



**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: 32 out of 50

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

### **QUESTION 1 (multiple-choice questions) [10 marks in total] 8 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] 9 marks

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

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

Under the MLCBI, the issue of the appropriate date to determine the COMI of a debtor was not specifically addressed. However the Guide to Enactment and Interpretation of the UNCITRAL Model Law on Cross Border Insolvency has suggested that the appropriate date to determine the COMI of a debtor is the date of commencement of the foreign proceeding [paras 157 – 160]. This is after having regard to the evidence required to accompany an application for recognition under article 15 and the relevance accorded the decision commencing the foreign proceeding and appointment of the foreign representative.

For full marks it should be addressed that because it is not explicitly laid out there are slightly different approaches in different jurisdictions.

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

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

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

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

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

Statement 1 – Article 30. Coordination of more than one foreign proceeding

Statement 2 – Article 32. Rule of payment in concurrent proceedings

Statement 3 – Article 16. Recognition of presumptions

### **Question 2.3 [2 marks] 2 marks**

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

In the *IBA* case appeal, the Court of Appeal have identified that the issue to be determine in this case was whether as a matter of settled practice the court should not exercise its power to grant the indefinite Moratorium Continuation as to do so would;

- a) In substance prevent the English creditors from enforcing their English law rights in accordance to Gibbs Rule; and/or
- b) Prolong the stay after the Azeri reconstruction has come to an end.

In upholding the decision that the court should not exercise its power to grant the indefinite Moratorium Continuation, the Court of Appeal have concluded in answering the question above that:

- a) The English court could only properly grant the indefinite Moratorium Continuation if it were satisfied that (i) the stay would have to be necessary to protect the interest of *IBA*'s creditors and (ii) the stay would have to be an appropriate way of achieving such protection. In this case, the Court of Appeal held that neither these conditions had been satisfied.
- b) The Court of Appeal held that once the foreign proceeding has come to an end and the foreign representative cease to hold office, there is no scope for further orders in support of the foreign proceeding to be made and any relief previously granted under the Model law should terminate.

### **Question 2.4 [2 marks] 2 marks**

In terms of relief, what should the court in an enacting State, where a domestic proceeding has already been opened in respect of the debtor, do after recognition of a foreign main proceeding? In your answer you should **mention the most relevant article of the MLCBI**. What (ongoing) duty of information does the foreign representative in the foreign main proceeding have towards the court in the enacting State? Here too you are required to **mention the most relevant article of the MLCBI**.

Where a concurrent domestic proceeding and foreign main proceeding exist pursuant to Article 29(b) of the MLCBI where a foreign main proceeding is recognised, the court in an enacting state shall review any relief granted to the foreign representative under article 19 or article 21 or any automatic relief granted to the foreign main proceeding. If the relief granted is inconsistent with the domestic insolvency proceeding, the court in an enacting state shall modify or terminate the relief granted.

Pursuant to Article 18 of the MLCBI, the foreign representative, from the time of filing for recognition of the foreign proceeding have the duty to promptly inform the court in an enacting state of:

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

### **QUESTION 3 (essay-type questions) [15 marks in total] 6,5 marks**

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

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

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

Access rights as provided under MLCBI have provided the foreign representative standing before the courts in the enacting state without the need for the foreign proceeding to be recognised in the enacting state and without the need for the foreign representative to meet formal requirements of the enacting state such as licenses or consular action. This is provided under Article 9 of MLCBI. Access rights also allows the foreign representative standing to open domestic insolvency proceedings in the enacting state, provided that all requirements for such an opening are otherwise met. This is provided under Article 11 of MLCBI. Meanwhile co-ordination rights allows the court in enacting state to deal directly with the foreign representative.

The foreign representative of a foreign proceeding opened in State B stand to benefit from the access and co-ordination rights in State A as the foreign representative is able to use the available local tools for recovery without the need for any separate proceedings in State A to obtain standing before the courts of State A. This will enable the foreign representative of State B to save time and cost hence maximising the recoveries to the foreign creditors without being burdened with unnecessary domestic proceedings and without the standing creating any adverse jurisdictional consequences in State A.

**For full marks on this question the following should also be addressed:**

- **Cooperation:** Similar to access rights, the cooperation provisions in the MLCBI (articles 25-27) also operate independently of recognition and it is not a prerequisite to the use of the cooperation provisions that recognition of the foreign proceedings is obtained in



advance. Courts in State A can freely cooperate with the foreign representative without having to worry whether the status in State B of the foreign representative can be recognised in State A.

- **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] 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.

In making the application for recognition of foreign proceeding, the foreign representative in the foreign proceeding opened in State B must consider to include the documents evidencing the foreign proceedings and his appointment which meets the requirement under paragraph 2(a) or 2(b) or 2(c) of Article 15 of MLCBI to support the recognition application. Should the foreign representative need to rely on any other documents which does not meet the requirements of paragraph 2(a) or 2(b) of Article 15 and is forced to rely on other evidential documents as stipulated under paragraph 2(c) of Article 15, the foreign representative may be required to provide reasonable explanation to the court of State B as to why the alternate form of proof should be accepted.

The foreign representative is also required to include a statement identifying all foreign proceedings in respect of the debtor that are known to the foreign representative in the submission to court of State B as required under paragraph 3 of Article 15 of MLCBI. The foreign representative may also be required to provide a translation of the documents submitted to court of State B.

Notwithstanding that the presumption under Article 16 of MLCBI is relied upon and in the absence of any objections, the foreign representative may need to consider establishing the facts supporting the existence of a “main” proceeding as some courts have said that they are not bound to automatically accept the Article 16 presumption as the receiving court still have the rights to review the application to determine all requisite for recognition are met.

In cases where there is an allegation that there is a separation between the place of the debtor’s registered office and its alleged COMI (Centre of Main Interest), the burden of proof to satisfy the receiving court of the location normally lies with the party alleging the COMI is not at its place of registration which may be a creditor or an interested party. However, some state may apply a different approach and may place the burden of proof to the foreign representative to satisfy the court instead (Tradex Swiss AG, 384 B.R 34,33 (Bankr. D. Mass 2008) CLOUT 791).

**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.
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.

The foreign representative may consider requesting for relief provided under Article 19 of MLCBI from the enacting state prior to the recognition of the foreign proceeding where there is an urgent need to protect the assets of the debtor. The foreign representative may seek for a stay of execution against the debtor's assets and seek for the administration or realization of all or part of the debtor's assets located at the enacting state to be vested with the foreign representative, and/or any relief mentioned in paragraph 1(c), (d) and (g) of Article 21 MLCBI. In seeking for the pre-recognition relief, the foreign representative must ensure that an application for recognition must have been made to the enacting state as the court have no authority to consider such request under MLCBI should the recognition application is not made to the enacting state court. It must be noted that Article 19 MLCBI allows for flexibility in the interim relief that can be granted as the wording of Article 19 is expressed in a non-exhaustive terms.

Upon recognition of foreign proceeding, the foreign representative may consider requesting for relief provided in Article 20 MLCBI to (a) commence or continue a stay of individual actions or individual proceedings concerning the debtor's assets, rights, obligations or liabilities; (b) to stay the execution against the debtor's asset and (c) to suspend the right to transfer, encumber or otherwise dispose of any assets of the debtor. Notwithstanding the automatic or mandatory nature of the stay provided in paragraph 1 of Article 20 MLCBI, paragraph 2 of Article 20 MLCBI expressly provides that the effect of the relief is subject to exceptions or limitations that may exist in the law of the enacting state to grant protection to classes of people who would normally receive protection in insolvency proceedings commenced in the enacting state. The limitations can include repossession of goods in debtor's possession under hire purchase agreement or rights to set-off against a claim by the debtor or discretion for the enacting state court to modify or terminate the stay on such terms and conditions as the court deems fit.

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

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

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

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?

Unless extended under paragraph 1(f) of Article 21 MLCBI, the relief granted under Article 19 MLCBI terminates upon the decision for the application for recognition of foreign proceedings.

It should be noted in the answer also, that it could be possible, however art. 21 provides for other forms for protection leaving the freezing order un-warranted.

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

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

**(1) Background**

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

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

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

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

***Classification of the bank as troubled***

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

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

***Classification of the bank as insolvent***

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

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

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

### ***Provisional administration***

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

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

- (i) the DGF (acting via an authorised officer) begins the process of directly administering the bank's affairs. Articles 35(5) and 36(1) of the DGF Law provide that during provisional administration, the DGF shall have full and exclusive rights to manage the bank and all powers of the bank's management.
- (ii) Article 36(5) establishes a moratorium which prevents, *inter alia*: the claims of depositors or creditors being satisfied; execution or enforcement against the bank's assets; encumbrances and restrictions being created over the bank's property; and interest being charged.

### ***Liquidation***

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

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

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

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

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

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

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

Article 35(1) of the DGF Law specifies that an authorised person, must have: *"...high professional and moral qualities, impeccable business reputation, complete higher education in the field of economics, finance or law...and professional experience necessary."* An authorised person may not be a creditor of the relevant bank, have a criminal record, have any obligations to the relevant bank, or have any conflict of interest with the bank. Once appointed, the authorised officer is accountable to the DGF for their actions and may exercise the powers delegated to them by the DGF in pursuance of the bank's liquidation.

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

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

## **(2) The Bank's liquidation**

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

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

Those operations included:

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

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

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

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

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

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

**QUESTION 4.1 [maximum 15 marks]**

Prior to any determination made in the English Proceedings, Ms G, in her capacity as authorised officer of the Deposit Guarantee Fund (or DGF) of Country A in respect of the

liquidation of the Commercial Bank for Business Corporation (the Bank), together with the DGF (the Applicants), applied for recognition of the liquidation of the Bank before the English court based on the Cross-Border Insolvency Regulations 2006 (CBIR), the English adopted version of the MLCBI.

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

4.1.1 whether the Bank's liquidation comprises a "foreign proceeding" within the meaning of article 2(a) of the MLCBI [**maximum 10 marks**]; **6 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.

In considering whether the Bank's liquidation process comprises as a "foreign proceeding" within the meaning of Article 2(a) of MLCBI, the judge will need to establish that the Bank's liquidation meets the elements of the definition of sub paragraph (a) of Article 2. The first element being whether the liquidation of the Bank is a judicial or administrative in nature in that the liquidation of the Bank is pursuant to a law relating to insolvency (Australia: Raithatha v. Ariel Industries PLC [2012] FCA 1526). If the process includes sending notice of liquidation to creditors and requesting proof of debts from creditors, the process is said to meet the administrative elements. Where the court is involved in reviewing the actions of the liquidator, the process becomes judicial (United States: Betcorp Limited 400 B.R 266, 280-281 (Bankr. D. Nev. 2009) CLOUT 927). In this case the judge may need to review whether the process that will be undertaken by the DGF and its authorized person in seeking and satisfying its creditors' claims is akin to the administrative process undertaken in an insolvency proceeding and/or whether there will be an involvement by the court under the foreign act to supervise the action of the liquidator.

The next element of the definition to be established is whether the Bank's liquidation process meets the definition of a collective proceedings. In evaluating the definition of collective proceedings for the purpose of MLCBI or CBIR, the courts have identified collective proceedings as having characteristics which includes:

- a) Imposition of an orderly regime that affects the rights and obligations of all creditors and all of the assets of the debtor;
- b) Distribution of assets is in accordance with statutory priorities;
- c) Interested parties should not be able to individually enhance their position by exploiting some fortuitous circumstance which may yield an unfair advantage;
- d) Creditors' participation is a reality;
- e) Creditors should have the opportunity to seek appellate review of the proceeding;
- f) Adequate notice should be provided to creditors including unsecured creditors under the applicable foreign law.

The next element to be established is whether the foreign law in which the Bank's liquidation is conducted under is a law which is pursuant to a law relating to insolvency. The MLCBI acknowledges the fact that foreign liquidation and reorganization process might be conducted under a law which is not labelled as insolvency act but nevertheless deals with insolvency or

severe financial distress. As such, the judge will need to evaluate if the provision in the LBBA in which the Bank's liquidation is conducted fits the criteria of a law which deals with insolvency and severe financial distress.

The next element to be established is whether the assets and affairs of the debtor are subject to control or supervision by a foreign court. The Guide to Enactment and Interpretation indicates that although the definition under subparagraph (a) of Article 2 is intended to be formal in nature, it may be potential rather than actual. The Courts have indicated that control or supervision may also be exercised indirectly by the courts where for example the insolvency representative who are controlling and supervising the insolvency process is itself subject to control by the court or other regulatory authorities. In this case, regards is to be given to the fact that whether the DGF is subject to a control of the court or the regulatory authorities under the law of Country A.

The last element to be established is whether the process considered in the application is for the purpose of liquidation or reorganization and that the power conferred and the duties imposed to the foreign representative are not limited than the powers and duties associated with liquidation or reorganization process.

Should the Bank's liquidation process is able to satisfy the required element to establish the definition stipulated under subparagraph (a) of Article 2, the judge will be able to consider recognising the process as "foreign proceeding".

**The answer should include an evaluation of whether *you* think the criteria are met based on the fact of the case.**

The definition of "foreign representatives" under Article 2(d) of MLCBI means a person or body, including one appointed on an interim basis, authorized in a foreign proceeding to administer the reorganization or the liquidation of the debtor's assets or affairs or to act as a representative of the foreign proceeding. In this case, DGF and its authorised officer Ms. G may be considered to meet the definition of "foreign representatives" as both the bodies and personnel appointed are authorised under the law of Country A to administer the Bank's liquidation and their duties and powers would include as suggested by the Guide to Enactment and Interpretation to seek recognition, relief and co-operation in another jurisdiction and for the purpose of representing the foreign proceeding. In addition, authority given to the bodies and person may not necessary only by the foreign courts but also includes appointments made by special agency other than the court as MLCBI does not specify that the foreign representative must be authorised by the foreign court.

For full marks it should also be addressed how the parties are appointed and a more inclusion of the facts.

**\* End of Assessment \***