INSOL INTERNATIONAL

FOUNDATION CERTIFICATE

IN INTERNATIONAL INSOLVENCY LAW

SUMMATIVE (FORMAL) ASSESSMENT: MODULE 2A

THE UNCITRAL MODEL LAWS RELATING TO INSOLVENCY

Commented [SL1]: TOTAL = 38

76%

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]: SUBTOTAL = 10 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 certainly 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

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]

Commented [SL3]: SUBTOTAL = 9 MARKS

Question 2.1 [maximum 3 marks]

Commented [SL4]: 2 marks.

Discussion of continuance of COMI; art 17(2)(a) for full marks.

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

[The appropriate time to determine COMI would be the date of when the foreign proceeding commences.

However, In Morning Mist Holdings Ltd vs Krys (Matter of Fairfield Sentry Ltd) (2nd Circuit appeals Apr. 16, 2013) it was determined that the COMI of the debtor should be determined by the events around the time of the filing of a Chapter 15 (USA's interpretation of the Model Law). The court further decided that the period it may consider would be from the date of then the insolvency proceeding commences to the date of the filing of a Chapter 15. This is to ensure that the Debtor doesn't use the concept of determining COMI and manipulate to the most favourable position or outcome for the debtor.]

Question 2.2 [maximum 3 marks]

Commented [SL5]: 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 sets out the requirements of notification of creditors in the Model law. The purpose of Article 14 is to ensure that creditors whose claims are affected by a foreign insolvency proceeding are given notice of the recognition of the foreign proceeding and the procedure for filing their claims.*

- *Statement 2: This statement is provided for in article 10. The Safe Conduct Rule or the "Equal Treatment of the Parties" rule and ensures that the enacting State does not assume its control over all the debtors assets simply based on the fact that a foreign application proceeding was made in the foreign state*
- *Statement 3: Article 16 (3) of the Model Law does provide a rebuttable presumption that the residence or place of the registered office of the debtor is to be regarded as its COMI. It is presumed that the COMI is not in the Foreign state where the foreign proceedings was opened.]*

Question 2.3 [2 marks]

Commented [SL6]: 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.

[The IBA brought the Gibbs Rule into question. In the IBA case the Moratorium Continuation Application (the "MCA" was disputed by two creditors (the "Creditors"). The MCA prevented the Creditors from enforcing English law (the claims related to debt instruments that were governed by English Laws) on their claims while concurrently allowing the English courts to recognise the Gibbs Rule whereby the Creditors still exists and were not discharged by foreign insolvency proceedings without consent.

The courts in the IBA case dismissed the relief granted in MCA as this was not inline with the Gibbs Rule.

In the IBA appeal the decision was upheld by the English Court of Appeal, because if the courts were able to allow indefinite Moratorium Continuation then this would prevent the English Creditors from carrying out their English legal rights inline with the Gibbs Rule and it would extend the stay even after the reconstruction of Azeri (IBA matter) came to an end. The English laws concluded that as they could not see how the indefinite Moratorium Continuation was necessary to protect the Creditors and that enforcing the stay would not be appropriate of achieving protection, the decision of the IBA Case was upheld.]

Question 2.4 [2 marks]

Commented [SL7]: 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.

[Article 18 sets out the procedure for the commencement of a foreign proceeding after a domestic proceeding has already been opened. Specifically, it provides that the foreign representative may seek recognition of the foreign proceeding in the enacting State and that the court may recognize the foreign proceeding as a foreign main or foreign non-main proceeding.

Under Article 29(a), after recognition of a foreign main proceeding, the enacting court must grant "appropriate relief" to the foreign representative, which may include a stay or dismissal of any actions or proceedings against the debtor in the enacting State. This provision is designed to prevent parallel proceedings and ensure that the foreign representative is able to administer the debtor's assets in a efficient and coordinated manner.
]

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

Commented [SL8]: SUBTOTAL = 13 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 out of 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 co-operation, explain how these rights in State A can benefit the foreign representative.

[State A enacts the Model Law and is known as the enacting State. The Model Law makes provision for effective devices in dealing with cross border insolvency matters, and it promotes co-operation between the courts and other authorities of the court like foreign representatives.

The purpose is not to take on a substantive rewrite or unification of current insolvency law but to provide a framework for co-operation between states.

Access and co-ordination are benefits provided by the Model Law and it provides the foreign representative access to the courts in State A (enacting state) and allowing the foreign representative a voice in the courts of State A. Allowing the court to properly and appropriately determine what co-ordination is needed amongst State A and State B jurisdictions to achieve the best outcome in the insolvency for the parties concerned. Model Law thus permits the courts for State A and State B and the foreign representatives to work together more effectively in the insolvency matter. This *decreases delays, time and costs of the insolvency matter.* ***[1]*** *Furthermore, Model Law allows for rules to be established for better co-ordination where concurrent insolvency proceedings (proceedings in State A and State B) takes place. This also allows for the co-ordination of relief grants in State A that may take place in the insolvency proceeding to State B.* ***Save time and costs is one of the key benefits to both the access provisions and the cooperation provisions, and as a result value destruction can be avoided the value enhancement prompted.***

Article 9 sets out the difference between recognition and enforcement. Recognition requires that the originating state (State B) has the judgement effect in place, and the receiving court (State A) will give effect to State B's courts determination of rights and its obligations that is stated in its judgement. Enforcement is the application of the legal steps of the courts of State A to guarantee its compliance with the judgment delivered by the courts of State B. The Foreign representative is also allowed direct access to the courts of State A as stipulated in the principles of Article 9.

Legal standing (Article 9 MLCBI): The key access for the foreign representative is set forth in Article 9 MLCBI. In the capacity of foreign representative, the foreign representative has automatic standing before the courts in State A without having to meet any formal requirements such as a license or any consular action. In other words, the "status" in State B of the foreign representative is automatically recognised in State A for the purpose of granting the foreign representative standing before the courts in State A. This allows the foreign representative to safeguard and pursue assets of the debtor estate in State A before its courts.

Article 11 of the Model Law allows the foreign representative of State B the rights to open local insolvency proceedings in State A if the requirements are met. No prior recognition of the foreign proceeding would be required for this. ***[1]***

Article 25 provides that the courts of State A must co-operate to the maximum extent possible with the courts of State B (the foreign court) or foreign representative. Furthermore subsection 2 allows for the courts in State A (enacting state) to request information or assistant from the courts of State B (the foreign court) or foreign representative. ***[1]***

Article 26 provides that the insolvency office holder or practitioner of the enacting state (State A), under supervision of the courts of State A, must co-operate to the maximum extent possible with the courts of State B or the foreign representative.

Article 27 provides further non-exhaustive list for ways of co-operation.
]

Question 3.2 [maximum 5 marks] [4 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.

[In accordance with article 17(1)(a) and 17(1) (b) of the Model Law, the court of State A has already assessed that the foreign proceeding opened in State B qualifies as a "foreign proceeding" within the meaning of article 2(a) of the Model Law and the "foreign representative" qualifies as a foreign representative within the meaning of article 2(d).

As the both the foreign proceeding and the foreign representative meet all the requirements of article 2, there are no grounds to raise the public policy exception of Article 6 of the Model Law and the articles of 17(1) c and (d) are met, (the Court in State A should still check, based on Article 6 of the Model Law that the recognition application is not manifestly contrary to public policy of State A). the court of State A (enacting state) will need to determine if the COMI is in foreign state (State B) where the foreign proceeding commenced(Article 17(1) which indicates whether the foreign proceeding can be recognised as a foreign proceeding per the Model Law or if its an establishment (not COMI) then it will be
recognised as a foreign non-main proceeding. [1]

If there is only certain assets in State B then it will be unlikely to argue in court in State A (enacting court) that that COMI or an establishment (defined in Article 2(f)) exists which cause the recognition of a foreign proceeding to be denied under the Model Law of State A.

The recognition for a foreign proceeding needs to comply with Article 15 of the Model Law, which provides for the following:

- ***The foreign representative may apply to the courts in State A for the recognition of the foreign proceedings lodged in courts of State B.***
- ***Application for recognition must include either a certified copy of decision commencing foreign proceeding and the appointed foreign representative or a Certificate from the court of State B confirming foreign proceeding and appointing foreign representative or any evidence showing its existence***
- ***A statement from the from the foreign representative identifying all known foreign proceedings relating to the debtor.***
- ***A translation of the above to language of enacting state may be requested [1]***

Article 1 (2) provides for exclusions to be used by State A (the enacting state) to exclude certain proceedings from the application of the Model Law. Banks and insurance companies are examples that State A might exclude from the Model Law as they may be administered under local consumer protection laws or similar regulatory regimes. [1]

The purpose of this exclusion is to protect consumers by ensuring that disputes arising from consumer transactions are resolved in a way that is more favourable to consumers.

Article 3 provides restrictions for the enacting state (courts of State A) states that where multi-state or international treaties or agreements are in conflict with the Model Laws, [1] then the multi-state or international treaties or agreements will take priority over the model law.
]

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.

[Article 12 of the Model Law provides for pre-recognition relief or provisional relief which is obtainable from when recognition is first sought after. This relief includes freezing the disposal of any assets related to the insolvency matter and judgements have been issue against. Any other fair legal relief can be granted if within scope of the insolvency matter. The relief under article 12 terminates when recognition and enforcement of the judgement is made, unless the relief granted under article 12 is prolonged.

Article 19 of the Model Law provides for the courts of State A to grant relief of a temporary nature to protect the assets of the debtor or the creditors interest, from the time of filing the recognition application until the application concludes. If this relief under article 19 clashes with the main proceeding of the court can refrain from granting any such relief.

Article 21 par 1, of the Model Law provides that the court in State A with flexible or discretionary powers to protect the assets of the debtor or interest of the creditors at the demand of the foreign representative. A number of Reliefs can be granted towards the foreign representative, and they include:

- *Extending the commencement of individual court actions relating to the debtors' assets, rights, obligation if not already done so under article 20 (1)(a).*
- *Extending the execution against the assets under question if not already done under article 20(1)(a)*
- *Suspend the right to transfer/dispose of the assets under question if not already done under article 20(1)(a)*

- ***Provide witnesses, evidence and any information deemed appropriate concerning the assets, affairs, labilities, obligations, and rights under question***

Article 21 relief cannot interfere with the insolvency proceedings of another state in particularly the amin proceeding.

Article 20 provides for automatic relief as soon as the foreign proceeding is recognised by the courts of State A.

1. ***Article 22 provides for interim relief and is subjected to the "Adequate protection" test of article 24. Pursuant to Article 22 of the Model Law any interim relief under Article 19 of the Model Law or any post-recognition relief under Article 21 of the Model Law require the court in State A to be satisfied that the interests of the creditors and the other interested persons, including the debtor, are adequately protected and any relief may be subject to conditions as the court considers appropriate.***

2. ***Based on Article 3 of the Model Law, the court in State A should make sure that there are no existing international obligations of State A (under a treaty or agreement) that may conflict with granting the requested relief under the implemented Model Law in State A.***

3. ***Based on Article 6 of the Model Law, the court in State A should also make sure that the relief application is not noticeably 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?

[the relief granted under article 19 is void when the application for recognition is decided upon per article 21. The court may also refuse to grant relief under article 19 if such relief would interfere with the administration of a foreign main proceeding.

Article 21 provides for another form for protection leaving the freezing order un-warranted. This was the case in Igor Vitalievich Protasov and Khadzhi-Murtat Derev.]

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] [6 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 <u>not excluded</u> ***from the scope of the MLCBI by article 1(2) of the MLCBI.***

[4.1.1 whether the Bank's liquidation comprises a "foreign proceeding" within the meaning of article 2(a) of the MLCBI [4 out of 10]

Article 2(a) of the MLCBI defines the key term "foreign proceeding". It states that a foreign proceeding means "a collective judicial or administrative proceeding in a foreign state (Which in this case is State A), 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 liquidation or reorganisation."

In other words a foreign proceeding refers to any legal or administrative proceeding in a foreign country that deals with the financial affairs of a debtor who is experiencing financial difficulties. Where the assets and affairs of the debtor are subject to the control or supervision of a foreign court.

Article 2 (a) does however gives banks as an example of a company that the enacting state, being English Courts, would want to exclude from the Model Law as they are required to be administered under a special regulatory regime, as is the case with liquidation proceeding of the Bank in State A which is subject to the Affidavit, which sets out a detailed summary of the legislation of Country A's specific insolvency procedure for Banks.
Please note that instructions to this Q specifically state that: For the purpose of this question, you may further assume that the Bank is <u>not excluded</u> ***from the scope of the MLCBI by article 1(2) of the MLCBI.***

To apply the definition of foreign proceeding we need to consider the definition above:

- ***The Affidavit proceeding does clearly qualify as a <u>Single</u> <u>proceedings</u> as it detailed summary of the legislation of Country A's specific insolvency procedure for the Bank.***
- ***The Affidavit <u>proceeding is collective</u> in nature as the proceeding deals with the Bank and its own creditors. The English courts would consider it as collective in nature as was done in the Agrokor case.***
- ***The Affidavit proceeding is <u>subject to control or supervision by a foreign court</u> of State A. Under CBIR it can be potential, rather than actual and indirect rather than direct supervision.***
- ***Is the Law of Country A on Banks and Banking Activity (LBBA) the <u>law relating to insolvency</u> for the Bank? The MLCBI only requires that it deals with insolvency issues which the Affidavit does. It does not require the law to be labelled as an insolvency law. Hence we would see this as satisfied as Insolvency is clearly stated in this LBBA as the matter to deal with.***
- ***The Affidavit proceeding take place in State A a foreign country and the purpose is for liquidation.***

Based on the above the Bank's liquidation does comprise a "foreign proceeding" per article 2(a) of the MLCBI.

Your answer fails to provide guidance for each element of the definition and does not apply this guidance to the fact pattern provided. For example, on the "collective nature" element we would expect your answer to address the following for full marks:

1. ***UNCITRAL's guide for judiciary, "The Model Law on Insolvency: The Judicial Perspective" (2013) explains the requirement for proceedings to be "collective":***

"The UNCITRAL Model Law was intended to apply only to particular types of insolvency proceedings. The Guide to Enactment and Interpretation indicates that the notion of a "collective" insolvency proceeding is based on the desirability of achieving a coordinated, global solution for all stakeholders of an insolvency proceeding. It is not intended that the Model Law be used merely as a collection device for a particular creditor or group of creditors who might have initiated a collection proceeding in another State, or as a tool for gathering up assets in a winding up or conservation proceeding that does not also include provision for addressing the claims of creditors. The Model Law may be an appropriate tool for certain kinds of actions that serve a regulatory purpose, such as receiverships for such publicly regulated entities as insurance companies or brokerage firms, provided the proceeding is collective as that term is used in the Model Law."

2. ***The Guide to Enactment and Interpretation of the UNCITRAL Model Law (2014) explains that when:***

"evaluating whether a given proceeding is *collective* for the purpose of the Model Law, a key consideration is whether substantially 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. A proceeding should not be considered to fail the test of collectivity purely because a class of creditors' rights is unaffected by it."

3. ***Based on the facts provided the understanding is that all of the Bank's creditors are entitled to claim in the liquidation and that their claims are met from available assets, according to the statutory order of priorities. Consequently, the conclusion can be reached that the Bank's liquidation is a "collective proceeding".***

The "subject to control or supervision from a foreign court" element should be addressed as follows in your response for full marks:

1. ***The term "foreign court" is defined at article 2(e) of the MLCBI and means: "a judicial or other authority competent to control or supervise a foreign proceeding".***
2. ***The Guide to Enactment notes: "87) A foreign proceeding that meets the requisites of article 2, subparagraph (a), should receive the same treatment irrespective of whether it has been commenced and supervised by a judicial body or an administrative body. Therefore, in order to obviate the need to refer to a foreign non-judicial authority whenever reference is made to a foreign court, the definition of "foreign court" in subparagraph (e) includes also non-judicial authorities."***
3. **In** *Re Sanko Steamship Co Ltd* **[2015] EWHC 1031 (Ch) Simon Barker QC, noted that a foreign proceeding may be recognised where the control or supervision of the proceeding is undertaken by a non-judicial administrative body.**
4. ***The Guide to Enactment states: "74) The Model Law specifies neither the level of control or supervision required to satisfy this aspect of the definition nor the***

time at which that control or supervision should arise. Although it is intended that the control or supervision required under subparagraph (a) should be formal in nature, it may be potential rather than actual. As noted in paragraph 71, a proceeding in which the debtor retains some measure of control over its assets, albeit under court supervision, such as a debtor-in-possession would satisfy this requirement. Control or supervision may be exercised not only directly by the court but also by an insolvency representative where, for example, the insolvency representative is subject to control or supervision by the court. Mere supervision of an insolvency representative by a licensing authority would not be sufficient."

5. ***In this case the DGF has control of all of the Bank's assets and overall control of the liquidation.***
6. ***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.***
7. ***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.***

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

Article 2(d) of the Model Law on Cross-Border Insolvency defines the term "foreign representative". It states that a "foreign representative" means "a person or body authorised in a foreign proceeding to administer the reorganisation or the liquidation of the debtor's assets or affairs or to act as a representative of such a person."

In other words, a foreign representative refers to an individual or entity authorised in a foreign proceeding to manage or administer the reorganisation or liquidation of the debtor's assets or affairs, or to act as a representative of such an individual or entity.

To apply the definition of foreign representative we need to consider the definition above:

The applicants in question here are Deposit Guarantee Fund (DGF) is a governmental body of Country A.

DGF is a governmental body and was appointed as provisional administrator on 17 September 2015 (also appointing its authorised representative Mrs C)
The appointment was part of a foreign proceeding as explained in question 4.1.1 above.

Here you should have referenced Article 16(1) of the MLCBI, which 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.'

The appointment was to commence liquidation proceedings for the Bank's net assets and to act as the representative with the courts for State A.
17 December 2015, 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.

Based on the above DGF meets the definition of foreign representative as defined by article 2(d) of the MLCBI .
For full marks your answer should have addressed the following:

1. ***This application is brought jointly by the DGF and Ms G. The DGF's role as liquidator arises under statute and article 77 of the LBBA provides that the DGF is automatically appointed as liquidator on the day it receives the NB's decision pursuant to article 77 revoking a bank's licence and commencing its liquidation.***
2. ***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".***
3. ***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.***
4. ***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.

5. ***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.***

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* End of Assessment *