



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

**THE UNCITRAL MODEL LAWS RELATING TO INSOLVENCY**

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

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

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

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

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

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

## **ANSWER ALL THE QUESTIONS**

**Total marks: 39 out of 50**

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

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

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

#### **Question 1.1**

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

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

#### **Question 1.2**

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

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

### Question 1.3

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

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

### Question 1.4

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

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

### Question 1.5

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

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

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

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

#### Question 1.6

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

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

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

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

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

#### Question 1.7

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

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

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

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

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

#### Question 1.8

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

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

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

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

(d) None of the above.

### Question 1.9

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

(a) Enforcement of insolvency-related judgments.

(b) An indefinite moratorium continuation.

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

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

### Question 1.10

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

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

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

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

(d) All of the above.

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

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

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

The date for determining the COMI of a debtor is generally held to be the date of commencement of the foreign proceeding. The COMI must be readily understood by third parties, therefore any movement of COMI in the lead up to the commencement of the foreign proceedings will make ascertaining COMI more difficult. It can be noted that the EIR Recast has a 3 month period in which any move of the COMI will be considered suspect.

In the US a court in *Morning Mist Holdings v Krys (Matter of Fairfield Sentry Ltd)* the Second Circuit of Appeals determined the COMI in relation to activity in and around the time of the Chapter 15 application as opposed to the commencement of the foreign proceedings. This was in the context of ensuring that there had been no manipulation of the COMI between commencement of the foreign proceedings and the application under Chapter 15.

### Question 2.2 [maximum 3 marks] 3 marks

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

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

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

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

Statement 1: This the concept of 'concurrent foreign non-main proceedings' and according to Article 30(c) the court must grant, modify or terminate relief for the purpose of facilitating co-ordination of the proceedings. The Model Law doesn't proscribe any ranking of two foreign non-main proceedings.

Statement 2: This is the 'hotch potch rule' set out in Article 32. Excepting as a result of preferential rights in rem this rule is designed to prevent a creditor forum shopping and obtaining a realisation in one jurisdiction and then claiming in another so that it achieves a better recovery than other creditors in the same credit position.

Statement 3: Article 16 contains a recognition presumption that, unless there is contrary proof, the debtor's registered office for a company or place of habitual residence for a person, is presumed to be the COMI for that debtor.

### **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 affirmed the Gibbs rule (the rule that it takes an English court to compromise an English law obligation) and looked at the Articles on relief in Article 20 and 21. In this case it was under Article 21. The Court of Appeal that it could only grant an indefinite moratorium on actions if it were satisfied by two things: 1) the moratorium was necessary to protect the interests of the debtor's creditors and 2) the moratorium would be the right way to achieve that protection. IN this context the court examined the test of necessity in Article 21(1). The court went on to discuss the ability of a moratorium to go beyond the ending of the foreign proceedings. The Court of Appeal noted a strong implication in Article 21 that once a foreign proceeding had come to an end and the foreign representative was no longer in office there should be no scope for further orders to support the no longer existing foreign proceedings and previous relief granted must come to an end. The Court noted that had the Model Law intended that the relief continue post the foreign proceedings ending then it would have explicitly legislated for that eventuality.

### **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.**

Under Article 21 in the domestic court there are three automatic effects: (1) stay commencement or continuation of individual actions/proceedings concerning the debtor's assets, rights, obligations or liabilities; (2) stay any execution against the debtor's assets; and (3) suspend any right of transfer, encumbrance or disposal of any asset of the debtor. In this case the domestic court would need to stay the ongoing domestic proceeding. **The correct answer here is art. 29 (a) on concurrent proceedings**

Under Article 18 the foreign representative, from the time of filing the recognition application, to promptly tell the domestic court of (1) any substantial change in the status of the foreign proceeding or the appointment of the foreign representative and (2) if the foreign representative becomes aware of other foreign proceedings in relation to that foreign debtor, to tell the domestic court.

### **QUESTION 3 (essay-type questions) [15 marks in total] 8 marks**

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

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

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

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

Article 9 states the principal of direct access for foreign representatives to domestic courts of an enacting state. No recognition of the foreign proceeding in which the relevant foreign representative is appointed is required to provide the foreign representative with standing in the courts of the domestic state.

Article 25 provides that, in the context of a cross-border insolvency to which the Model Law applies, requires that a court in the enacting domestic state must cooperate with foreign representatives and foreign courts to the maximum extent possible. Article 27 provides an indicative list of the type of assistance that the Model Law permits. The list is deliberately not definitive but is drafted as types of assistance that could be given so as to allow local courts to fashion assistance that is appropriate within the context of their own legal systems. The Practice Guide goes on to provide information to domestic judges and other insolvency practitioners on the practical side of coordination and communication.

Article 10, the safe conduct rule, also benefits the foreign representative in that he/she can be confident that he/she can access the coordination and access rights without fear that it may result in the domestic court seeking to exercise additional jurisdiction whilst the foreign representative seeks information on which to make a recognition request.

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



- Opening domestic insolvency proceedings (Article 11 MLCBI): The foreign representative is further specifically entitled to apply for the opening of domestic insolvency proceedings in State A, as reflected in Article 11 of the MLCBI. Whether or not the foreign representative would wish to do this will depend on what the requirements are for opening such domestic proceedings. Can these requirements be met? On the other hand, it will depend on what the foreign representative believes he/she can get in terms of (interim) relief for the foreign proceedings in State B. In other words, are domestic insolvency proceedings really needed, or just additional time and costs that should be avoided?
- Save Time & Costs: The key benefits of both the access provisions and the cooperation provisions are that they save time and therefore also costs, as a result of which value destruction can be avoided and value enhancement is being promoted.

### 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.

Having ascertained that the conditions to qualify as a 'foreign proceeding' and a 'foreign representative' are met the court must look at a number of other issues.

Firstly the court must ascertain whether there are any grounds on which to invoke the public policy exception. This is set out in Article 6 which provides that there is no requirement to recognise where it would breach the domestic courts public policy. Any breach must be 'manifest' and therefore looked at restrictively. The English courts in the Agrokor case considered that the words 'manifestly' in article 6 means that the threshold to invoke this right must be high and not merely 'contrary to [English] public policy'.

The foreign representative must meet the requirements set out in Article 15; being evidence of the foreign proceeding and appointment of the foreign representative. That must also be accompanied by a statement from the foreign representative of all other foreign proceedings of which it is aware. Under Article 15 the domestic court may exercise a right to have the relevant documents translated into the domestic language.

IN making its recognition decision the domestic court is entitled to the benefit of certain presumptions in Article 16. The court is able to presume that the information showing that the proceeding is a 'foreign proceeding' and the representative is a 'foreign representative' if stated so in the application documentations required under Article 15. Similarly the court is entitled to presume all documents delivered in accordance with Article 15 are true.

The court must determine whether the foreign proceeding is a 'foreign main proceeding' or a 'foreign non-main proceeding' so as to decide whether Articles 20 or 21 apply. IN making its decision on this point it must ascertain where the 'Centre of Main Interest/COMI' of the debtor is. Under Article 15 it is entitled to presume that the COMI is in the debtors place of registered office (for a corporate entity) or its place of habitual residence (for a natural person). Notwithstanding this presumption, the COMI must be the place where the central administration of the debtor takes place and such must be readily ascertainable by the creditors of the debtor. The court is able to look to a number of factors in determining the

location of the COMI and whether to displace the presumption of the registered office/place of habitual residence. If there is no COMI in State B there must be an establishment. An establishment being 'any place of operations where the debtor carries on non-transitory economic activity with human means and goods or services'. The presence of assets along is not sufficient to create an establishment. If the debtor neither has its COMI nor an establishment in State B then the court in State A will not grant recognition.

For full marks the following should also be addressed:

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] 2 marks**

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

Article 19 gives the court of State A powers to grant urgently required interim relief upon application from a foreign representative. This applies whether the State B proceedings would be main or non-main proceedings. Article 19 specifies a number of reliefs available. The court may refused to grant such interim relief if it would interfere with a foreign main proceeding under paragraph 4 of Article 19.

If the proceeding in State B is determined to be a foreign main proceeding then Article 20 would apply certain automatic reliefs without need for further action on the part of the foreign representative. These are a stay on actions against the debtor, a stay of execution against the debtors assets and a suspension of the debtors right to dispose of assets. Paragraph 2 of Article 20 allows State A to enact protections to allow State A's courts to modify or terminate the automatic stay where the stay would be contrary to the interests of any part with an interest including the debtor. Paragraph 3 provides that the automatic stay does not prevent the opening of actions needed to preserve a claim against the debtor. Also, paragraph 4 states that the automatic stay doesn't affect the right to request the start of certain State A insolvency proceedings or to file claims in that proceeding.

Article 21 allows the court in State A to give discretionary relief in any foreign proceeding to protect assets of the debtors or interests of the creditors. Article 21 sets out these discretionary reliefs in paragraph 1 sub-paras (a) to (g). Paragraph 2 grants State A's a discretionary power upon request of the foreign representative to order a handing over of debtor assets located in State A to the foreign representative provided that State A's court is satisfied that the local creditors in State A are adequately protected. Article 21 Para 4 requires that any relief should not interfere with the administration of another insolvency proceeding, this is in particular in relation to the main proceedings.

For full marks the following should also be addressed:

1. **Adequate protection:** Pursuant to Article 22 of the Model Law any interim relief under Article 19 of he Model Law or any post-recognition relief under Article 21 of the Model Law require the court in State A to be satisfied that the interests of the creditors and the

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

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

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

As referred to at the end of the last answer, Art 21 para 4 requires that any Art 21 relief must not interfere with administration of other insolvency proceedings, in particular the main proceeding. As a global freezing order is likely to do that it would be unlikely to be appropriate for State A to continue this order but instead the foreign representative should seek relevant orders in the main proceedings and recognition of those main proceedings in other jurisdictions. The only possibility for a conditional continuation would be were such an order was not available in the main proceedings state and recognition of the proceedings wasn't available in another state but that state would recognise the State A order. In that case a limited freezing order might be obtainable. I note the earlier comments made above in relation to the ratio of the English Court of Appeal in the Azerbaijan case in which it said it could not see any basis for relief continuing once the foreign proceedings were closed.

**QUESTION 4 (fact-based application-type question) [15 marks in total] 14 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]; 10 marks** and

4.1.2 whether the Applicants fall within the description of "foreign representatives" as defined by article 2(d) of the MLCBI **[maximum 5 marks]. 4 marks**

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

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

**4.1.1**

Firstly, the CBIR does not require reciprocity in the corresponding state so the fact that Country A has not adopted the Model Law does not exclude the operation of CBIR.

Article 2 contains the definition of 'foreign proceeding', the following are the required elements:

- a proceeding;
- that is judicial or administrative;
- it is collective;
- in a foreign state;
- under an insolvency law;
- under which the assets and affairs of the debtor are subject to control or supervision of the foreign court; and
- the proceeding is for the purpose of reorganisation or liquidation.

These thresholds were considered by the English court in the Agrokor case which concerned the resolution of a systematically important entity in Croatia under a law specifically enacted to deal with systematically important companies. The fact pattern in Agrokor is similar to that which we are given above. As we are considering an English law determination under CBIR its worth noting that questions in relation to the Country A law are questions of fact to be established by leading evidence from Country A, the Affidavit should qualify for the purpose and I assume it is to be accepted as good evidence.

Looking at the elements of the 'foreign proceeding' test:

- 'a proceeding'; whilst this has not been extensively considered in courts globally a helpful descriptive was given in the US case of 'Irish Bank Resolution Corp' where a proceeding was given the characteristics of 'a statutory framework that constrains a company's actions and that regulates the final distribution of a company's assets'. This appears to be the case based on the details of the Affidavit.
- 'Judicial or administrative': this has been considered in courts in Australia, England and the US. In the English New Paragon case found a foreign proceeding where the proceeding included a extrajudicial or administrative proceeding *provided* it related to liquidation. Here the proceeding does relate to liquidation so is likely to qualify as was the case with Agrokor on similar facts.
- 'collective': this was considered by the English courts in Agrokor where the similar law (called the EAP) was considered collective enough. The GEI is helpful in this analysis as it indicates that for it to be collective, it should deal with substantially all of the assets and liabilities of the debtor which the LBBA appears to do on the facts we have. The test was also considered in relation to Stanford International by the English courts. The facts given to us don't support a deeper analysis of whether the tests laid down in Stanford International are met.
- 'foreign state': on a plain reading this is met
- 'insolvency law': Whilst the LBBA isn't manifestly a law solely involved with insolvency it contains within it the insolvency mechanisms for a bank in Country A. the Affidavit provides evidence as to the Country A law and the English court is entitled to rely on it. The Model Law was specifically drafted to recognise that a law will qualify even though it is not manifestly one labelled as such provided that it contains operative insolvency mechanisms. This is supported by the commentary in the GEI. It was also applied in the Agrokor case by the English courts on similar facts.
- 'assets and affairs of the debtor are subject to control or supervision of the foreign court': The GEI states that the supervision by court should be forma but it can be potential rather than actual for expel through an insolvency representative. This has been considered in a number of cases. In the US the leading case is Betcorp Limited where a liquidator was recognised even though no direct supervision by the Australian court was needed. The English courts considered this element in Agrokor where the Croatian government had the potential for substantial involvement; this was not a bar to the supervision test. The involvement of the DGF should not therefore be a bar to this limb being satisfied.
- 'purpose of reorganisation or liquidation': the GEI affirms that the legislation must be for the purpose of reorganisation or liquidation, it is not sufficient to have elements of insolvency related law that does not encompass the elements of reorganisation or liquidation. On very similar facts the English courts in Agrokor were satisfied that the EAP did satisfy this test. In the case of the LBBA is clearly ends with a liquidation if the relevant triggers are met.

#### 4.1.2

Article 2 contains the definition of 'foreign representative', the following are the required elements:

- A person or body, including an interim appointment
- Authorised in a foreign proceeding
- To administer the reorganisation or liquidation of the debtor, its affairs and assets or to act as a foreign representative

It is not required that the foreign representative be authorised by a foreign court. This has been extensively affirmed in a number of cases in the USA and Australia. This is important to note on our fact pattern as the DGF and its authorised officer are not appointed directly by the courts in Country A as appointment is automatic under Art 77 of LBBA. The power to delegate



to the authorised officer under art 49 of the DGF law is also not one that requires court consent or ratification.

Dealing with the elements of a 'foreign representative':

- 'a person or body': the application is made jointly by Ms G and the DGF. A person has its ordinary meaning and Ms G would qualify as such. The meaning of 'body' was considered in the US case of *Petition of Ernst & Young* and used an ordinary legal meaning of 'an artificial person created by legal authority'. DGF would come within that meaning as it is created under the laws of Country A.
- 'Authorised in a foreign proceeding': As noted above The Model Law does not specify that the foreign representative be appointed by a court. There must be a foreign proceeding and the authorisation must be in the context of that proceeding. The GE page 46 specifically affirms this. In our case the DGF is appointed in the context of the liquidation under the LBBA. Ms G is appointed under the terms of the DGF law as an authorised officer.
- 'administer the reorganisation or liquidation of the debtor': the foreign representative must have the power to administer the reorganisation or liquidation of the assets or affairs at the time of application (see the USA case of *Oversight & Control Commission of Avanzit*). It is clear that the DGF and its authorised person have the power to liquidate the assets and affairs of the Bank under Article && of LBBA. The fact pattern does not go on to discuss the law relating to liquidation in Country A however the powers of the DGF outlined are those ordinarily seen in a liquidator, what is not described is the distribution laws in a liquidation which would ordinarily be required for it to qualify as a liquidation.

**For full marks, it should be discussed how the split of powers – if at all – effects both the DGF and Ms G's capability to be countered as a foreign representative.**

**\* End of Assessment \***