



SUMMATIVE (FORMAL) ASSESSMENT: MODULE 2A
THE UNCITRAL MODEL LAWS RELATING TO INSOLVENCY

Commented [SL1]: TOTAL = 39.5

79%

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

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

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

INSTRUCTIONS FOR COMPLETION AND SUBMISSION OF ASSESSMENT

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

1. You must use this document for the answering of the assessment for this module. The answers to each question must be completed using this document with the answers populated under each question.
2. All assessments must be submitted electronically in MS Word format, using a standard A4 size page and a 11-point Arial font. This document has been set up with these parameters – **please do not change the document settings in any way. DO NOT** submit your assessment in PDF format as it will be returned to you unmarked.
3. No limit has been set for the length of your answers to the questions. However, please be guided by the mark allocation for each question. More often than not, one fact / statement will earn one mark (unless it is obvious from the question that this is not the case).
4. You must save this document using the following format: **[student ID.assessment2A]**. An example would be something along the following lines: 202223-336.assessment2A. **Please also include the filename as a footer to each page of the assessment** (this has been pre-populated for you, merely replace the words “studentID” with the student number allocated to you). Do not include your name or any other identifying words in your file name. **Assessments that do not comply with this instruction will be returned to candidates unmarked.**
5. Before you will be allowed to upload / submit your assessment via the portal on the Foundation Certificate web pages, you will be required to confirm / certify that you are the person who completed the assessment and that the work submitted is your own, original work. Please see the part of the Course Handbook that deals with plagiarism and dishonesty in the submission of assessments. **Please note that copying and pasting from the Guidance Text into your answer is prohibited and constitutes plagiarism. You must write the answers to the questions in your own words.**
- 6.1 If you selected Module 2A as one of your **compulsory modules** (see the e-mail that was sent to you when your place on the course was confirmed), the final time and date for the submission of this assessment is **23:00 (11 pm) GMT on 1 March 2023**. The assessment submission portal will close at 23:00 (11 pm) GMT on 1 March 2023. No submissions can be made after the portal has closed and no further uploading of documents will be allowed, no matter the circumstances.
- 6.2 If you selected Module 2A as one of your **elective modules** (see the e-mail that was sent to you when your place on the course was confirmed), you have a **choice** as to when you may submit this assessment. You may either submit the assessment by **23:00 (11 pm) GMT on 1 March 2023** or by **23:00 (11 pm) BST (GMT +1) on 31 July 2023**. If you elect to submit by 1 March 2023, you **may not** submit the assessment again by 31 July 2023 (for example, in order to achieve a higher mark).
7. Prior to being populated with your answers, this assessment consists of **14 pages**.

ANSWER ALL THE QUESTIONS

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 [SL2]: SUB-TOTAL = 9 MARKS

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

Question 1.1

Which of the following statements **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.
- (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.

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

Commented [SL3]: Correct answer is (b).

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.

(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.

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

Question 1.6

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

- (a) No interim relief based on Article 19 of the Model Law is available if concurrent domestic insolvency proceedings and foreign proceedings exist at the time of the application of the foreign proceedings in the enacting State.
- (b) In the case of a foreign main proceeding, automatic relief under Article 20 of the Model Law applies if concurrent domestic insolvency proceedings and foreign proceedings exist at the time of the application of the foreign proceedings in the enacting State.
- (c) The commencement of domestic insolvency proceedings prevents or terminates the recognition of a foreign proceeding.
- (d) If only after recognition of the foreign proceedings concurrent domestic insolvency proceedings are opened, then any post-recognition relief granted based on Article 21 of the Model Law will not be either adjusted or terminated if consistent with the domestic insolvency proceedings.

Question 1.7

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

- (a) The court must be satisfied that the interests of the creditors and other interested parties, excluding the debtor, are adequately protected.
- (b) The court should consider whether the relief requested is necessary for the protection of the assets of the debtor or the interests of the creditors and strike an appropriate balance between the relief that may be granted and the persons that may be affected.
- (c) The court should 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.

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).

(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]

Question 2.1 [maximum 3 marks]

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

It was recommended by the UNICTRAL Secretariat in the updated UNCITRAL Guide to Enactment (2014) that "the date of commencement of that proceeding (foreign proceeding) is the appropriate date".

Business activity of debtor ceases after commencement of the foreign proceeding therefore when application is made for recognition, it was the foreign proceeding and activity of the foreign representative in administering the insolvency estate which could assist to indicate the debtor's COMI.

Furthermore, as the debtor's COMI can move, it would be harder to obtain evidence for establishing the same in later proceeding as evidence may evaporate and bring uncertainty to the issue.

However, the above is the general European approach and other jurisdictions (e.g. US and Australia) adopt timing like filing/hearing of the recognition application.

Question 2.2 [maximum 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'".

Commented [SL4]: SUB-TOTAL = 9 MARKS

Commented [SL5]: 2.5 marks

Could have discussed *Morning Mist Holdings Ltd v. Kryss*.

Commented [SL6]: 2.5 marks

Art 16(3) for full marks

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

Statement 1 : **Notification to foreign creditors of a proceedings or “Timely Notice” (Article 14 of the Model Law)** : foreign creditors should be notified whenever notification is required for local creditors in the enacting State

Statement 2 : **Limited jurisdiction or “Safe Conduct Rule” (Article 10 of the Model Law)** : the court in the enacting State does not assume jurisdiction over all the assets of the debtor on the sole ground of the fact that the foreign representative has made an application for the recognition of a foreign proceeding

Statement 3 : **Centre of main interests (Article 16 of the Model Law)** : in the absence of proof to the contrary, the debtor’s registered office, or habitual residence in the case of an individual, is presumed to be the centre of the debtor’s main interests

Question 2.3 [2 marks]

Commented [SL7]: 2 marks

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

In the *IBA* case appeal, the Court of Appeal had considered under Article 21 of the Model Law, whether it was appropriate to grant an indefinite moratorium which would prevent the challenging creditors from enforcing their English law rights pursuant to the rule in *Gibbs* or to prolong the moratorium after the end of the Azeri reconstruction.

It was held that the moratorium could only be extended if it was necessary to protect the interest of the *IBA*’s creditors and it was an appropriate way of achieving such protection.

In addition, creditors under the Azeri reconstruction had achieved everything they were entitled and no further protection was required given *IBA* had resumed trading. *IBA* could have commenced a parallel scheme of arrangement in the UK but chose not to do so.

Furthermore, it was the Court of Appeal’s view that the relief would override the creditors’ English law rights under the rule in *Gibbs* and it was held by the Supreme Court in *Rubin v Eurofinance SA* that Article 21 of the Model Law was concerned with procedural matters but not to circumvent the English law rights under the rule in *Gibbs*.

Lastly, under Article 18 of the Model Law, the foreign representative should promptly inform the English court of any substantial change in status of the recognized foreign proceeding or his/her appointment under the same. Both came to an end upon completion of the foreign proceeding and no further order should be made in addition to terminating the granted relief.

Question 2.4 [2 marks]

Commented [SL8]: 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(a) of the Model Law, any relief granted under Article 19 or 21 of the Model Law must be consistent with the domestic proceeding and if the foreign main proceeding is recognized, automatic relief under Article 20 of the Model Law does not apply.

Under Article 18 of the Model Law, the foreign representative is required after application for recognition of foreign proceeding is made, to promptly inform the court of domestic proceeding (1) any substantial change in the status of the recognized foreign proceeding or his/her appointment and (2) other foreign proceeding in respect of the same debtor which is known to him/her.

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

Commented [SL9]: SUBTOTAL = 10.5 MARKS

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

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

Question 3.1 [maximum 4 marks] [3.5 out of 4]

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.

Chapter II of the Model Law provided for access for foreign representative and creditors. Under Article 9, the foreign representative is entitled to apply directly to the court of State A with expedited access and without meeting certain formal requirements. [1]

Furthermore, Article 11 ensured the foreign representative (whether main or non-main proceeding) to have standing to commence insolvency proceeding in State A if conditions are met without modification. It was crucial that the foreign representative can commence such proceeding without prior recognition as there may be urgent need to preserve assets of the Debtor [1]

Should a domestic insolvency proceeding had been commenced in State A, the foreign representative is entitled to participate in the same upon recognition under Article 12.

Chapter IV of the Model Law provided for co-operation with foreign courts and foreign representative. Under Article 25 and 26, [½] court and certain officeholders (e.g. those appointed to administer debtors' assets) in State A must co-operate to the maximum extent with the foreign representative in the manner of direct communication. In urgent situation such as preserving assets of the Debtor [1], such channel forgoing the use of more formal communication would be beneficial to the interest of the creditors. A further ½ mark would have been given to mention article 27. Cooperation operates independently of recognition and is not a prerequisite for cooperation to be obtained in advance. State A can freely cooperate with the representative of State B.

Article 27 provided an indicative list of means of co-operation, which included "co-ordination of the administration and supervision of the debtor's assets and affairs" (para. (c)). Other means of co-operation may be implemented, if appropriate, as the list in Article 27 is non-exhaustive.

The key benefits of both access provisions and cooperation provisions are to save time and costs to avoid value destruction and promote value enhancement.

Question 3.2 [maximum 5 marks] [2 marks out of 5]

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.

First Part of Chapter III (Articles 15 to 18) provided for recognition of foreign proceedings. By prescribing straightforward and requirements which are easy to be met, the Model Law expedites and simplifies the process required for obtaining recognition of foreign proceedings.

Evidential requirements for recognition of a foreign proceeding are provided in Article 15. Such application shall be accompanied by (1) certified copy of the decision commencing the foreign proceeding and appointing the foreign representative, (2) certificate from the foreign court affirming the existence of the foreign proceeding and of the appointment of the foreign representative, or (3) any other evidence acceptable to the court of the existence of the foreign proceeding and of the appointment of the foreign representative. [1]

In addition, the application shall also include a statement identifying all foreign proceedings in respect of the debtor that are known to the foreign representative. All documents supplied may need translation into official language of the state going to recognize the foreign proceeding.

Certain presumptions are provided Article 16, including authenticity of the documents provided in the application (without the need of legalisation, etc.) and the state where the debtor's registered address situates being its COMI in the absence of contrary evidence. [1]

However, under para. 4 of Article 17, the recognition granted would be modified or terminated if the grounds for granting the same were fully or partially lacking or ceased to exist (e.g. termination of the foreign proceeding). It is the duty of the foreign representative to update the court of relevant development which may affect the status of recognition under Article 18.

A foreign representative has the duty of full and frank disclosure to the court and if such obligation is breached, the application would be affected as the court may consider this to be abuse of process. It is domestic law or procedure rule which determine what constitute an abuse of process as it had not been provided in the Model Law.

Furthermore, although the public policy exception under Article 6 may not be itself a basis for refusing recognition application, it can still be a basis for limiting the relief later to be granted.

Your answer should have included a discussion on the following:

- 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. *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.**
- 4. *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.

Second Part of Chapter III (Articles 19 to 24) provided for relief of foreign proceedings.

Pre-recognition relief is governed by Article 19. At the request of foreign representative, the court may grant relief which is urgently needed to protect the assets of debtor or interests of creditors. Such relief is provisional in nature and run from the filing of recognition application until the decision is made.

Possible pre-recognition relief include stay of execution against the debtor's assets, entrusting the administration or realization of all or part of the debtor's assets (which may be more perishable or in jeopardy, etc.) in the state to the foreign representative or other designated person for preserving and protecting the value of such assets and other relief under para. 1(c), (d) and (g) of Article 21.

Under para. 4 of Article 19, the court may refuse to grant such interim relief if the same would interfere with the administration of a foreign main proceeding. The rationale is that if there is a foreign main proceeding pending, any relief granted in favour of a foreign non-main proceeding should be consistent with the foreign main proceeding. Accordingly, it is a requirement of application that all foreign proceedings known to the foreign representative should be included in a statement.

Article 20 provides 3 automatic effects upon recognition of a foreign main proceeding, including (1) stay of commencement or continuation of individual actions or individual proceedings against debtor's assets, etc., (2) stay of execution against the debtor's assets and (3) suspension of right to transfer, encumber or otherwise dispose of the debtor's assets.

Such automatic effects are subject to certain appropriate protections (for legitimate interests of a party in interest) to be included under the law of the state so that the relief can be modified or terminated (para. 2 of Article 20).

Other possible limitations and exceptions to Article 20 also include enforcement of claims by secured creditors (matter of priority), right to commence individual actions or proceedings to

the extent necessary to preserve a claim against the debtor (para. 3) and commencement of a local insolvency proceeding (para. 4 and shall be dealt with according to principle of coordination).

Lastly, Article 21 governs appropriate relief to be granted upon recognition of a foreign proceeding under discretionary power of the court for the purpose of protecting assets of the debtor or interest of creditors or at request of the foreign representative. A non-exhaustive list is provided in para. 1 of Article 21.

The foreign representative or other designed person may be entrusted the distribution of all or part of the debtor's assets if it is satisfied that the interests of creditors in the state are adequately protected (para. 2).

Whether the relief granted is "appropriate" is also subject to certain limits as illustrated in some cases :

1. Enforcement of an insolvency-related in personam default judgment is not covered under the Model Law in contrary to English common law principles of private international law (*Rubin v Eurofinance SA*)
2. Applying foreign insolvency law to an English law governed contract is not appropriate (*Fibra Celulose S/A v Pan Ocean Co Ltd*)
3. English court determined that it did not have jurisdiction to grant indefinite moratorium (*the IBA case*)

Lastly, the court in determining relief to be granted (under Article 19 or 21) must strike an appropriate balance between such relief and the interests of the persons (including creditors, debtors, etc.) that may be affected (Article 22). In addition, relief granted may be subject to certain conditions (para. 2) or be modified or terminated upon request of the foreign representative or interested persons.

- 1. Existing international obligations of State A: Based on Article 3 of the Model Law, the court in State A should again verify that there are no existing international obligations of State A (under a treaty or otherwise) that may conflict with granting the requested relief under the implemented Model Law in State A.**
- 2. Public policy exception: The court in State A should, based on Article 6 of the Model Law, also again verify that the relief application is not manifestly contrary to public policy of State A.**

Question 3.4 [maximum 1 mark] [1 mark]

Briefly explain – 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?

It was held in an English case, *Igor Vitalievich Protasov and Khadzhi-Murat Derev*, that despite having jurisdiction to grant such post-recognition relief, relevant restrictions and limitations would inhibit proper exercise of such jurisdiction.

Under English insolvency regime, there are other forms of protection and relief by way of freezing order is not warranted. Under the Model Law, foreign parties should enjoy same position as domestic officeholder as far as practicable. In that case, special or exceptional

reasons (as in *Raithatha v Williamson* involving future assets) which justify granting of freezing order or other similar order did not exist.

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 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] [11 out of 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]; 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**].

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 [7 out of 10]

Under Article 2(a) of the Model Law, “foreign proceeding” means “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”.

For the Bank’s liquidation to be viewed as “foreign proceeding”, those elements in Article 2(a) must be satisfied.

The proceeding itself must be a **collective proceeding** as it is intention of the Model Law to provide a tool for co-ordinated, global solution for all stakeholders. It should not be a platform for a particular group of creditors to satisfy their specific class of claims. The key to consider whether the proceeding is collective is whether substantially all assets and liabilities of the debtor would be dealt with (subject to certain statutory exclusion, priority or exception). It appears that no specific claims or creditors is excluded from the Bank’s liquidation and it can be viewed as a collective proceeding.

The second element is that the proceeding should be “**pursuant to a law relating to insolvency**”. Under this requirement, the law does not need to be labelled as an insolvency law, it is acceptable as long as it is dealing with or addressing insolvency or severe financial distress and liquidation or reorganization can be conducted thereunder. The LBBA and DGF Law, despite not being labelled as insolvency law, deal with situation where an entity like the Bank is in financial trouble with liquidation as a possible outcome. Therefore, the liquidation of the Bank should be pursuant to a law relating to insolvency.

Despite not specifying the level of control of supervision required, the foreign proceeding should be subject to “**control or supervision by a foreign court**”. The control and supervision may be direct or indirect (e.g. exercised by an insolvency representative under control or supervision of the court). In the fact given in the case, it appears that no “court” was involved in liquidation of the Bank. However, under Article 2(e) of the Model Law, a “foreign court” is defined as “a judicial or other authority competent to control or supervise a foreign proceeding”. As a result, non-judicial authorities like NB or DGF in Country A may also be classified as “foreign court” in considering whether such proceeding is a “legal proceeding”. In this case, Country A’s authorities (especially the DGF) has the control and supervision power over liquidation of the Bank thus his condition can be viewed as satisfied.

For full marks your answer should also have addressed the following detail:

1. In this case the DGF has control of all of the Bank’s assets and overall control of the liquidation.
2. 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.
3. 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.

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

Lastly, the "foreign proceeding" must be **for the purpose of reorganization or liquidation**. This element is not difficult to be established as the proceeding in question is the liquidation of the Bank. Unlike those minor proceedings such as prevention of dissipation and waste, preservation of assets, etc., liquidation of the Bank was to realize all its assets and satisfy the claims thereafter.

Accordingly, by satisfying the 4 elements, liquidation of the Bank should be classified as "foreign proceeding" under Article 2(a) of the Model Law.

For full marks reference should also be made to paragraphs 6.4.1 and 6.4.2 of the Guidance Text and in particular the *Agrokor* case discussed there.

4.1.2 [4 out of 5]

Under Article 2(d) of the Model Law, "foreign representative" means "a person or body, including one appointed on an interim basis, authorized in a foreign proceeding to administer".

The Model Law has not defined what constitute a "**person**" or "**body**" is. Citing Black's law dictionary, Digest of Case Law on the UNCITRAL Model Law on Cross-Border Insolvency classified a "body" as "an artificial person created by a legal authority. Accordingly, the Applicants (i.e. DGF) which is a governmental body of Country A and governed by the DGF Law, can be classified as a "body" as required in the broad definition in Article 2(d) of the Model Law.

The next element to be considered is whether the Applicants had been **authorized in a foreign proceeding**. The Model Law does not require that the foreign representative must be authorized by the foreign court. The focus is put on the authorization being provided in the context of or in the court of the proceeding but not the party granting such authorization. Such authorization can be given by the court, the legislation or even by the debtor. DGF, being the automatic liquidator of the Bank, do have the authorization under the liquidation of the Bank.

Lastly, such "foreign representative" should be authorized to **administer** the reorganization or liquidation of the debtor's assets or affairs or to act as representative of the foreign proceeding. As in the facts provided in the Question, DGF have very extensive powers in administering the liquidation procedure of a bank (e.g. investigation, management, disposal of assets, satisfaction of claims and such other powers as necessary, etc.).

Accordingly, DGF should have the status of being the "foreign representative" in application for recognition of liquidation of the Bank in UK. However, should Ms. G be appointed to do so on behalf of DGF, potential concern is that under Resolution 1513, some powers are excluded from Ms. G's authority (e.g. power to arrange for sale of the Bank's assets which still vesting in DGF). It is doubtful if Ms. G may satisfy the requirement of "authorized to administer" thus it is the Applicants who are the more appropriate party to seek recognition as "foreign representative".

While the doubt expressed in your answer is not incorrect, the better response may be along the following lines:

As a result of the sharing of some, but not all of the liquidator's powers and the division of responsibility between Ms G and the DGF, it seems likely that depending on the nature and timing of relief sought from this Court pursuant to the CBIR (if any), the appropriate applicant may, in the future, be either or both of Ms G and the DGF. I am satisfied that subject to the express limitations on Ms G's powers, they are both authorised to administer the liquidation and as such both meet the definition of "*foreign representative*". In my judgment they both had the necessary standing to apply in that capacity, for recognition of the Bank's liquidation.

In addition, for full marks also the following should be addressed in your answer:

1. Article 16(1) of the MLCBI provides:

'If the decision or certificate referred to in paragraph 2 of article 15 indicates that the foreign proceeding is a proceeding within the meaning of sub-paragraph (i) of article 2 and that the foreign representative is a body or person within the meaning of sub-paragraph (j) of article 2, the court is entitled to so presume.'

*** End of Assessment ***