



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: 33 out of 50 marks

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] 6 marks

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

Question 1.1

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

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

Question 1.2

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

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

Question 1.3

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

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

Question 1.4

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

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

Question 1.5

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

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

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

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

Question 1.6

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

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

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

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

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

Question 1.7

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

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

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

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

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

Question 1.8

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

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

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

- (c) While (for purposes of the Model Law) the COMI of a debtor can move, the closer such COMI shift is to the commencement of foreign proceedings, the harder it will be to establish that the move was “ascertainable by third parties”.
- (d) None of the above.

Question 1.9

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

- (a) Enforcement of insolvency-related judgments.
- (b) An indefinite moratorium continuation.
- (c) Both (a) and (b).
- (d) Neither (a) nor (b).

Question 1.10

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

- (a) The UNCITRAL Guide of Enactment and the Practice Guide.
- (b) The UNCITRAL Guide of Enactment and the Legislative Guide – Parts One, Two, Three and Four.
- (c) The UNCITRAL Guide of Enactment and the Judicial Perspective.
- (d) All of the above.

QUESTION 2 (direct questions) [10 marks in total] 7 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 model law does not define COMI

Article 16, Paragraph 3 of the Modern Law does state the presumption of COMI based on the debtors registered office, or residence in the case of an individual
This is on the basis that, there is no evidence that contradicts this

The appropriate date for determining the COMI is generally the date of the opening of proceedings.(The GEI paragraphs 157-160)

However, there have been several cases such as ‘Morning Mist Holdings Ltd v Krys (USA) and Re Toisa Limited (UK) where this has been challenged in that there was potential for the

COMI to have been moved in bad faith with the pending insolvency action. In these cases the COMI may be challenged by the Courts.

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.”*

Article 30 Coordination of more than one foreign proceeding
(c) if, after recognition of a foreign non-main proceeding, another foreign non-main proceeding is recognised, the court shall grant, modify or terminate relief for the facilitating coordination of the proceedings

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

Article 32 – The hotchpot Rule

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

Article 31 – Presumption of insolvency based on recognition of a foreign main proceeding
Article 16, Paragraph 3 – Presumptions concerning recognition (Establishment of COMI)

Question 2.3 [2 marks] 0

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.**

Gibbs Rule – (derived from 1980 case *Anthony Gibbs & Son v La Societe Industrielle et Commerciale des metaux*).

This *IBA* case appeal, was in relation to the issue of the balancing of interests of persons affected when granting article 19-24 relief, and what the court should consider in this regard.

The Gibbs rule refers to that any debt government by English law cannot be discharged by a foreign insolvency proceeding.

In relation to this re the *IBA* case, Mr Justice Hilyard denied the permanent stay of relief ‘Moratorium Continuation’. It as not deemed that a permanent stay would satisfy that such stay would protect the interest of the creditors. And as such, Mr Justice Hilyward did not grant the indefinite moratorium continuation.

To receive full marks on this question, the answer should reflect the appeal case and not the 1st instance.

Question 2.4 [2 marks] 1

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**.

If any relief was provided under article 19 at the presenting of the application for recognition in relation to relief, this will automatically terminate on the recognition order so therefore the court will need to establish the particulars of relief in accordance with the recognition.

Article 20 states the relief that will automatically be placed on proceedings recognised as foreign main proceedings. The court will need to assess therefore any particulars in relation to relief covered by Article 21 as these as digressory following recognition.

The correct answer is art. 29 (a)

Ongoing obligations – Article 18

Foreign representatives, from the time of filing the recognition application for the foreign proceedings to promptly inform the court in the enacting state of any substantial changes in the status of the recognised foreign proceedings or the status of the foreign representative's appointment and any other foreign proceedings regarding the same debtor that becomes known to the foreign representatives.

QUESTION 3 (essay-type questions) [15 marks in total] 7 marks

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

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

Question 3.1 [maximum 4 marks] 3 marks

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

The Model law is 'soft law' as such is not legally binding, soft law relates to agreements and/or principles which can give guidance in certain issues. It is an adoption, in whole or in part, into the domestic legislation of the state, therefore the following will be on the basis that Stat A has not adapted the Model Law with exemptions, or conflicting matters with domestic legislation.

Article 9 – Direct Access

Under this article it would not be necessary to gain recognition in order to have direct access to the proceedings in State A. Access however does not automatically give the representative any rights or powers.

Under these provisions therefore the representative could make enquiries into the proceedings in State A and perhaps have sight over the assets and liabilities in the jurisdiction before underdoing the costs and time of opening foreign proceedings in that state.

Articles 25-27 of Model Law deals with the cross boarder co-operation
Co-operation does not require recognition and therefore State B would be able to take advantage of this provision before seeking formal recognition, and dependant on the action they wished to take it may mean they do not need to incur the costs of time for recognition.

Article 25 provides for the fact that the court must co-operate to the maximum possible extent with foreign representatives, being that they are able to communicate directly with, or request information or assistance directly from foreign courts an representatives. This can also be in relation to assistance elsewhere (outside of the enacting state).

For full marks on this question, you must also make reference to art. 11

Question 3.2 [maximum 5 marks] 2 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.

Evidence:

In relation to evidence, the foreign representative must ensure they are able to evidence the existence of the proceedings and their position as representative,

According to article 15, an application for recognition should be accompanied by:

- A certified copy of the decision commencing the foreign proceedings and appointment the foreign representative; or
- A certified form for the foreign court affirming the existence of the foreign proceedings and the appointment of the foreign representatives
- In the absence of evidence referred to in sub-paragraphs a) and b) any other evidence acceptable to the court of the existence of the foreign proceeding and the appointment of the foreign representative (this may include for example correspondence with the regulatory body or company registrar)

Restrictions

The question does not differentiate between foreign main and foreign none main proceedings. There would be restrictions on the relief granted dependant on which proceeding was opened according to articles 19-21.

If the proceedings were foreign main, then article 20 relief would automatically apply. However if the proceedings were foreign none-main then article 20 would be discretionary and State B proceedings may be restricted.

Exclusions

Although it is noted that MLCBI article 2 © ad (d) have been satisfied, if the companies are banks and financial institutions they may not be granted recognition as they may be required to be administered under a special regulatory regime.

Limitations

There is no reciprocity requirement in the Modern law and on that basis a foreign proceeding should not be denied recognition on the grounds that the court (in state A for example) would not provide equivalent relief to an insolvency representative from the other state. Some states however have included reciprocity provisions in relation to some jurisdictions. This may present a challenge if these provisions are in place in gaining recognition.

For full marks on this question, the answer should include:

1. **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.
2. **Judicial scrutiny:** While the court in State A is able to rely on the rebuttable presumptions set forth in Article 16 of the Model Law, in the context of Article 17 of the Model Law the court will have to assess whether either the COMI or at least an establishment of the debtor is located in State B where the foreign proceedings were opened. If the COMI of the debtor is in State B the foreign proceedings should be recognised as foreign main proceedings and if only an establishment of the debtor is in State B the foreign proceedings should be recognised as foreign non-main proceedings. Without a COMI or at least an establishment of the debtor in State B, recognition cannot be granted by the court in State A.
3. **Public policy exception:** Finally, the court in State A should also ensure based on Article 6 of the Model Law that the recognition application is not manifestly contrary to public policy of State A.

Question 3.3 [maximum 5 marks]

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

Pre-Recognition relief – Article 19

From the time of filing of the application for recognition, under article 19, the court may grant urgent relief to protect the assets of the debtor and the interests of the creditors.

This relief could include the stay of action against the debtor's assets meaning to action could be taken by creditors and no sale could take place. The court may also entrust the sale of assets locate din the state to the foreign representatives ahead of the recognition being confirmed by order of the Court.

It should be note that unless extended, the relief granted under this article terminates which the recognition is decided upon, in accordance with paragraph 3 of article 19.

The court may under paragraph 4 of article 19, refuse to grant relief if such relief would interfere with the administration of a forging main proceeding,

Post-Recognition relief

As the recognition will not be main proceedings, article 20 will not automatically apply. Therefore relief, post recognition will be discretionary by the court under article 21.

Article 21

Under article 21, upon recognition the court has the powers to grant the following options for relief to protect the assets of the debtor and the interests of the creditors:

Stay the commencement or continuation of individual action or individual proceedings concerning the debtor's assets, rights, obligations or liabilities

Stay on execution of assets

Suspension to the right to transfer or otherwise dispose of any assets of the debtor

Providing for examination of witnesses, the taking of evidence or the delivery of information concerning the debtors assets, affairs, rights, obligations or liabilities

Entrusting the administration or realisation of all or part of the debtors assets located in the state to the foreign representative (or another person defined by the court)

Extending relief granted under article 19

Granting any additional relief that may be available

The court may, under paragraph 2 of article 21 grant the foreign representative the right to distribute all or part of the debtor's assets located in the state to the foreign representative - provide the interest of the creditors are protected

For full mark on this question, the answer should include the following:

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

Question 3.4 [maximum 1 mark] 0

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 world-wide freezing order would not be able to be granted as there is no worldwide court, this is the reason for the writing of UNCIRTA. There may be action taken in relation to companies/corporations that operate on a worldwide basis such as banks. In this case relief

may not be granted from article 19 through to article 21 if the proceedings were foreign non main proceedings as these are subject to court discretion.

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] 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]; 9 marks** and

Schedule 1 of UNCITRAL Model Law on Cross Boarded Insolvency in relation to The Cross-Boarder Insolvency Regulations 2006, Article 1, paragraph 2 lists the types of Company whereby the law would not apply in the UK. The bank does not qualify to fall into any of these categories owing to the information provided.

The court will need to determine if the proceedings would be foreign main, or foreign proceedings before granting recognition. UNCITRAL does not define COMI, however under UK law this would be determined as being where the main place of operation and or the registered office. Based on the above the country's COMI would be in Country A and therefore proceedings would be foreign none main proceedings.

According to article 2(a) of the MLCBI; and
Section 2. Elements of the definition of 'foreign proceeding' from UNICITRAL Model Law on Cross-Border Insolvency

"Foreign proceeding means a collective judicial or administrative proceeding in a foreign state, including in interim proceeding, pursuant to a law relating to insolvency in which proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganisation or liquidation"

The Judicial Perspective a foreign proceeding; is determined by the following factors which are tested in relation to the Banks liquidation:

Judicial or administrative proceeding

According to the Model Law for this test the proceeding would have to be by an appropriate court, or department of the government,

As the banks liquidation is being conducted by a government body, being The Deposit Guarantee Fund (DGF) in Country A, this would classify as satisfying this test.

As can be seen in paragraph (4) under article 2 of the Model Law a 'proceeding' was defined by a court as being 'a statutory framework that contains a company's actions and that regulates the final distribution of a company's assets'. In relation to Company A it can be seen that:

- Pursuant to article 34 of the DGF Law – the DGF removed the bank from the market

- Articles 35(5) and 36(1) of the DGF Law provide that during provisional administration, the DGF had full and exclusive rights to manage the bank and all powers of the bank's management.
- 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.
- DGF (acting via an authorised officer) begins the process of directly administering the bank's affairs.
- In addition, when the Company entered liquidation all powers of the banks management were terminated – including banking activities.

These points satisfy the requirement that the Companies actions were/are contained.

In relation to satisfying that the proceedings aims to regulate the final distribution of a company's assets', it could be argued that the liquidation may not satisfy this test as it was declared on 14 December 2020, that the satisfaction of creditor's claims, was no longer possible. It may be that there would be recoverable assets within England that would allow for this to be possible, however it would have to be evidenced to the Court.

Collective Proceedings

According to the Model Law the notion of a "collective" insolvency proceeding is based on the desirability of achieving a coordinated, global solution of all stakeholders of an insolvency proceeding.

As proceedings have been issued in the High Court of England and Wales (Chancery Division) against various defendants connected to the liquidation of the Bank, it would satisfy this test that the proceedings should be carried out in coordination. However, as these proceedings are in relation to claims of fraud, it may be challenged as in "*Stanford International Bank (case no. 26), a receivership order made by a court in the United States of America was held by a court in England not to be a collective proceeding pursuant to an insolvency law. The receiving court held that the order was made after an intervention by the Securities Exchange Commission of the United States "to prevent a massive ongoing fraud". The purpose of the order was to prevent detriment to investors, rather than to reorganize the corporation or to realize assets for the benefit of all creditors. 107 That view was upheld on appeal, largely for the reasons given by the English lower court.*"

Courts have identified also, in order to qualify as collective, the proceedings should have various other characteristics, including:

- 'Imposition of an orderly regime that affects the rights and obligations of all creditors and all of the assets of the debtor'

This is met owing to the

- 'All creditors need not receive a share of the distribution – the representative could acknowledge the duty to creditors in general'
- 'Interested parties should not be able to Individually enhance their position'

The DGF has demonstrated its independence.

- 'Creditor participation must be a reality'
- 'Creditors should also have the opportunity to seek appellate review of proceedings'
- 'Adequate notice should be provided to creditors'

In a foreign state, including an interim proceeding

The bank, having its liquidation in Country A, which is not England, would satisfy that the main proceedings are in a foreign state.

Is authorised or conducted under a law relating to insolvency

Model Law requires that the foreign proceeding be "pursuant to a law relating to insolvency", this does not necessarily mean the law needs to be labelled as 'insolvency'; but that it deals with the pertinent issues relating to insolvency.

In relation to the bank in Country A, the following facts satisfy the fact:

- 17 September 2015, the NB classified the Bank as insolvent pursuant to article 76 of the LBBA
- The Bank entered provisional administration on 17 September 2015
- The Bank was placed in liquidation on 17 December 2015

In which the assets and affairs of the debtor are subject to control or supervisions by a foreign court

The Model law does not specify the level of control, or the time frame of such.

'The courts have indicated that control or supervision may be exercised not only directly by the court, but also indirectly by an insolvency representative where, for example, the insolvency representative itself is subject to control or supervision by the court or other regulatory authority. The GEI suggests that mere supervision of an insolvency representative by a licensing authority would not be sufficient'

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.

The powers of the DGF and the appointed person can be seen to satisfy this test:

- (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".*

Which proceedings is for the purpose of reorganisation or liquidation

Owing to 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.

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.

As the Company is in liquidation this will satisfy this test.

For full marks on this question, a more elaborate discussion on the requirement of collective should be made as well as a discussion if the DGF can be said to qualify as a "foreign court".

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]. 5 marks**

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

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

Pursuant to article 2(d) of MLCBI a foreign representative a foreign representative is defined as being:

"a person or body, including one appointment on an interim basis, authorised in a foreign proceeding to administer the reorganisation or the liquidation of the debtor's assets or affairs or to act as a representative of the foreign proceedings"

The representative does not have to be authorised or directly supervised by the court, but it may be authorised by a government body or a supervisory body which is indirectly supervised by the court. In the example of the Deposit Guarantee Fund (DGF) this is a government body of Country A and as such Ms. G would fall under the remit to be authorised by such government body.

The affidavit stated that the DGF responsible for the winding down via liquidation, and has the full powers of the liquidator under the law of country A. Although it is not expressly stated that the government body (DFG) is regulated by the Court and therefore in line with the provisions, it is assumed this is the case as the powers are granted under the law of the country and therefore would satisfy this test.

In relation to 'administer the reorganisation or the liquidation of the debtors assets', it can be seen that DGF has extensive powers allowing them to deal with/dispose of the assets of the company, ongoing management and duties of the Company.

It is noted that it would need to be confirmed that the requisite documents were filed when Ms. G replaced Ms C as the authorised officer by DGF. Resolution 1513 excludes some powers notably the sale of assets, this may present a challenge for the court. It is not clear from the details provided if the Company has assets available or recovery in the UK, so this may not affect the representation which is sought and an exemption may be able to be applied.

*** End of Assessment ***