



**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](mailto: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

Commented [DB1]: 43 out of 50 = 86%

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]

Commented [DB2]: 9 out of 10

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. Yes
- (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. Yes

### 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. **Yes**
- (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.** **Yes**
- (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. **Yes**

(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. **Yes**

#### 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.

**Yes**

- (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.** Yes

**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).** Yes
- (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.**
- (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]**

Commented [DB3]: 10 out of 10

**Question 2.1 [maximum 3 marks] 3 marks**

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

[The appropriate date for determining the COMI of a debtor is the date of the commencement of the foreign proceeding (even though the COMI of a debtor can move and that MLCBI does not have a direct definition of what or where COMI is in its articles).

It is also relevant to highlight that, when determining what is the COMI of an establishment that has ceased its activities it is important to take into consideration the precedent *Morning Mist Holdings Ltd v Krys (USA)*, in which it was concluded that, since the Company was ceased, it was appropriate to consider the debtor's nerve centre where its activities used to be conducted.

The subject is still controversial.]

**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 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 lays down the rules regarding the possibility for the court to decide whether it will notify foreign creditors regarding the commencement of the local insolvency proceeding.

Statement 2 - article 10 provides the rule so called Safe Conduct and seeks to ensure that the court in the enacting State does not assume jurisdiction over all the assets of the debtor only because the foreign representative has made an application to recognize the foreign proceeding.

Statement 3 - the name of the provision is Presumption of insolvency, and is foreseen in article 16(3)]

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

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

[Specially in the decision taken by the Court of Appeal two different questions were answered regarding the decision in which it was determined that the court should not exercise its power to grant the indefinite Moratorium Continuation ("MC").

The first question: *such non exercise would, in substance, prevent the English creditors from enforcing their English rights in accordance with the Gibbs Rule*, was answered in the way the English court could only properly grant the indefinite MC if the stay was essential to protect the interest of IBA's creditors and that the MC was the right way to ensure such protection.

The court understood that neither those conditions were satisfied.

As for the second question that the Court seek to answer while dealing with the Appeal, we have the following: *the non-exercise of the power to grant the indefinite MC would prolong the stay after the Azeri reconstruction came to an end?* The answer for that take into account that the information obligation on the foreign representative - foreseen in article 18 of the Model Law - requires the foreign proceeding to still be in existence and the foreign representative to still be in office.

That being said, the Court understood that once the foreign procedure no longer exists and the foreign representative is no longer in office there is no scope for further order in support of such foreign proceeding, and any relief once granted should be terminated.

Once such questions were clarified, the Court had no other "road" to take than to uphold the decision that the Court should not exercise its power to grant the indefinite MC.]

Good answer

**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**.

[According to article 29 there are four items that should be taken into account when in the situation of a commencement of a non-main proceeding. Such items;questions that must be taken into consideration - collectively with article 29, are:



- Is the commencement going to improve either the protection of the creditor's interest or the realisation of assets in the enacting State?;
- Are non-main proceeding ("NMP") required to address the claims or the realisation of assets in the enacting State?;
- Could the NMP impede achievement of the purpose of the main proceeding?;
- Could the NMP interfere with the conduct of the main proceedings and the development and implementation of a global group insolvency solution?.

As for the duties of the foreign representative before the court where the foreign main proceeding was recognized, as mainly foreseen in article 18, they have the duty of inform the Court of (i) any substantial change in the status of the recognised foreign proceeding or the status of the foreign representative's appointment; and (ii) any other foreign proceeding regarding the same debtor that becomes known to the foreign representative.]

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

Commented [DB4]: 13 out of 15

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] 4 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 cooperation, explain how these rights in State A can benefit the foreign representative.

[The foreign representative can be benefitted from the access to rights and coordination with State A in many ways. But firstly, it is important to highlight the benefits prior to the request of recognition.

As foreseen in articles 9 and 11 of the Model Law, prior to the recognition the foreign representatives may have a direct access to the foreign jurisdiction/courts, being a clear example of the provisions that the Model Law have in its content and that could help create a coordinated insolvency system.

As for the benefits that can be obtained if the access is eventually requested, the foreign representative will be able to benefit from the protection, which State A can grant, to the debtor (the so-called stay period), a measure that aims to guarantee a "relief" to the debtor

while he reorganizes himself and negotiates a judicial reorganization plan (or a payment plan) with his creditors a plan.

Another benefit worth mentioning is access to the debtor's assets that are located in State A, which gives the foreign representative bigger control/supervision and greater ability to coordinate the debtor's assets and obligations in a State other than the one in which the main proceeding was commenced.

Furthermore, coordination with State A facilitates the foreign representative's control over the debtor company's indebtedness and facilitates the communications between the foreign representative and the debtor's creditors, given that, consequently, when doing business in State A, the debtor must very certainly have entered into contracts that may originate some credits against the company in debts, in that State.

The possibility and ease of coordinating with another State, other than State B, will facilitate the work of the "surveillance" that must be played by the foreign representative of the debtor, having bigger access to his assets and obligations, what will ended up leading the judicial reorganization proceeding to a more satisfactory conclusion.

All that said and briefly explained, the conclusion that can be pointed out is that access and coordination rights are time and cost preserving, both for the foreign representative and for the Debtor itself, being a "win-win" scenario.]

Good answer

### Question 3.2 [maximum 5 marks] 4 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.

[In addition to the requirements that the foreign proceeding filed in State B must qualify as a "foreign proceeding" within the meaning of Article 2 of the MLCBI and the "foreign representative" must qualify as a foreign representative, some of the other requirements that need to be fulfilled in order for the recognition of the foreign procedure to be granted, foreseen for in article 15 of the MLCBI are:

- the foreign representative must apply before the court of the state in which recognition is sought;
- the request for recognition must be made using the correct form (taking into account the peculiarities of each of the different jurisdictions that have adopted de MLCBI) accompanied by a copy of the decision that commenced the foreign procedure and the decision that appointed the foreign representative for the

position; or a declaration, issued by the Court in which the main procedure was commenced, recognizing the existence of the foreign procedure and the appointment of the foreign representative; or in the absence of these two documents, evidence that proves such requirements;

- the request must also be accompanied by a statement describing any and all foreign proceedings that may have already been commenced with reference to such debtor; and
- it is more appropriate for the form and all accompanying documents to be in the language of the jurisdiction in which recognition is sought.

Additionally, to the requirements foreseen in article 15 and above mentioned, it is also relevant to highlight that the foreign representative must take into consideration, prior to the request for recognition, if the debtor is the type of entity that could be excluded from insolvency regimes in such jurisdiction (accordingly to article 1(2)).

One practical example that could be mentioned is that, even though Brasil allows the liquidation of Banks, it no longer authorises the judicial reorganization of such entities, and in this scenario would not recognize as insolvency proceeding the judicial reorganization of a Bank.

Another criterion that must be considered by the foreign representative prior to the requirement is the existence of international obligations before the jurisdiction of State A that could lead up to a conflict with granting the recognition application (as foreseen in article 3, of the Model Law).

Following those lines, the foreign jurisdiction - in this case, State A -, should also take into account if the recognition is not contrary to public policy of its jurisdiction (following the foreseen in article 6 of the Model Law).

Article 16 of the MLCBI also foresees the questions that may be presumed by the jurisdiction, such as that the documents that accompanied the form are official and reproduce the truth of the facts, as well as that the debtor's centre of interest (also known as COMI) is located in the State in which the main procedure was commenced.

Finally, after presenting all the necessary documentation before the Court, article 17 of the MLCBI provides that the decision to recognize the foreign procedure must be taken as soon as possible, and the recognition may be modified or terminated at any time, if it's proven that the basis for granting the measure have been changed or been terminated.

In the context of Article 17 of the Model Law, it is also important that the Court of State A take into its own hands and decides, based on the documentation presented by the foreign representative, whether either the COMI or at least an establishment of the debtor is located in State B where the first proceedings were opened. Without a COMI or at least an

establishment of the debtor in State B, recognition cannot be granted by the court in State A.]

Good answer

**Question 3.3 [maximum 5 marks] 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. 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.

[[According to article 19 of the MLCBI, the Court has the right to grant the debtor, even before the decision on recognition of the foreign procedure is granted, if it becomes evident that it is of paramount importance to the debtor that such a measure is granted, a relief (also known as "stay period").

Such measure may include protection against possible restrictions on the debtor's assets, as well as granting the foreign representative or any other individual appointed by the Court the obligation to administer and care for all or part of the debtor's assets located in that jurisdiction.

The emergency measure provided for in article 19 may also grant the debtor one or all of the rights that would be obtained with the granting of the benefit provided for in article 21 of the MLCBI, namely:

- suspension of the right to transfer or encumber any of the debtor's assets;
- witness hearing and collection of evidence regarding any of the debtor's contracts, assets, obligations or liabilities; and
- the granting of additional relief that may be available to the liquidator under the laws of the enacting state.

After the recognition of a foreign main proceeding, according to article 20 and 21 of the MLCBI, the company that had the procedure recognized will have granted the following three (automatic) effects:

- a stay of the commencement or continuation of individual actions or individual proceedings concerning the debtor's assets, obligations, liabilities and rights;
- a stay of execution against the debtor's assets; and
- a suspension of the right to transfer, encumber or otherwise dispose of any assets of the debtor.

This means that, in addition to creditors being prohibited from taking measures that may reduce or interfere with the debtor's assets, the debtor must also refrain from taking any measure that may reduce or squander his assets.

Such protection has as its main objective to guarantee, both to creditors and to the debtor, that the negotiations of a restructuring plan can be conducted in a more peaceful and organized way.

As for what is foreseen in article 21 of MLCBI, it is important to highlight that the Court may, in a discretionary manner, take the actions that they understand as necessary to protect the interest of the debtor's assets, since, in addition to the assets being part of the debtor's debt restructuring plan, the court cannot allow certain creditors to receive their credits before another (if this were to happen, one of the basic principles of insolvency would be affected, that of *par conditio creditorum*).

Additionally, it is worth to mention article 22 of the Model Law, that indicated that any kind of relief pursued and granted under article 19 or under article 21 of the Model Law requires that the court/jurisdiction of State A to be convinced that the interest of the creditors and third related parties are adequately protected, and any relief may be subject to the conditions that the Court imposes.

Regarding such provision, it is important to take into account the IBA precedent and that, if State A is a jurisdiction located in the UK, such precedent must be taken into account regarding the indefinite Moratorium Continuation.

Adding to article 19, 21 and 22 of the Model Law it is also relevant to take into account article 3 of the Model Law, that foresees that State A to verify that there are no existing rules within the jurisdiction that could cause a conflict when granting the requested relief (as well as must be done when State A analyses the request for foreign proceeding recognition).

And finally, as a complement to article 3 and as well as it must be done when deciding the request for foreign proceeding recognition, article 6 of the Model Law must be taken into consideration, to respect the public policy rule.]

**Good answer**

**Question 3.4 [maximum 1 mark] 0 marks**

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 measure granted under article 19 is intended to meet an emergency and immediate need of the debtor and must be granted quickly and widely to protect the company while they are seeking recognition of its insolvency proceedings in the other States of their interest.

But, when the provisions of article 21 of the Model Law are taken into consideration it is possible to identify that once the debtor's emergency status has passed, he must have organized himself and sought protections and recognitions in all the states in which he has business and assets, and it is up to each of the jurisdictions to apply the MLCBI, often combined with local law to handle the procedures specifically.

The conclusion, therefore, would be that even though the court has jurisdiction to allow a continuation of the freezing order, article 21 grants a more adequate protection. This matter is the main subject that is discussed in the IBA precedent - from the English Courts -, in which the Court confirmed the decision taken in the first degree where it was determined that the court should not exercise its power to grant the indefinite Moratorium Continuation.

In conclusion, it is safe to say that maintaining such broad and global protection, could end up creating discomfort between jurisdictions/states, given that it is up to each one to regulate insolvency in its own terms, and in a sovereign way.] **Case law? Read the question!**

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

Commented [DB5]: 11 out of 15

**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 DGF acquires the full powers of a liquidator under the law of Country A.

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

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

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



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

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

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

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

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

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

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

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

Those operations included:

- (i) a breach, for eight consecutive reporting periods, of the NB's minimum capital requirements;
- (ii) 10 months of loss-making activities;

(iii) a reduction in its holding of highly liquid assets;

(iv) a critically low balance of funds held with the NB; and

(v) 48% of the Bank's liabilities being dependent on individuals and a significant increase in "adversely classified assets" which are understood to be loans, whose full repayment has become questionable.

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

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

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

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

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

**QUESTION 4.1 [maximum 15 marks]**

Prior to any determination made in the English Proceedings, Ms G, in her capacity as authorised officer of the Deposit Guarantee Fund (or DGF) of Country A in respect of the liquidation of the Commercial Bank for Business Corporation (the Bank), together with the DGF (the Applicants), applied for recognition of the liquidation of the Bank before the

English court based on the Cross-Border Insolvency Regulations 2006 (CBIR), the English adopted version of the MLCBI.

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

4.1.1 whether the Bank's liquidation comprises a "foreign proceeding" within the meaning of article 2(a) of the MLCBI [maximum 10 marks] 8 marks; and

4.1.2 whether the Applicants fall within the description of "foreign representatives" as defined by article 2(d) of the MLCBI [maximum 5 marks] 3 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.

[4.1.1. The definition given by article 2(a) for foreign proceeding is "a collective judicial or administrative proceeding in a foreign State, including an 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 reorganization or liquidation"

Therefore, prior to answering if the Bank's liquidation comprises a foreign proceeding within the meaning of article 2(a) of the MLCB, it is important to first indicate what does the UNCITRAL understands as a collective proceeding, once such concepts is highly relevant for the case.

For UNCITRAL, for a proceeding to be considered as "collective" the proceeding must aim to achieve a coordinated, global solution for all stakeholders of an insolvency proceeding. As far as cross border collective proceeding goes, it is also important to mention that the main goal of the foreign proceeding is to gather assets, address foreign creditors, and obtain a more successful proceeding - both for creditors and debtors.

Furthermore, the Guide to Enactment and Interpretation of the UNCITRAL Model Law points out that to understand whether a proceeding should be considered as collective one must take into account if all of the assets and liabilities of the debtor are dealt with in the proceeding, subject to local priorities and statutory exceptions, and to local exclusions relating to the rights of secured creditors.

That stated and, based on the facts provided above, we can safely say that the Bank's liquidation is a "collective proceeding", once it aims to track and assets the Bank's assets, as well as effectively pay or restructure its credits.

That being cleared out, and coming back to the remaining of the definitions contained in article 2(a), as regarding to the necessity for the proceeding to be started in a foreign State, The term "foreign court" is defined at article 2(e) of the MLCBI as: *"a judicial or other authority competent to control or supervise a foreign proceeding"*. In the case of the Bank, DGF has control of all of the Bank's assets and overall control of the liquidation.

As for The Deposit Guarantee Fund (DGF), it is a governmental body of Country A, and it is responsible for the administration, sale, custody, conservation, and disposal of the assets of The Bank (according to the legislation that regulates bank liquidations used in Country A, the LBBA), confirming that it is an 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.

Taking these factors into account, the Bank's liquidation is administrative, and its assets and affairs of are subject to the control of the DGF, an official body which exercises its powers in the liquidation. Therefore, it should be considered, for the purposes of the definition set out in article 2(e) of the MLCBI, as a *"foreign court"*

Furthermore, the article also indicates that the procedure, in addition to being commenced in a foreign jurisdiction, must be a procedure regulated by a *"to a law relating to insolvency"*. In the present case, although the regulation of the procedure is through the specific regulation of Country A regarding banks and banking activities, the fact is that LBBA, although not a specific insolvency law, specifically deals with the insolvency and liquidation of Banks (which is normal in several States, considering that banks generally have different regulations than common companies).

The Bank's liquidation was commenced pursuant to those provisions and therefore should be considered by the foreign Court as being *"pursuant to a law relating to insolvency"*.

Additionally, the article also indicates that, in order to be recognized as a foreign proceeding, the procedure must regulate that *"assets and affairs of the debtors are subject to control or supervise by a foreign court"*. This is also true in the case of the Bank, since

Finally, the objective of the procedure must be *"reorganizations or liquidation"*, under the terms of article 2(a), which is the case in matter presented above, once the objective of the procedure initiated in Country A is the liquidation of the Bank.]

**This is a comprehensive answer with most aspects on point.**

[4.1.2. The definition given by article 2(d) for foreign representative is the following *"Foreign representative" means a person or a body, including one appointed on an interim basis, authorized in a foreign proceeding to administer the reorganizations or the liquidation of the debtor's assets or affairs or to act as a representative of the foreign proceeding"*.

Taking that into account, and, as mentioned in the answer above, The Deposit Guarantee Fund (DGF), is a governmental body of Country A, and it is responsible for the

administration, sale, custody, conservation, and disposal of the assets of The Bank (according to the legislation that regulates bank liquidations used in Country A, the LBBA), confirming that it is an 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.

Taking these factors into account, the Bank's liquidation is administrative, and its assets and affairs of are subject to the control of the DGF, an official body which exercises its powers in the liquidation. Therefore, it can be considered, by the definition given by the Model Law, that DGF is a body, including authorized in a foreign proceeding to administer the liquidation of the Bank.

This represents the truth in the case of The Bank, considering that the regulation of the DGF, as well as the LBBA (law that regulates the liquidation of financial institutions in Country A) foresee as powers of the DGF and of any third party that the body chooses to appoint, among others not related to assets or affairs:

- (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"

That stated and, taking into account the description of DGF and its activities, DGF could also be considered as the foreign representative of the Bank, in the foreign jurisdiction.

Finally, it is important to highlight the situation and the split representation that could take place considering the appointment of DGF as well as the appointment of Ms. G. Considered the above mentioned regarding DGF, and that Ms. G also fits in the description as representative of the Bank's liquidation, there is a scenario in which both parties could split the foreign representativeness. **Reasonable answer.**

**\* End of Assessment \***