



SUMMATIVE (FORMAL) ASSESSMENT (RESIT SEPTEMBER 2022): MODULE 2A

THE UNCITRAL MODEL LAWS RELATING TO INSOLVENCY

This is the **summative (formal) re-sit assessment** for **Module 2A** of this course. Please read the instructions 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. This assessment 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.assessment2Aresit]**. An example would be something along the following lines: 202223-336.assessment2Aresit. **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. This assessment must be returned to David.Burdette@insol.org by e-mail no later than **23:00 (11 pm) BST (GMT +1) on Monday 26 September 2022**. When returning the assessment by e-mail, your e-mail must 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. Prior to being populated with your answers, this assessment consists of **14 pages**.

ANSWER ALL THE QUESTIONS

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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]

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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 **does not** reflect the purpose of the Model Law?

- (a) The purpose of the Model Law is to provide greater legal certainty for trade and investment.
- (b) The purpose of the Model Law is to provide protection and maximization of the value of the debtor's assets.
- (c) The purpose of the Model Law is to facilitate the rescue of a financially troubled business, by providing a substantive unification of insolvency law. 1 Mark
- (d) The purpose of the Model Law is to provide a fair and efficient administration of cross-border insolvencies that protects all creditors and the debtor

Question 1.2

Which of the following statements are reasons for the development of the Model Law?

- (a) The increased risk of fraud due to the interconnected world.
- (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) All of the above. 1 Mark

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

Which of the following rules or concepts set forth in the Model Law ensures that fundamental principles of law are upheld?

- (a) The *locus standi* access rules.
- (b) The public policy exception. 1 mark
- (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 Argentina, foreign main proceedings are opened in South Africa and foreign non-main proceedings are opened in Argentina. Both the South African foreign representative and the Argentinian 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), Argentina 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 Argentina will be recognised in the UK despite Argentina not having implemented the Model Law.

(b) Both the foreign main proceedings in South Africa and the foreign non-main proceedings in Argentina will not be recognised in the UK because the UK has no principle of reciprocity and Argentina has not implemented the Model Law.

(c) Both the foreign main proceedings in South Africa and the foreign non-main proceedings in Argentina will be recognised in the UK. 1 Mark

(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. 1 mark

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.

1 mark

(c) The court should be satisfied that the foreign proceeding is a main proceeding.

(d) All of the above.

+

Question 1.8

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

(a) COMI is not 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) For an individual debtor, the Model Law does contain a rebuttable presumption that the debtor's habitual residence is its COMI.

(d) All of the above. 1 mark

Question 1.9

An automatic stay of execution according to article 20 in the Model Law covers:

(a) Court proceedings.

(b) Arbitral Tribunals.

(c) Both (a) and (b). 1 mark

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

Question 1.10

Article 13 grants access to the creditors in a foreign proceeding. Which of the following statements correctly describes the protection granted in Article 13?

(a) A foreign creditor has the same rights regarding the commencement of, and participation in, a proceeding as creditors in this State. 1 mark

(b) A foreign creditor has the same rights as it has in its home state.

(c) All foreign creditors' claims are, as a minimum, considered to be unsecured claims.

(d) Article 13 contains a uniform ranking system to avoid discrimination.

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

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Question 2.1 [maximum 3 marks] 2 marks

Under the MLCBI, **explain and discuss** what the appropriate date is for determining the COMI of a debtor?

The Model Law on Cross Border Insolvency (MLCBI) does not provide a single answer for what is the appropriate date for determining the COMI (centre of main interests) of a debtor. However, the MLCBI Guide to Enactment and Interpretation suggests that the appropriate date to determine the COMI of a debtor is the date of the commencement of the foreign proceeding. Determining the COMI is important because it affects the recognition and relief granted to a foreign proceeding by the enacting state, that is, whether it should be classified as a foreign main or foreign non-main proceeding. However, it should be noted that the conditions for recognition outlined in Article 15 do not include specific guidelines that would allow the court to which the application for recognition is made, to evaluate the foreign court's decisions to allow for the opening of the foreign proceeding. Such an exercise may be time-consuming, and it is recommended that a recognition application be granted at the earliest possible time according to Article 17(3). Nevertheless, Article 17(4) of the MLCBI allows for the recognition decision to be modified or terminated if there is evidence that conditions for granting the recognition no longer exist or are lacking fully or partially. Different viewpoints suggest that the appropriate date should be the date of the filing of the recognition application or the date on which the recognition application is granted. **Position in US (different approach) and US case law?**

Question 2.2 [maximum 3 marks] 2 marks

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

Statement 1 *"This Article lays down the requirements of notification of creditors."*

Statement 2 *"This Article is referred to as the 'Safe Conduct Rule'".*

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

Statement 1: Article 14 - Notification to Foreign Creditors of a proceeding under law of the enacting State relating to insolvency. **Yes**

Statement 2: Article 10 - Limited Jurisdiction **Yes**

Statement 3: Article 31 - Presumption of insolvency based on recognition of a foreign main proceeding. **Art 16(3)**

Question 2.3 [2 marks] 1 mark

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.**

At issue in the *IBA* case appeal was whether the court exercise its discretionary powers to grant the relief pursuant to Article 21 of the Model Law which was incorporated in the English regulations for Cross Border Insolvency (the CBIR), in the form of an indefinite moratorium. The Court of Appeal held that in order to grant the requested relief it would have to satisfied that the stay, (in the form of a moratorium) was needed for the protection of the interest of the creditors of *IBA*. **Yes (issue 1)** Additionally, the stay was considered as the most appropriate way to protect the rights of *IBA*'s creditors.

Issue 2: Based on Article 18 of the MLCBI, the English Court of Appeal in the *IBA* case appeal held that had the MLCBI ever contemplated the continuance of relief after the end of the relevant foreign proceeding, it would have addressed the question explicitly and provided appropriate machinery for that purpose.

Question 2.4 [2 marks] 1 mark

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

- Article 25 states that it should be mandatory for the court in the enacting state to engage in direct communication and to request information or assistance **No - Article 29(a) MLCBI ("(i) any relief granted under article 19 or 21 must be consist with the domestic proceeding in the enacting State and (ii) if the foreign proceeding is recognised in the enacting State as a foreign main proceeding, article 20 does not apply")**

Article 18 provides that a foreign representative for a foreign proceeding, from the moment an application for recognition has been made, communicate in a timely manner, any developments such as changes in the status of the foreign proceeding, or in the appointment of the foreign representative. Additionally, the foreign representative must inform the enacting state of any other known proceedings of which the debtor is a party. **Yes**

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

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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

The foreign representative is considering his options to secure the value of the debtor's assets located in State A. With reference to the Model Law's provisions on access and co-operation, explain how these rights in State A can benefit the foreign representative.

The Model Law on Cross Border Insolvency has provisions that address access and co-operation between foreign representatives and foreign courts. Article 9 of the MLCBI states that, "a foreign representative is entitled to apply directly to the courts of the enacting state". Therefore, if State A has adopted the Model Law or some version of the provision in article 9, **yes** then the foreign representative would have access to the courts in State A, even if the foreign proceeding has not been recognized in State A. Additionally, according to Article 11 of MLCBI, **yes** a foreign representative has the standing to request the commencement of an insolvency proceeding in the enacting state, once the relevant conditions are satisfied and regardless of recognition. This is useful since allows the foreign representative to communicate with the court and it may be vital for the safeguarding of the debtor's assets and for the protection of the interest of the creditors. The access rights along with the co-operation between and foreign representative and foreign court can result in a more effective and efficient administration of insolvency proceedings and consistency in the treatment of stakeholders. Article 25(1) of the Model Law **yes** states that in insolvency proceedings reference in Article 1 of the Model Law, the court and foreign representative must co-operative to the full extent possible whether directly or through a person or body with administering a reorganization or liquidation proceeding. Article 25(2) provides that court may request information or assistance and communicate directly with the foreign representative or foreign court. Article 26 enables the foreign representative in the exercise of its duties, subject to court supervision to initiate direct communication with a foreign court and foreign representative and to co-operate as best as possible. These provisions for co-operation exist independently of the granting of application for recognition. Article 27 outlines some ways in which co-operation may be achieved by a list of procedure tools for co-operation. However, these procedural guidelines should be used alongside any local guidelines. Using the access rights and co-operations provisions the foreign representative should communicate directly using the most appropriate means whether email or some other appropriate means to inform that foreign courts of the foreign proceeding commenced in State B and his

appointment as the foreign representative by submitting the documents outlined in Article 15 of the Model Law and make an application for recognition of the foreign proceeding and relief. The foreign representative may be able to obtain an interim stay of any proceeding pursuant to Article 19, subject to recognition, that would stop any potential actions that may destroy the value of debtor's assets or remove any assets for the general pool available for realization. Likewise, any assets for the debtor located in State A could be entrusted to a foreign representative or foreign court for purpose of preserving the value and realization according to Article 19.1(b).

Save time & costs?

Question 3.2 [maximum 5 marks] 3 marks

For a recognition application in State A to be successful, the foreign proceeding opened in State B must qualify as a "foreign proceeding" within the meaning of article 2(a) of the MLCBI and the "foreign representative" must qualify as a foreign representative within the meaning of article 2(d) of the MLCBI. Assuming that 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.

Before recognition can be granted, it is necessary for certain conditions to be met. These include:

1. Evidence - Article 15 **yes** provides the procedural guidelines for evidentiary requirements a foreign representative should submit when a request for recognition of a foreign proceeding (whether main or non-main) is made to a foreign court.
2. Restrictions - Article 6 of the Model Law permits the court of an enacting state to an action governed by the Model Law, if the action is expressly contrary to the public policy of that state. The application of this Article should not used where it is not fundamental importance for the enacting state. **Yes**
3. Exclusions - Article 1 (2) **yes** outlines certain types of proceedings which may qualify for exemption from the Model Law application. Examples of entities which may be bank or financial institutions and insurance companies. The rationale for this recommendation is that these entities generally fall under special regulations and administration.
4. Limitations - Article 2 defines the qualifications needed to be foreign proceeding. It is a requirement for all the criteria to be met for an application for recognition to be granted. **Art 3 restrictions?**

5. Judicial Scrutiny – Article 4 [art 16?](#) provides the opportunity for an enacting state to provide clarity where any duties or responsibilities are carried out by an authorized body (a government agency) other than a court. This creates transparency in the process, which increases the likelihood of effective co-operation and communication between the foreign representative and the court.

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. Sufficient evidence: Article 15 of the Model Law sets forth in paragraph 2 what evidence in respect of the commencement of the foreign proceedings and the appointment of the foreign representative must accompany the recognition application. A statement identifying all foreign proceedings in respect of the debtor that are known to the foreign representative must also accompany the recognition application (Article 15(3) of the Model Law).
4. 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.
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] 4 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. Also address which restrictions, limitations or conditions should be considered in this context. For the purposes of this question, it can be assumed that there is no concurrence of proceedings.

Assuming that the foreign representative in State B, has applied for recognition of the foreign proceeding in State A, and the courts of State A has granted the recognition. Article 21 of the MLCBI allows the foreign representative to request relief to protect debtor's assets. The court in State A has the discretion to grant such relief that it deems appropriate for safeguarding the assets. Prior to recognition, the type of

relief may include an interim stay of any individual actions against the assets of the debtor. Similarly, the discontinuation of any previously commenced proceeding against the debtor's assets may also be stayed. **Yes**

Once recognition is granted, if the foreign proceeding is deemed to be foreign main proceeding, it is mandatory for an automatic stay against any action involving the debtor's assets to be enforced pursuant to the provisions of Article 20 of the Model Law. Regardless of automatic stay being in place, a creditor may still take individual action against the debtor, nor does it prohibit other creditors from filing claims in any such proceedings opened in State A. **Yes**

Article 21(1) allows the court to upon the request of the foreign representative to grant any relief it is convinced is necessary for the protecting of creditor's interest and to safeguard the debtor's assets. This relief may be granted whether the foreign proceeding is established as a foreign main or foreign non-main proceeding. **Yes**

The conditions under which relief should be granted are outlined in Article 22 of the Model Law. it requires to court to ensure that in granting the requested relief, the interest of the creditors and other related parties are protected. There is also option to limit the relief to specific time period (until recognition) and to modify or discontinue the relief. Any relief granted should not jeopardize any public policy rules. **Yes** In scenarios, where treaties between the countries exist on a related matter, the provisions of the treaties are given preference to the Model Law.

Question 3.4 [maximum 1 mark] 1 mark

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

The IBA case appeal, is an example of a case law which demonstrates that any interim relief granted pursuant to Article 19 of the Model Law prior to recognition, is unlikely to remain post-recognition. The judge in the English Court of Appeal found that once the foreign proceeding ended and foreign representative was no longer an office holder, any relief previously granted under the Model Law should end as there was no longer any scope for such an order, in this case (the granting of an indefinite moratorium). Article 22 (3) gives the court the discretionary power to discontinue or modify any previously granted relief at the request of an affected person (the creditors) if the terms of which such relief was granted no longer exist or were lacking fully or partially.

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

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 commenced 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 by 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 [] 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]

Commented [DB5]: 14/15

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

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

- 4.1.1 whether the Bank's liquidation comprises a "foreign proceeding" within the meaning of article 2(a) of the MLCBI [maximum 10 marks]; **10 marks** and
- 4.1.2 whether the Applicants fall within the description of "foreign representatives" as defined by article 2(d) of the MLCBI [maximum 5 marks] **4 marks**.

While not all facts provided in the fact pattern given for this 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.

For an application for recognition to be granted the Model Law outlines several conditions, one of which is that insolvency proceeding fits the definition of a foreign

proceeding **yes**. Article 2(a) of the Model Law defines a foreign proceeding as, “a collective judicial or administrative proceeding in a foreign state, including an interim proceeding, pursuant to the law relating to insolvency, in which the assets and affairs of the debtor are subject to control or supervision by a foreign court for the purpose of reorganization or liquidation”. **Yes** This definition was implemented into the Cross Border Insolvency Regulations 2006 which provides the guidelines for cross-border insolvency matters in the English Court. In determining whether the application for recognition should be granted, the judge should do detailed review of the key characteristics of the definition of a “foreign proceeding” to ensure that there is sufficient evidence to support the decision in respect of the recognition application. **yes**

The first characteristic of a foreign proceeding is that it must be judicial or administrative proceeding **yes** that is based insolvency related law in the enacting state. In the scenario, the applicant The Deposit Guarantee Fund (DGF) is a governmental body of Country A, with responsibility for the liquidation of the Bank. The court of County A has empowered the act as the liquidator under Articles 77 or the LBBA Act. The DGF is also authorized to act as the liquidator pursuant to Articles 37,38,37-52,523 and 53 if the DGF Law. The liquidation is an insolvency related matter, and therefore satisfies criteria as to the type of foreign proceeding allowed.

Secondly, the foreign proceeding must be collective in nature. **Yes** This means that it should include all the assets and liabilities of the debtor, permissible under the statutes of the foreign state. The Guide to Enactment and Interpretation of MLCBI (The GEI) also suggests that a collective proceeding is one which based on a desire to obtain global solutions for all stakeholders in an insolvency matters through coordination. **Yes**

Thirdly, a foreign proceeding should have established control or supervision of the assets and affairs of the debtor or any other official body. **Yes** In accordance with the Model Law, the CBIR allows court supervisors to be potential in nature or direct or indirect. In this scenario the supervision of the court indirect in nature since the liquidation was administered by the DGF, a government body who derived its power through the laws of County A.

Lastly, the fact that the foreign proceeding for which the recognition was sought by the DGF was a liquidation, the characteristic of the purpose of the proceedings being either for reorganization or liquidation was satisfied.

Based on the evidence provided, the liquidation proceeding could qualify as a foreign proceeding under the CBIR provisions and the definition of foreign proceeding therein which is based on the Model Law. However, the judge would also have to consider the liquidation proceeding involved a bank which is usually excluded according to Article 1(2) of Model and of the CBIR respectively. In making his ruling it would be useful for the judge to review the MLCBI Guide to Enactment and Interpretation. Paragraphs 60-65 comment on entities such as banks which are usually excluded from cross-border insolvency proceedings due to special regulatory regimes and to mitigate against instability in financial markets. The recommendations state that in deciding whether to recognize a foreign proceeding the court should ensure that it does not unintentionally and undesirably impose limitations on the right of an insolvency administrator or court to seek assistance or recognition in an enacting state, purely because such a proceeding is subject to a special regulatory regime.

The CBIR provides for recognition and relief where the debtor has its COMI (centre of main interest) or an establishment in the jurisdiction of the foreign representation. In the absence of other evidence, it can be presumed that the registered office of the Commercial Bank for Business Corporation (the Bank) is the COMI of the debtor. At common law, the Standard International bank Ltd 2010 case can be used to strengthen this presumption. At issue was the application of COMI by the courts in UK in a dispute between Antiguan and US representatives as to which proceeding should be recognized as the foreign main proceeding. Judge Lewison J ruled in favour of the Antiguan proceeding by application principle of the registered office was the COMI, except where there is other objective evidence that is easily ascertainable to third parties. The judge also ruled that US Proceeding, which was a receivership, was not foreign proceeding as defined by the Model Law and incorporated in the CBIR. Similarly, qualification as a foreign representative had not been met by US. The ruling was upheld on appeal.

The Model Law defines a foreign representative as a person or body, with the power in a foreign proceeding to administer the reorganization of the liquidation of the assets and affairs of a debtor or to act as a representative of the foreign proceeding. **1 mark** The definition includes a representative that is appointed on an interim basis. The Cross Border Insolvency Regulations 2006 of England and Wales has incorporated this definition of a foreign representation which can found in Schedule 1, Article 2(j). The DGF was empower through the Article 77 of the LBBA **Yes** of the foreign state to act as the liquidator under special regulatory regime that governs commercial banks in County A. Ms G has been authorized at act as a representative of the liquidator, the DGF. She is appropriately authorised since the DGF allows for the appointment of authorised officer pursuant to Articles 37,38,47-52,521 and 53 of the DGF Law as well as by the special resolution passed by the executive board Resolution 1513. **Yes** The definition of a foreign representative put forward by the Model Law does not specify that a foreign representative by authorised by a court, therefore the DGF, which is governmental body fits those criteria for qualification as a foreign representative. **Yes**

Under the provisions of the Model Law, which have been incorporated by the English Court through CBIR, reciprocity is not a requirement for recognition to be granted. Therefore, although County A has not adopted the MLCBI, it is still possible for recognition to be granted by English court once an application for recognition and assistance has been received from the foreign representative. It is reasonable to assume that foreign representative may have an interest in the proceedings commenced in the High Court of England and Wales involving the fraud at the Bank. The foreign representative may want to request information and assistance that may be useful in carrying out the duties of as liquidator.

*** End of Assessment ***