes need to be taken into account, for example, if the debtor moves its registered

office to a different jurisdiction shortly before entering insolvency, in order to prevent a debtor manipulating its COMI in bad faith.

For full marks it should be mentioned that different jurisdiction takes slightly different approaches.

Question 2.2 [maximum 3 marks] 2 marks

The following **three (3) statements** relate to particular provisions / concepts to be found in the Model Law. Indicate the name of the provision / concept (as well as the relevant Model Law article), addressed in each statement.

Statement 1 *“This Article provides guidance in case of concurrence of two foreign non-main proceedings.”*

Statement 2 *“The rule in this Article does not affect secured claims.”*

Statement 3 *“This Article contains a rebuttable presumption in respect of an undefined key concept in the MLCBI.”*

Statement 1: Article 30(c), co-ordination of more than one foreign proceeding

Statement 2: Article 32, rule of payment in concurrent proceedings (the hotchpot rule)

Statement 3: Article 31, presumption of insolvency based on recognition of a foreign main proceeding **Correct answer is art. 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.**

The Court of Appeal upheld the judgment of Mr Justice Hildyard on two bases. Firstly, the Court concluded that the Cross-Border Insolvency Regulations 2006 (“CBIR”), incorporating the Model Law on Cross-Border Insolvency (“MLCBI”), should not be interpreted so as to circumvent the rule in *Antony Gibbs* (i.e. that a contractual obligation governed by English law cannot be discharged or compromised by a foreign insolvency proceeding, unless the creditor has submitted to that foreign proceeding). There was nothing in the MLCBI which overrode substantive rights in English law, whereas the MLCBI would have made that explicit if such an effect had been intended. Paragraph 21 of the Guide to Enactment reinforced the point that the MLCBI was not intended as a substantive unification of insolvency law; instead, its scope was limited to procedural aspects of cross-border insolvency cases. In this case, the effect of granting the indefinite Moratorium Continuation would have been to prevent the English creditors from enforcing their rights under English law, contrary to the rule in *Antony Gibbs*.

Secondly, the Court held that no relief is available under the CBIR after the termination of the relevant foreign proceeding; there was no express provision to that effect in the MLCBI and such an interpretation was inconsistent with the strong implication elsewhere in the MLCBI that the foreign proceeding must be ongoing, and the foreign representative still in office, in order for relief to be available under the CBIR (e.g. the ongoing information obligations on the foreign representative, which the Court considered were only explicable on the basis that the foreign representative remained in office).

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**.

Where domestic proceedings have already been opened in the enacting state, the court considering post-recognition relief should not grant automatic relief under Article 20 (Article 29(a)(ii)). Further, the court must ensure that any relief granted under Article 21 is consistent with the domestic proceeding.

The foreign representative has an ongoing duty of full and frank disclosure to the court in the enacting state under Article 18. This obliges the foreign representative from the time of filing the application for recognition of the foreign proceeding, to inform the court promptly of:

- (a) "Any substantial change in the status of the recognized foreign proceeding or the status of the foreign representative's appointment; and
- (b) Any other foreign proceeding regarding the same debtor that becomes known to the foreign representative."

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?

Prior to making an application for recognition in State A, the foreign representative has the benefit of the access right in Article 9 MLCBI (locus standi). This the right to apply for permission to commence domestic insolvency proceedings in State A if the conditions for doing so are otherwise met (Article 11).

The foreign representative also has the benefit of the maximum co-operation provisions at Articles 25-27. Such co-operation is independent of recognition and the provisions may be called upon before an application for recognition is made. More specifically, Article 25 provides for mandatory co-operation and communication (either directly or through a specified person or body) between the court of State A and the foreign representative or a foreign court. Article 25(2) confirms that this is a two-way arrangement, so the court of State A may communicate directly with, or request information or assistance from, the foreign representative. Article 26 extends that communication arrangement to the specified person or body which administers restructuring or liquidation under the laws of State A. Article 27 elaborates with examples of how co-operation could be effected. Real world examples of cooperation are discussed in the Judicial Perspective at paragraphs 195-200.

For full marks it should be noted that access and coordination rights are time and cost preserving.

Question 3.2 [maximum 5 marks] 3 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.

The foreign representative will need to make his application under Article 15(1) MLCBI to the competent court or authority specified in Article 4. The application must comply with the documentary requirements of Article 15(2)-(3) as well as any requirements imposed by the domestic procedural law of State A.

Once the application has been made, the first matter which the court in State A will consider is whether the foreign proceeding and the foreign representative fall within Article 2 of the MLCBI (Article 17(1)(a) and (b)). In this respect, the court may rely on the presumptions set out at Article 16(1) of the MLCBI. I am instructed to assume that these requirements are met.

The applicant will then need to establish that the debtor has either its COMI (Article 17(2)(a)) or an establishment (Article 17(2)(b)) in the jurisdiction of the foreign proceeding. If neither can be established, the application will fail. The location of the COMI or establishment relied on by the applicant must be proved by evidence, although Article 16(3) provides a presumption that the debtor’s COMI is its registered office or (in the case of an individual) his habitual residence. There is no equivalent presumption to assist in determining whether an establishment exists.

The opening words of Article 17(1) (“Subject to article 6...”) refer to the exception to recognition where that would be manifestly contrary to the public policy of State A. The English court has held that the word “manifestly” imposes a high threshold on the party raising the public policy exception (*Agrokor*).

If the court is satisfied of all these matters, it will then move on to consider relief.

For full marks the following should also be included in the answer:

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.

Chapter III of the MLCBI deals with relief. In overview, the relief for which a foreign representative may apply will depend on the time when the relief is sought and the nature of the foreign proceedings. Prior to determination of the recognition application, the representative may apply for pre-recognition relief under Article 19. Post-recognition, if the foreign proceeding is a main foreign proceeding (i.e. the debtor's COMI is in the jurisdiction of the foreign proceeding) then the relief at Article 20 will automatically be granted. If the foreign proceeding is a non-main proceeding (i.e. the debtor has an establishment but not its COMI in the jurisdiction of the foreign proceeding) then discretionary relief will be available at the request of the foreign representative under Article 21 after recognition. Any discretionary relief which the court might grant under Articles 19 or 21 must be balanced against the interests of the creditors and other interested persons, including the debtor, so that all interests are adequately protected (Article 22).

Following recognition, the foreign representative will also enjoy enhanced access to the court of the enforcing state, so that he may both commence proceedings and intervene in existing proceedings under Articles 23 and 24. This is in contrast to the pre-application right under Article 11 to *apply* to commence proceedings.

For full marks, the following should also be included:

1. Existing international obligations of State A: Based on Article 3 of the Model Law, the court in State A should again verify that there are no existing international obligations of State A (under a treaty or otherwise) that may conflict with granting the requested relief under the implemented Model Law in State A.
2. Public policy exception: The court in State A should, based on Article 6 of the Model Law, also again verify that the relief application is not manifestly contrary to public policy of State A.

Question 3.4 [maximum 1 mark] 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?

A post-recognition worldwide freezing injunction would likely hamper the administration of the international insolvency and, in particular, the distribution of assets to creditors which is the ultimate aim of insolvency proceedings.

Here it should be mentioned that art. 21 provides for other forms for protection leaving the freezing order 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]; 8 marks** and
- 4.1.2 whether the Applicants fall within the description of "foreign representatives" as defined by article 2(d) of the MLCBI **[maximum 5 marks]. 2 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

Article 2(a) MLCBI requires a foreign proceeding to demonstrate all of the following characteristics:

- (1) a proceeding (including an interim proceeding);
- (2) which is either judicial or administrative;
- (3) which is collective in nature;

- (4) which is in a foreign state;
- (5) which is pursued under a law relating to insolvency;
- (6) in which the assets and affairs of the debtor are subject to control or supervision by a foreign court; and
- (7) which is for the purpose of reorganisation or liquidation.

The liquidation in Country A is plainly a proceeding in a foreign state. On the Affidavit evidence, it appears to be administrative in nature. It also seems relatively clear that the proceeding is for the purpose of reorganisation or liquidation, and is pursuant to a law relating to insolvency. The Guide to Enactment explains at paragraph 73 that “a law relating to insolvency” is intended to refer broadly to proceedings involving debtors that are in severe financial distress or insolvent, irrespective of whether that law was regarded as insolvency law in its home jurisdiction (as opposed to, for example, an aspect of company law or public regulation). On the question of purpose, although the liquidation has been extended to an indefinite date, which might not be regarded as a typical trait of liquidation, the words of Mr Justice Paul Matthews in *Agrokor*, [2017] EWHC 2791 (Ch) are resonant: “the purpose of this law is clearly to protect the stability of the economic system against systemic shocks by enabling the restructuring of companies of systemic importance that get into financial difficulty. Restructuring obviously implies protection for the debtor whilst the restructuring goes ahead. It also implies reduced payments to creditors, or payments over a longer term, just as might occur in a bankruptcy.” Accordingly, requirements (1)-(2), (4), (5) and (7) are satisfied in my view.

In evaluating whether a given proceeding is collective for the purpose of the MLCBI, the Guide to Enactment explains at paragraph 70 that a key consideration is whether substantially all of the assets and liabilities of the debtor are dealt with in the proceeding. A variety of collective proceedings would be eligible for recognition as foreign proceedings, whether compulsory or voluntary, corporate or individual, winding-up or reorganisation. The definition would also include those proceedings in which the debtor retains some measure of control over its assets, albeit under court supervision. I do not regard the Affidavit evidence as clear on this point. Some assets, we are told, have been sent to overseas companies. It is not clear to me what assets remain in Country A, but I understand from the nature of the powers granted to the DGF and its agents that whatever assets remain in Country A all fall under the control of the liquidator and are included within the liquidation process. On that basis, it seems likely that the proceeding is a collective one and requirement (3) is met.

The real question here is whether the debtor’s assets and affairs are subject to control or supervision by a foreign court. The Affidavit evidence explains the involvement of the National Bank, which may or may not be independent of the government of Country A. It further explains that DGF is independent. However, all the steps described in the liquidation process are administrative (by resolution or other executive acts). The Guide to Enactment at paragraph 74 explains that the necessary control or supervision could be potential rather than actual. In this situation, I would be inclined to take a broad view of “control or supervision” and hold that this liquidation process is a foreign proceeding. The reason is this. In my view, both the background to the MLCBI and the explanatory supporting materials published by UNCITRAL emphasise the flexible nature of the definitional aspects of the MLCBI. The Model Law exists to facilitate international co-operation between courts and insolvency professionals, not to alter substantive legal rights. It exists to assist with the swift and efficient identification and administration of assets. That rationale is all the more important in this case, to which the backdrop is, we are told, a large-scale international fraud. When one steps back and asks the broader question, is this liquidation process a foreign insolvency proceeding, an affirmative answer is instinctively compelling, because it has so many features of that type of proceeding. The MLCBI explicitly foresees that the proceeding may be administrative rather than judicial. When a complex organisation such as a large bank is the debtor, it is to be expected that much of the work of the liquidation will be administrative rather than judicial. Viewed in the

round, and in circumstances where the Guide to Enactment envisages that the requisite control or supervision by a foreign court may be potential rather than actual, I would be inclined to hold that this is a foreign proceeding. Quite how I would make that finding fit on the evidence, I do not know. Perhaps a supplementary affidavit might provide evidence of the judicial review system to which the liquidator in Country A is subject.

There is nothing to indicate that recognition would be manifestly contrary to public policy.

For full marks on this question, more detail on the banks insolvency should be provided. Regarding the discussion on subject to control, see the following:

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

1. The collective proceeding, must be “*judicial or administrative*” where “*the assets and affairs of the debtor are subject to control or supervision by a foreign court*”.
2. 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*”.
3. 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.*”
4. 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.
5. 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.*”
6. In this case the DGF has control of all of the Bank’s assets and overall control of the liquidation.
7. 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.
8. 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.
9. Taking these factors into account, the Bank’s liquidation is *administrative*. The assets and affairs of the Bank are subject to the control of the DGF, an official body which exercises its powers in the liquidation free from intervention by government or the NB and which should be considered, for the purposes of the definition set out in article 2(e) of the MLCBI, as a “*foreign court*”.

4.1.2

Article 2(a) MLCBI requires a foreign representative to demonstrate the following characteristics:

- (1) a person or body (including one appointed on an interim basis); and
- (2) who/which is authorised in a foreign proceeding – thus “foreign proceeding” within the meaning of Article 2(a) MLCBI is an integral part of the definition of “foreign representative” within Article 2(d) – to administer the reorganisation or liquidation of the debtor’s assets or affairs; or
- (3) who/which acts as a representative of the foreign proceeding.

Whether the “foreign representative” is authorised to act as a representative of a debtor’s liquidation or reorganisation is determined by the applicable law of the State in which the insolvency proceedings began. It seems clear from the Affidavit evidence that both DGF and Ms G are so authorised, and they are plainly a body and a person, respectively. Accordingly, Ms G and DGF are foreign representatives within the meaning of Article 2(d).

This answer is inadequate. More details on the facts should be provided along with a discussion on whether both Ms G and DGF can say to “administer”.

*** End of Assessment ***