



SUMMATIVE (FORMAL) ASSESSMENT: MODULE 2A

THE UNCITRAL MODEL LAWS RELATING TO INSOLVENCY

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60%

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]

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.

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

(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 [SL4]: 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?

[Answer:

Under MLCBI, appropriate date for determining the COMI of a debtor is the date of commencement of foreign proceedings. However, different jurisdictions have different laws and have different criteria for selecting the date for determination of COMI. Normally, there is a significant time gap between the date on which foreign insolvency proceedings were instituted and the date on which application for its recognition was filed. It is also possible that the corporate debtor might change the location of its operations between this time gap for changing its COMI. Therefore, there are two options available for determining appropriate date for determining the COMI - Date on which the foreign insolvency proceedings were recognized OR date on which the application for the same was filed]

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'".

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

Commented [SL6]: SUBTOTAL = 6.5 MARKS

Commented [SL7]: 2 marks

Mention of *Morning Mist Holdings Ltd v. Krys (Matter of Fairfield Sentry Ltd)* required.

Commented [SL8]: 2 marks

[Answer:

Statement 1: This statement is dealt with under Article 14 of the Model Law. Whenever a notification is to be given to creditors under laws of the enacting State, such notification must also be given to those known creditors which do not have addresses in this State. The court can order that necessary steps should be taken to notify those creditors whose addresses are not known.

Statement 2: This statement is covered under Article 10 of the Model Law. Article 10 is made with an aim to ensuring that that the court in the enacting State do not assume jurisdiction over all the assets of the debtor. Article 10 also says that only the application is not a sufficient ground for the court of the enacting State to assert jurisdiction over the foreign representative in the matters which are unrelated to insolvency.

Statement 3: This statement is covered under Article 31 of the Model Law. As per Article 13 of the Model law, to open a insolvency proceedings in the enacting state, recognition of foreign main proceeding is a sufficient proof of the debtor being insolvent.]

Commented [SL9]: Article 16(3) is the correct answer.

Question 2.3 [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.**

[Answer:

In the IBA appeal case, the English Court of Appeal upheld that the English court could only grant indefinite Moratorium Continuation if it is satisfied about two things – 1) stay is necessary for protecting the interests of IBA creditors and 2) Stay is the only way of protecting the interest of IBA creditors]

Commented [SL10]: 1.5 marks

Discussion of Art 18 MLCBI

Question 2.4 [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**.

[Answer:

According to Article 20 on the recognition of foreign main proceeding as an automatic relief, the court in an enacting state should grant on the commencement or continuation of individual actions or proceedings regarding debtors assets, liabilities, rights and obligations. It should also grant stay of execution against debtor's assets. Court in an enacting state should also suspend the right to transfer, encumber or dispose off any asset of the debtor.

The relevant foreign representative's continued responsibility to the court of the enacting state in each foreign main proceeding is to keep the court informed. According to Article 18, the foreign representative is required to notify the court of a state that has enacted the law, of any material changes to the status of the recognised foreign proceedings or to the status of his appointment. Any other overseas proceeding involving the same debtor that comes to the foreign representative's attention must be disclosed]

Commented [SL11]: 1 mark

Art 29(a)

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

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

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

Question 3.1 [maximum 4 marks] [3.5 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.

[Answer:

The cross-border insolvency cases are very time consuming due to which the value of the assets of the debtors get depleted and depreciated. The access in the State A can benefit the foreign representative in saving time, energy and money and safeguarding the value of the assets. [1]

The foreign representative will also have the direct access to the courts of enacting state A (which doesn't contain reciprocity provision) in terms of Article 9 of the Model law [1] and he can also request for the commencement of local or domestic insolvency proceedings in the State A in terms of the Article 11 of the Model law without the requirements of having licenses. [1]

According to the Model Law, co-operation and co-ordination is granted without any recognition. [½] Also, it is available with regards to any proceedings on the basis of the presence of assets. Cross border co-operation also brings judges of the different states together to achieve time efficient and optimum results. The foreign representative can also request information or assistance directly from the court of State A. This access to information brings transparency in the proceedings. **Your answer must include which articles deal with cooperation provisions – articles 25-27 of the MLCBI.**

The foreign representative can also request immediate interim relief as per Article 19 of the Model law.]

Question 3.2 [maximum 5 marks] [2.5 out of 5 marks]

For a recognition application in State A to be successful, the foreign proceeding opened in State B must qualify as a "foreign proceeding" within the meaning of article 2(a) of the MLCBI and the "foreign representative" must qualify as a foreign representative within the meaning of article 2(d) of the MLCBI. Assuming that both qualify as such, list and briefly explain (with reference to the relevant MLCBI articles) any other evidence, restrictions, exclusions and limitations that must be considered, as well as the judicial scrutiny that must be overcome for a recognition application to be successful.

[Answer:

Following are the 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:

- 1- Foreign representative must be appointed by a foreign court in foreign proceedings.
- 2- The Foreign representative will have to apply to the court of enacting state by filling an application in this regard.
- 3- The application must be accompanied by-
 - a) Certified copy of the decision commencing the foreign proceedings in state B and his appointment
 - OR
 - b) Certified from the foreign court of state B confirming the existence of the foreign proceedings and his appointment
 - OR
 - c) Any other evidence with regard to the existence of foreign proceedings in state B and his appointment which is acceptable to the court, if the documents mentioned under point a) & b) are not available. [1/2] - Article 15
- 4- The application must be accompanied by a statement giving details of foreign proceedings regarding the same debtor which are in the knowledge of the foreign representative of the State B.
- 5- The court of State A can ask for translation of the documents submitted along with the recognition application to the official language of the enacting state i.e. State A.
- 6- Before granting the recognition of foreign proceedings in State B, the court of the enacting state (State A) shall satisfy itself that:

The foreign representative appointed by State B shall be according to the definition as given in Article 2 (d)

AND

A foreign proceeding opened in State B must be according to the definition as given under Article 2(a)

On satisfying itself regarding the above, the court of State A shall presume that documents submitted along with the recognition application are authentic and the debtor's registered office or habitual residence (in case of individual) is presumed as COMI of the debtor. (Article 16 of the Model Law) [1]

If above requirements are met, the court in State A shall recognise the application filed by the foreign representative of State B.

On the recognition, if the debtor has COMI in State B, the foreign proceedings shall be recognised as foreign main proceedings in State A and if the debtor has an establishment in the State B, the foreign proceedings shall be recognised as foreign non- main proceedings in State A.] [1] - Article 17

Your answer lacks reference to the articles that are discussed. Your answer must include 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 check if the foreign proceedings regarding that type of a debtor are excluded in State A based on Article 1(2) of the implemented Model Law in State A.*
2. **Restrictions: Existing international obligations of State A:** *Based on Article 3 of the Model Law, the court in State A should also check if there are no existing international obligations of State A (under a treaty or otherwise) that may conflict with granting the recognition application under the implemented Model Law in State A.*
3. **Sufficient evidence:** *Article 15 of the Model Law sets forth in paragraph 2 what evidence in respect of the commencement of the foreign proceedings and the appointment of the foreign representative must accompany the recognition application. A statement identifying all foreign proceedings in respect of the debtor that are known to the foreign representative must also accompany the recognition application (Article 15(3) of the Model Law).*
4. **Judicial scrutiny:** *While the court in State A is able to rely on the rebuttable presumptions set forth in Article 16 of the Model Law, in the context of Article 17 of the Model Law the court will have to assess whether either the COMI or at least an establishment of the debtor is located in State B where the foreign proceedings were opened. If the COMI of the debtor is in State B the foreign proceedings should be recognised as foreign main proceedings and if only an establishment of the debtor is in State B the foreign proceedings should be recognised as foreign non-main proceedings. Without a COMI or at least an establishment of the debtor in State B, recognition cannot be granted by the court in State A.*
5. **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] [3.5 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.

[Answer:

Pre and Post recognition reliefs to be granted to the foreign representative of the foreign proceedings are discussed in Articles 19 to 21 of the Model Law.

Article 19 talks about relief to the foreign representative of the State B, he can request urgent needed interim relief. Article 20 talks about recognition of foreign main proceedings and Article 21 provides that court has discretionary power to provide post recognition relief.

Provisions of these three Articles are discussed below:

Article 19

In order to protect the assets of the debtor or the interest of the creditors, the foreign representative of State B can request urgent interim relief. On satisfying itself, the court of State A may grant provisional relief from the time of filing an application for recognition until the application is decided upon. The reliefs granted by the court of State A shall include:

- a) Stay of execution against the debtor's assets in state A.
- b) Entrusting the administration or realisation of all or part of the debtor's assets located in state A to the foreign representative or any other person designated by the court.
- c) Any of the following recognition relief:
 - i) Suspending the right to transfer, encumber or otherwise dispose of any asset of the debtor in State A
 - ii) Providing for the examination of the witnesses, taking of the evidence or the delivery of the information concerning the debtor's assets, affairs, rights, obligations, or liabilities in State A.
 - iii) Granting any additional relief that may be available to the domestic liquidator under the laws of State A.

Article 20

If a proceeding which is opened in State B is recognised as foreign main proceeding in State A, then following automatic reliefs may be granted:

- a) Stay of the commencement or continuation of individual actions or individual proceedings concerning the debtor's assets, rights, obligations, or liabilities in state A.
- b) Stay of the execution against the debtor's assets in State A; and
- c) Suspension of the rights to transfer, encumber or otherwise dispose of any assets of the debtor in State A.

Article 21

On the recognition of foreign proceedings of State B in State A and on the request of foreign representative, the court of State A shall have the power to grant any appropriate relief listed below:

- a) Stay on the commencement or continuation of individual actions or individual proceedings concerning the debtor's assets, rights, obligation, or liabilities to the extent they have not been stayed under Article 20(1)(a).
- b) Stay on the execution against the debtor's assets to the extent it has not been stayed under the Article 20 (1)(b);
- c) Suspend the right to transfer, encumber or otherwise dispose of any asset of the debtor to extend this right has not been suspended under article 20 (1)(c);
- d) To provide for the examination of the witnesses, the taking of the evidence or delivery of the information concerning the debtor's assets, affairs, rights, obligation or liabilities;
- e) Entrusting the administration or realisation of all or part of the debtor's assets located in the state A to the foreign representative or any other person designated by the court;
- f) Extend the relief granting under article 19(1).
- g) Granting any other additional relief that may be available to the domestic liquidator/office holder under the laws of State A.

The Court of State A, at the request of foreign representative of State B and on being satisfied that the creditors of State A are adequately protected, may handover all or part of the debtor's assets located in the state A to the foreign representative, if required.

Restrictions, limitations, or conditions:

The court of State A may refuse to grant relief under Article 19, if this relief interferes with the public policy objectives and it does not affect the right to commence individual actions or proceedings to the extent necessary to preserve a claim against the debtor as per Article 20(3).]

1. ***Adequate protection:*** Pursuant to Article 22 of the Model Law any interim relief under Article 19 of the Model Law or any post-recognition relief under Article 21 of the Model Law require the court in State A to be satisfied that the interests of the creditors and the other interested persons, including the debtor, are adequately protected and any relief may be subject to conditions as the court considers appropriate.
2. ***Existing international obligations of State A:*** Based on Article 3 of the Model Law, the court in State A should again verify that there are no existing international obligations of State A (under a treaty or otherwise) that may conflict with granting the requested relief under the implemented Model Law in State A.
3. ***Public policy exception:*** The court in State A should, based on Article 6 of the Model Law, also again verify that the relief application is not manifestly contrary to public policy of State A.

Question 3.4 [maximum 1 mark] [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?

[Answer:

In a recent judgement of UK in a case between *Igor Vitalievich Protasov and Khadzhi-Murat Derev*, it was held by the court that MLCBI is intended to put foreign bankruptcy manager in the same position as office holder under domestic law. Also, recognition of foreign insolvency proceedings will bring into play the provisions of insolvency laws. In view of this, worldwide freezing order is not required and warranted.

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 [5 out of 10]
- 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]. [1 out of 5]

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.

[Answer:

4.1.1: As per Article 2(a) of the MLCBI in situation of seeking recognition for foreign proceedings the Foreign proceeding shall mean 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;

The essential elements of foreign proceedings are.

- a. Proceedings are in a foreign state.
- b. Proceedings are under a law relating to insolvency.
- c. The proceedings may be administrative or judicial.
- d. Proceedings may be interim proceedings.

e. In proceedings the debtor is under control or supervision of a court.

f. The purpose of the proceedings may be either reorganisation or liquidation.

Proceedings must be collective in nature. This element is not addressed at in your response.

If any given proceedings satisfy the above criteria, cumulatively, the proceedings are foreign proceeding contemplated under MLCBI and the country which has adopted the Model law is required to grant recognition to such proceedings.

Analysing the case of Commercial Bank of Business Corporation's liquidator seeking recognition of the proceedings in country A in England the following emerges.

a. The proceedings are in a country foreign to United Kingdom and the first condition is satisfied.

b. The proceedings are under the law of bank and banking activity in country A. The law has specific provisions for reorganization and liquidation of the banks. And therefore the law can be stated to be relating to insolvency. The term law relating to insolvency and law of insolvency are two different terms. The law relating to insolvency may not be called law of insolvency. The import of this term "relating to insolvency" is wider than the "of insolvency". The former assume that the law relating to reorganisation or liquidation may be contained any law not specifically labelled as law of insolvency. In the present case the title of the law of banks and banking activity does not convey the idea that it is a law of insolvency. In fact, it is a law relating to banking. But however as it provides both for the reorganisation of the banks and also for their liquidation it is a law relating to insolvency as per Article 2(a) of the MLCBI. And hence second condition is also satisfied.

For full marks you should also have addressed the following:

1. The Guide to Enactment provides at paragraph 48:

"Acknowledging that different jurisdictions might have different notions of what falls within the term "insolvency proceedings", the Model Law does not define the term "insolvency". However, as used in the Model Law, the word "insolvency" refers to various types of collective proceedings commenced with respect to debtors that are in severe financial distress or insolvent."

Further explanation is provided at paragraph 73:

"This formulation is used in the Model Law to acknowledge the fact that liquidation and reorganization might be conducted under law that is not labelled as insolvency law (e.g. company law), but which nevertheless deals with or addresses insolvency or severe financial distress. The purpose was to find a description that was sufficiently broad to encompass a range of insolvency rules irrespective of the type of statute or law in which they might be contained and irrespective of whether the law that contained the rules related exclusively to insolvency."

2. Article 76 of the LBBA clearly set out Country A's specific insolvency procedures for insolvent banks. The Bank's liquidation was commenced pursuant to those provisions and in my judgment should be considered by this Court as being *"pursuant to a law relating to insolvency"*.

c. The proceedings under the law relating to insolvency may be administrative or judicial. The judicial proceedings will involve courts or judicial tribunal in the proceedings whereas in the administrative proceedings any authorised officer or person may be responsible for carrying out the activities relating to reorganisation or liquidation. In the present case the activities of liquidation are entrusted to Deposit Guarantee Fund which is a government body but not a court. The proceedings thus can be stated to be administrative proceedings, which also meet the definition of the term foreign proceedings under Article 2(a) of MLCBI.

d. The foreign proceedings may be interim proceedings. However, in the present matter the proceedings are final proceedings of liquidation and thus the clause is not relevant.

e. The condition of the proceedings to be under the supervision or control does not envisage actual direct control or supervision of the court. In many cases the courts have held that control or supervision may be exercised not only directly by the court, but also indirectly. If an insolvency representative acting as liquidator under the authority of law is conducting the proceedings and such person is regulated by law and thus under the supervision and control of law the proceedings can be construed to be under the control or supervision by the court or other regulatory authority. In the present case the liquidator has been appointed under the provisions of deposit guarantee fund law and hence liquidation proceeding by him can be construed as under the supervision and control of A court of regulatory authority.

For full marks your response should also have addressed the following:

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.

In view of the above, Bank’s liquidation qualifies as a “foreign proceeding” within the meaning of article 2(a) of the MLCBI

4.1.2: As per Article 2(d) of MLCBI, Foreign representatives means a person or a body, authorized in foreign proceedings to administer the reorganization or the liquidation of the debtor’s assets or affairs or to act as a representative in the foreign proceedings. Foreign representatives include the ones appointed on an interim basis also.

In the above case, the Applicants, DGF in this case, has been authorised in the proceedings to administer the liquidation in proceedings which qualify as foreign proceedings as mentioned in Answer 4.1.1 above.

In view of this, the Applicants fall within the description of “foreign representatives” as defined under Article 2(d) of MLCBI.]

For full marks your response should have addressed the following:

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.’

2. 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.

3. 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”*.

4. 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.

5. 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.

6. 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.

*** End of Assessment ***