



SUMMATIVE (FORMAL) ASSESSMENT: MODULE 2A

THE UNCITRAL MODEL LAWS RELATING TO INSOLVENCY

Commented [SL1]: TOTAL = 34

68%

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.**
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- 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 = 7 MARKS

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

Question 1.1

Which of the following statements does not reflect the purpose of the Model Law?

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

Question 1.2

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

- (a) The increased risk of fraud due to the interconnected world.
- (b) The difficulty of agreeing multilateral treaties dealing with insolvency law.
- (c) The practical problems caused by the disharmony among national laws governing cross-border insolvencies, despite the success of protocols in practice.

(d) All of the above.

Question 1.3

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

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

Commented [SL4]: Correct answer is (c).

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

Commented [SL5]: Correct answer is (d).

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?

COMITY is the recognition which one nation allows within its territory to the laws and regulations in the courts. COMI stands for Centre of Main Interest but is not defined but is seen as where the entity is established. COMI determines the consequences of the recognition of the debtor.

The factors which determine the COMI are where the central admin of the debtor takes place as well as which is readily ascertainable by the creditors. They can look at location of the books, records, financing, cash management occurs, where assets are located, primary bank account, location of employees, controlling laws, policies held, contracts held with suppliers.

COMI is used in the definition of the Foreign main proceedings. This is where the administration of the interests on a regular basis. Other insolvency laws often use principal place of business but this is not the case with UNCITRAL. UNCITRAL looks at the main proceedings of the debtor. Therefore, the UNCITRAL model looks for the registered office or if it is an individual then the habitual residence.

Whereas the Foreign non main proceedings specify that the debtor has an establishment which is a place of operation where the debtors carry out business activities. Tests used to assess the non-main proceedings would be the presence of assets and the location of the assets.

The appropriate date for determining the COMI is the date of commencement of the foreign proceedings or also referred to as the effective date of commencement of proceedings or even the date of application for commencement. This may not always be the same place and can change.

The date is very important as this can change the treatment of the debtors assets and provides the debtor with protection between application and commencement. During this period, the representative can reclaim assets that have been disposed.

Commented [SL6]: SUBTOTAL = 8.5 MARKS

Commented [SL7]: 2 marks

Also, US case: *Morning Mist Holdings Ltd v. Krys (Matter of Fairfield Sentry Ltd)*

Question 2.2 [maximum 3 marks]

Commented [SL8]: 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."*

1) Name of the provision -

Grounds to refuse recognition and enforcement of an insolvency related judgement.

Model law article 14- Paragraph 3 of Article 14 states what a notification to creditors of commencement and proceedings should include.

2) Name of the provision -

Ongoing obligation to update court on development.

Model law article 18- Paragraph 4, this rule is like article 10 Model Law about concerns that participation might trigger expose to all jurisdictions.

3) Name of the provision -

Recognition Presumptions

Model law article 16- Paragraph 3 There is a rebuttable presumption that the place of RO of the debtor is the COMI.

Question 2.3 [2 marks]

Commented [SL9]: 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 case appeal which was about the indefinite Moratorium Continuation is about a state-run bank with a restructuring plan but creditors that that did not approve the vote argued that they could not be bound to the restructure. A recognition order was obtained as foreign main proceedings in the UK, and this imposed a moratorium preventing creditors from taking action without court permission and this was binding for all creditors. Although under the Gibbs rule that it is the proper law of the debt with determines how it can be extinguished.

The Judge decided that a permanent stay cannot be used to get out of the Gibbs rule. And the request for the Moratorium Continuation application was denied.

The Gibbs Rule was where a foreign representative had an earlier recognition order and requested relief under article 21 of ML by way of an indefinite continuation of automatic moratorium.

This order was contested by two creditors who had unpaid claims in English law and not foreign proceedings in which IBA was subject to. Therefore, the Gibbs rule didn't apply to the two creditors.

But due to a restructuring plan, this was binding on all creditors. But once the restructuring was finished the two creditors could then go to UK and enforce their English law against IBA, based on the Gibbs rule.

The Moratorium Continuation Application was used to protect the two creditors from enforcing English law.

This brought up the topic of Modified universalism which enables the court to grant relief in advance without affecting the Gibbs rule.

The above caused the emergence of many new restructuring procedures across the EU. But under Gibbs English law if it is English law governed debt and assets are located in the UK, the CBIR cannot be used to obtain recognition of discharge.

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.

With regards to recognition is dealt with in articles 15-18 and with regards to relief, this is discussed in articles 19-24. The COMI of the debtor determines the consequences of the recognition. If the COMI is in the jurisdiction where the foreign proceedings have been opened. The proceedings are main insolvency proceedings with automatic relief which is mandatory. But if the debtors only have an establishment in the jurisdiction where the foreign proceedings are opened, this is non main proceedings without automatic relief. Only discretionary post recognition relief not automatic.

There is no reciprocity requirement and there is ongoing duty to keep the court updated on the developments.

Article 18 - Obligation to update court on developments.

Commented [SL10]: 1.5 marks

Also art 29(a)

This article requires that the foreign representative must from the time of filing the recognition application for the foreign proceedings, to immediately inform the court in the enacting state the following items:

- 1) If there is any substantial change in the status of the recognised foreign proceedings*
- 2) Any substantial changes in the status of the foreign representative's appointment*
- 3) And other foreign proceedings regarding the same debtor*

Article 19-22

Due to the domestic proceedings already been opened, after the recognition of the foreign main proceedings, the court in the enacting state should even prior to the decision of the courts, they are entitled to grant urgently needed interim relief upon application for the recognition of a foreign proceedings (Article 19) The court in the enacting state must be satisfied that the interests of the debtors creditors and other parties are adequately protected. This triggers Article 20 which provides automatic mandatory relief.

Upon recognition of a foreign proceedings the ML provides the court in the enacting state with discretionary power (Article 21) This is to be able to protect the assets of the debtor or the interest of the creditors and allows them to grant appropriate relief.

With then the court in the enacting state must strike a balance between relief and interests of the persons. (Article 22)

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

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.

With regards to the foreign rep looking into their options to secure the value of the debtor's assets which are located in State A.

Model law looks at getting optimal results, however cooperation is not dependent on recognition, it only provides a framework and guidance. Access and recognition should be used and understood together with cooperation for better results. They aim to save time and expenses, avoid value destruction, and facilitate value creation. [1] It provides comfort and transparency for the Debtors to do business in the enacting state.

Your answer should include reference to Article 9 of the MLCBI which relates to legal standing and that in this regard the foreign representative has automatic standing before the courts in State A, without having to meet any formal requirements.

The rights in State A can benefit the Foreign Representatives by the following:

Access

When looking at Access rights, this provides the foreign representatives who are before the courts in the enacting state, without the need for separate proceedings to achieve a standing, to clearly facilitate cooperation as they allow the foreign rep to communicate with the court. [½] - your answer should make reference to the provisions contained in Article 11 of the MLCBI.

Cooperation

The object of cooperation is the allow the courts and the insolvency representatives from two or more counties to be efficient and achieve optimal results and have consistency of the treatment of stakeholders across in cross border insolvencies across jurisdictions. [1]

This is facilitated by recognition of foreign proceedings which allow the court to provide the foreign rep with appropriate and more tailer-made relief, when required.

Standing

The access is granted without the need for formal requirements such as licenses or consular action. [½]

Cost and time can be saved. [½] The key benefits of both the access provisions and the cooperation provisions are that they save time and therefore also costs, as a result of which value destruction can be avoided and value enhancement be promoted.

Powers which allow gathering of information to assess if insolvency Claw back actions or director's claims exist:

- *Allowing the examination of witnesses*
- *Taking of evidence*
- *The delivery of information concerning debtor's assets/affairs*

Question 3.2 [maximum 5 marks] [2 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.

Once the qualification of the foreign representative and the foreign proceedings, recognition is then successful. Items that must be considered are:

Evidence- Article 15 There must be the following documents accompanying the application.

Copy of decision commencing the foreign proceedings and appointing the foreign representative. There must be the certificate from the foreign court affirming the existence of the foreign proceeding and the appointment of the foreign rep. If no evidence, then other evidence is acceptable to the court of the existence of the proceeding and appointment of foreign rep. [1]

Restrictions - Articles 20(2), 22(4) and 24(3)

Exclusions- Article 1 (2) allows the enacting state to exclude certain proceedings from the application of model law. For example, banks and insurance companies as they could need special regulations. Public utility companies and consumers may also need special solutions and are excluded from qualification as a foreign proceeding. [1]

Limitations - Article 20 establishes a mandatory limitation to the effectiveness of the agreement.

Article 21 includes limits of relief.

A more detailed answer to the question was required, which should have included 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 out of 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.

Pre recognition-

Article 19 deals with prior to the decision on the recognition application. The court in the enacting state is entitled to grant urgently needed interim relief upon application for the recognition of a foreign proceeding.

(2) Allows the enacting state to include appropriate notice of the interim relief granted.

(4) If the interim relief would interfere with the admin of the foreign main proceedings, the court may refuse the grant. [1]

Post recognition -

Article 21 of model law sets out courts discretionary power to provide post recognition relief.

Article 24 provides for discretionary relief post recognition; this must meet the adequate protection test of article 27. [½]

Restrictions, limitations, and conditions should be considered:

Article 20

Provides automatic relief in case the recognised foreign proceedings qualify as foreign main proceedings. This allows time for steps to be taken. This is a mandatory limitation to the effectiveness of an arbitration agreements. [½]

(2) Allows for appropriate protections to be included in the law of the enacting states as to provide the court in the enacting state with authority to modify or terminate the automatic stay or suspension contemplated.

(3) Automatic stay and suspension do not affect the right to commence individual actions or proceedings necessary to preserve a claim against the debtor.

(4) The automatic stay and suspension do not affect the right to request the commencement of certain domestic insolvency proceedings or the right to file claims in the proceeding.

Article 22

Deals with granting or denying of the relief, the court in the enacting state must be satisfied that the debtor's interests and other stakeholders are protected. [1]

Article 23

The foreign rep obtains standing to initiate actions under the law in the enacting state to avoid or otherwise render ineffective legal acts detrimental to the creditors of the debtor.

- *Claw back rights*
- *Power to avoid antecedent transactions.*

Article 24

The foreign rep can intervene in any local proceeding in the enacting state in which the debtor is a party, provided the foreign rep meets the local requirement for this.

Your answer should include a discussion on the following elements:

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

Question 3.4 [maximum 1 mark] [1 mark]

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

Igor Vitalievich Protasov and Khadzhi-Murat Derev case [½]

There was relevant restrictions and limitations existed which served to inhibit the proper exercise of that jurisdiction. English bankruptcy law offers other forms of protection which resulted in the relief of freezing was not warranted. [½]

It was said "... the scheme of the Model Law is intended to put the foreign trustee or bankruptcy manager in the same position, as far as practicable, as an office holder appointed under domestic law, and consistent with that, the effect of recognition of a foreign main proceeding is to bring into play the same wide infrastructure of the insolvency legislation. Absent some exceptional reason, as freezing order or other similar order will not in my view be required or justified." extracted from Paragraph 52 of the *Protasov v derev* case judgement.

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] [9 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 [6 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]. [3 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.

4.1.1

(a) *"Foreign proceeding" means a collective judicial or administrative proceedings in a foreign State, including an interim proceedings, present 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 reorganisation or liquidation.*

Extracted from pg. 297 UNCITRAL Legislative Guide on Insolvency Law, United Nations Publication Sales No. E.05V.10 ISBN 92-1-133736-4

For the bank liquidation to qualify as the meaning of Foreign Proceedings it will need to meet the following elements:

- 1) Collective nature - While the proceeding may include an interim proceeding, it must be [judicial or administrative and collective in nature.**
- 2) Law related to insolvency- The proceeding must be in a foreign State authorised or conducted under a law related to insolvency.**
- 3) Subject to control or supervision by a foreign court- the assets and affairs of the debtor must be subject to control or supervision by a foreign court.**
- 4) Purpose of reorganisation or liquidation- the proceeding must be for the purpose of reorganisation or liquidation.**

5) The “judicial or administrative” element is a separate element from the “collective nature”

Therefore... based on the following facts:

- Registered office is in Country A (Country A has not adopted MLCBI)
- UBO has 95% of shares through various entities, some registered in England.
- Proceedings were commenced in English courts.
- Monies were sent to many overseas companies.
- It is a bank and has specific insolvency procedures for banks specifically. DGF is the government body in Country A which has rights to withdraw insolvent banks and act as interim administrators and its ultimate liquidation. They require full powers under the law of Country A. Banks and insurance companies are example of entities that could be excluded from model law, but it is assumed that this is not the fact in this case.

We would need to determine the COMI of the debtor. Which looks at:

- Location where central administration of the debtor takes place and which is readily ascertainable as such by creditors of the debtors.
- Due to the Registered Office being in Country A, this is seen as the COMI of the entity in foreign country. Other factors could change this assumption.

If the foreign proceedings take place in the state where the debtor has its COMI, the foreign proceedings will be recognised as foreign main proceedings.

The first step would be to determine if the article 15 is applicable and then if those are met then recognition will be granted via article 17. A foreign representative may apply to the court for recognition of the foreign proceedings to which the foreign representative has been appointed.

Article 15 provides the following:

- A foreign rep may apply to the court for recognition of the foreign proceeding to which the foreign rep has been appointed.
- An application shall be accompanied by:
 - o A certified copy of the decision commencing the foreign proceeding and appointing the foreign rep. OR
 - o A certificate from the foreign court affirming the existence of the foreign proceeding and of the appointment of the foreign rep OR
 - o Any other evidence acceptable to the court of the existence of the foreign proceedings and the appointment of the foreign rep.
- An application for recognition shall be included by a statement identifying all foreign proceedings in respect of the debtor that are known to the foreign rep.
- The court may require a translation to be in the enacting state official language.

DGF establishes a moratorium which prevents the claims of debtors and creditors being satisfied, execution and enforcement of banks assets, restrictions over the properties. They have the power to compile a list of creditor claims. Find

and recover assets, handle employment contracts, and dispose of assets. They have full rights and powers to manage the bank and assets of the banks under the Country A laws. It must be the proceedings relating to the debtor and its own creditors. This satisfies the collective nature element.

For full marks, your response should address the “collective nature” along the following lines:

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”.

NB has the requirement to classify the bank as troubled if meeting the law of banks requirements. Of which we have an affidavit of the legislation of the Country A insolvency legislation. Therefore, meeting the Law related to insolvency requirement.

For full marks, your response should address the “pursuant to a law relating to insolvency” element along the following lines:

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”.

DGF is the governmental body of the foreign country which is responsible for the withdrawing of the insolvent bank and winding down the operations vis liquidation which satisfies the Subject to control or supervision by a foreign court requirement. They are automatically the liquidator of which the liquidator has the powers.

Similar to the comments made above, your response should address each element in more detail, provide guidance and source references, as appropriate, and apply the facts.

Due to bank meeting the downfall to meet the troubled status The bank had 180 days to meet the requirements or else they are insolvent and meets the criteria of article 76 of the LBBA which results in Article 77 of the LBBA which provides that a bank can be liquidated by NB directly, revoking the license, which meets the 4th element- Purpose of reorganisation or liquidation.

See comment above.

Therefore, the bank liquidation comprises of a foreign proceeding of 2(a) of the MLCBI in Country A.

4.1.2

(d) “Foreign representative” means a person or body, including one appointed on an interim basis, authorized in a foreign proceeding to administer the reorganization or the liquidation of the debtor’s assets or affairs or to act as a representative of the foreign proceeding.

Extracted from pg. 298 UNCITRAL Legislative Guide on Insolvency Law, United Nations Publication Sales No. E.05V.10 ISBN 92-1-133736-4

With regards to the applicants fall, the following would need to qualify for it to be classified as a foreign representative:

- 1) Appointed authorised person or body - It needs to be appointed person or body (can also be on an interim basis) authorised in the foreign proceeding.*
- 2) Administer debtors’ assets or affairs or act as a representative- the authorisation of the representative is either to administer the reorganisation or liquidation of*

the debtor's assets or affairs or to act as representative of the foreign proceedings.

Therefore... based on the following facts:

The applicant is the DGF which is a government body in Country A which has rights to withdraw insolvent banks and act as interim administrators and its ultimate liquidation. They require full powers under the law of Country A. Country A has not adopted MLCBI, but local laws and laws on banks could overrule MLCBI.

DFG law empowers the DGF to delegate its power to an authorised officer or person. This is defined as an employee of the fund who on behalf of the fund and within the powers provided by this law/fund, perform actions to ensure the banks withdrawal from the market during provisional administration of the insolvent bank/ liquidation.

The authorised person must have a high professional and moral qualities, impeccable business reputation, completed higher education and professional experience. They may not be a creditor or have a criminal offence, have any obligations to the bank or any conflict of interests. Once appointed they are accountable for their actions and powers delegated to them by DGF.

DFG has been confirmed that they are independent, the person delegated has extensive powers over management and supervisory.

An interim person can be placed. Which the above person qualifies for the appointed authorised person was authorised in the foreign proceeding. And is the administrator/representative of the assets/affairs.

Therefore, based on the interim, DGF is the body which is the foreign representative. With Ms C being the appointed person at the body in DGF. This can be interim appointment. The foreign representative does not need to be authorised by the foreign court.

Article 18 provides the foreign representative with the obligation to update the court on the developments to the enacting state.

Ms C was appointed by DGF this was an interim person which was replaced by Ms G. in Aug 2020.

For full marks, we are looking for a response along the following lines:

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 our judgment they both had the necessary standing to apply in that capacity, for recognition of the Bank's liquidation.*

*** End of Assessment ***