



SUMMATIVE (FORMAL) ASSESSMENT: MODULE 2A

THE UNCITRAL MODEL LAWS RELATING TO INSOLVENCY

Commented [SL1]: TOTAL = 34.5

69%

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

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

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

INSTRUCTIONS FOR COMPLETION AND SUBMISSION OF ASSESSMENT

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

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

submit the assessment again by 31 July 2023 (for example, in order to achieve a higher mark).

- 7. Prior to being populated with your answers, this assessment consists of 14 pages.*

ANSWER ALL THE QUESTIONS

Please note that all references to the "MLCBI" or "Model Law" in this assessment are references to the Model Law on Cross-Border Insolvency.

QUESTION 1 (multiple-choice questions) [10 marks in total]

Commented [SL2]: SUBTOTAL = 8 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

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]

Commented [SL5]: SUBTOTAL = 7 MARKS

Question 2.1 [maximum 3 marks]

Commented [SL6]: 2 marks

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

The MLCBI states that the appropriate date for determining the COMI of a debtor is the date of the commencement of the foreign proceedings. However, in practice the COMI may change. If the COMI does change, the proximity in time to the instigation of the foreign proceedings will require careful scrutiny to avoid an attempted abuse of the rules and/or an attempt of 'forum shopping'. Officeholders have a duty of full and frank disclosure in this regard and the COMI must make sense to third parties affected by the change such as creditors. The US judgment of Morning Mist Holdings demonstrates the compromise a court may apply in balancing the established rules around selecting the date and the realities of potential manipulation of COMI.

Question 2.2 [maximum 3 marks]

Commented [SL7]: 2.5 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.

Art 16(3)

Statement 1 *"This Article lays down the requirements of notification of creditors."*

Article 14 - Timely Notice - exemplified by the equal treatment principle so that foreign creditors are entitled to notifications at the same time as domestic creditors without undue delay or formality.

Statement 2 *"This Article is referred to as the 'Safe Conduct Rule'."*

Article 10 - Deals with concerns about an 'all-embracing' jurisdiction.

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

Article 16 - 'in the absence of proof to the contrary, the debtor's registered office, or habitual residence is presumed to be the debtor's COMI. This presumption is rebuttable upon receipt of proper evidence.

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.

The English Court of Appeal confirmed that the indefinite Moratorium Continuation should not be granted because the risk of the English creditors successfully enforcing their claims jeopardising the restructuring plan was “far too indirect and imponderable a consideration” to satisfy the test of necessity in Article 21(1) of the Model Law. The Court further noted that the debtor could have attempted to implement a parallel scheme of arrangement in the UK. It can be inferred that the Court was of the view that the creditors of IBA as a whole already had sufficient protection without needing to permanently frustrate the English creditors in any attempt to enforce their claims.

Commented [SL8]: 1.5 marks

Discussion of Gibbs rule

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.

The Court in this scenario needs to instigate the mandatory relief prescribed in Article 20. The recognition of foreign main proceedings triggers a stay of execution against the debtor’s assets, a suspension of the right to encumber, dispose or transfer the debtor’s assets and grants a stay on the continuation of any individual proceedings against the debtor. These mandatory reliefs will all impact the pre-existing domestic proceedings.

In terms of the duty of the foreign officeholder, Article 18 imposes a positive obligation on that person to promptly inform the Court in the enacting state of any substantial change in the status of the recognised foreign main proceeding or their appointment. They must also notify the Court of any other foreign proceedings of which they are or become aware of.

Commented [SL9]: 1 marks

Art 29(a) and art 18 (which was discussed)

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.

Commented [SL10]: SUBTOTAL = 9 MARKS

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

Question 3.1 [maximum 4 marks] [2 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.

The Model Law's purpose is to facilitate a uniform approach to insolvency in the cross-border scenario. A key cornerstone of this is that a foreign representative needs to have access to a domestic State's relevant courts and their co-operation where appropriate to achieve his or her goals of maximising the debtor's estate for the benefit of creditors globally.

State A has implemented the Model Law without a reciprocity provision. Therefore the foreign representative can rely on the provisions available in the Model Law regardless of whether State B has implemented the Model Law.

Article 9 allows for the foreign representative to have direct access or 'standing' in the domestic courts in State A without the need for formal recognition. This will be of benefit to the foreign representative because he will have a right of standing without undue formality or cost. [1]

Article 10 allows the foreign representative access without concern that the court in State A will assume jurisdiction over all the debtor's assets - the so-called 'safe conduct rule'. Both of these rights will give the foreign representative the 'breathing-space' required to assess the debtor's assets in State A and to decide if pursuing formal recognition is needed in the circumstances.

Article 25 ensures that the Court in State A co-operates with the foreign representative to the 'maximum extent possible' and this right is available on the presence of assets rather than foreign main or non-main proceedings.

Finally the foreign representative will benefit from the provisions set out in Article 27 which defines very broadly the means of the co-operation from open communication between courts to supervision of the debtor's assets. The list is deliberately non-exhaustive and this will be of benefit to the foreign representative because he will be able to petition for relief appropriate to the debtor with the Court's approval. [1]

For full marks, your answer must also include a discussion on the following:

- **Opening domestic insolvency proceedings (Article 11 MLCBI): The foreign representative is further specifically entitled to apply for the opening of domestic insolvency proceedings in State A, as reflected in Article 11 of the MLCBI. Whether**

or not the foreign representative would wish to do this will depend on what the requirements are for opening such domestic proceedings. Can these requirements be met? On the other hand, it will depend on what the foreign representative believes he/she can get in terms of (interim) relief for the foreign proceedings in State B. In other words, are domestic insolvency proceedings really needed, or just additional time and costs that should be avoided?

- **Save Time & Costs: 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 is being promoted.**

Question 3.2 [maximum 5 marks] [3 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.

The various restrictions, other evidence for consideration, exclusions and limitations that must be considered before recognition will be granted are as follows:

- *Reciprocity - consideration must be given to the enacting State’s provisions vis a vis reciprocity. In this example State A has not enacted a reciprocity provision. But if it had, such as the provision enacted in South Africa, recognition would be refused if State B had not adopted the Model Law notwithstanding the fact that the foreign proceeding and foreign representative requirements were properly met.*
- *Exclusions - Article 1(2) allows State A to exclude certain proceedings from the application of the Model Law. For example, an insolvency of a bank or an insurance company that would have far reaching implications on the economy of State A can be excluded from general recognition as a foreign proceeding and State A can enforce the implementation of domestic regulatory proceedings under domestic laws instead to minimise the impact. This would also apply to companies of public interest such as utility companies etc. [1]*
- *Article 3 requires that the implementation of the Model Law does not interfere or breach any international obligations which must remain supreme. Therefore recognition may be refused on the grounds that the relevant proceedings are governed by international treaties such as the insolvency of an airline or shipping company. [1]*
- *Article 6 builds on the exclusions permitted under Article 1(2) by allowing for public policy exceptions. [1] As a safeguard to State A’s sovereignty,*

recognition may be refused if it would 'manifestly' break public policy concerns. 'Manifestly' is an incredibly high test as demonstrated in the *Agrokor* case. Here the court determined that provisions simply being 'contrary' to established UK public policy did not meet the threshold of 'manifestly' and as such recognition was allowed.

- Finally, Article 18 places a positive obligation on the foreign representative, both at the time of filing and after the granting of the recognition, to maintain full and frank disclosure with the Court in State A. Should there be any changes to the foreign proceeding, its status or the representative's authority they must make the court aware without delay. Misleading the Court in this regard could lead to recognition being withdrawn.

With reference to the question, your answer should also include a discussion on the following:

1. **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).
2. **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.

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 Relief

The Model Law allows for pre-recognition relief to be granted under Article 19 - also known as 'Interim Relief'. Interim Relief is granted where urgently required to protect the assets of the debtor or the interests of creditors in the enacting state. Relief is available in this regard from the time of filing the application for recognition until it has been determined. Relief includes a stay of execution against the debtor's assets amongst others. Article 19 paragraph 4 allows a

court to refuse to grant interim relief where it would interfere with the administration of a foreign main proceeding.

The Model Law allows for both pre and post-recognition relief to be granted by the enacting State providing an appropriate balance is struck between the relief sought and the interests of stakeholders who may be affected by the relief (Article 22). Article 22 specifically lists the interests of creditors and the debtor as examples of those whose interests must be taken into consideration. Article 22(3) allows for relief previously granted to be terminated or modified if no longer appropriate.

Post-Recognition Relief

Post-Recognition relief may be granted on either a discretionary or mandatory basis depending on the recognition granted.

Mandatory automatic relief is granted upon the recognition of a foreign main proceeding under Article 20. The relief available is:

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

Article 20(2) allows for the limitation or restriction of the mandatory relief where its imposition would be contrary to the legitimate interests of the parties (including the debtor). By way of example, the relief automatically granted under Article 20 would ordinarily render an arbitration clause difficult to impose. However, on the facts it may be that an arbitration is in the interests of the parties and as such the Court may allow it to proceed. Article 20(3) further states that the automatic stay granted under 20(1) does not prevent individual actions in so far as they are required to preserve a creditor's claim against the debtor. Other exceptions that may exist in the law of the enacting state may allow for the enforcement of secured claims or claims that arise after the commencement of the insolvency proceedings.

Discretionary relief is available at the Court's discretion following the recognition of both foreign main proceedings and foreign non-main proceedings under Article 21. Discretionary relief is awarded providing it is appropriate - it is therefore not automatic and will be assessed on a case by case basis and only granted where the Court is satisfied that the rights of local creditors are sufficiently protected. In addition, where discretionary relief is granted following the recognition of a foreign non-main proceeding, Article 21(4) requires that the relief granted is appropriate and does not interfere with the administration of any other relevant insolvency proceedings - particularly the main foreign proceedings. Examples of discretionary relief are:

- Staying execution against the debtor's assets to the extent it has not already been stayed automatically under Article 20;*

- Providing for the examination of witnesses, the taking of evidence or the delivery of information concerning the debtor's assets, affairs, rights, obligations or liabilities;
- Extending any interim relief granted previously; and
- Granting any additional relief that may be available to a domestic office holder under the enacting State's laws.

Your answer should also include a brief discussion on the following elements:

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?

A worldwide freezing order granted as pre-recognition relief under Article 19 is unlikely to be allowed to continue post-recognition because principally, interim relief is required in urgent circumstances for the preservation of assets. However Article 22 requires that any relief granted either pre or post-recognition is balanced between the needs of the foreign representative and those affected. Applying a balanced view it is unlikely that a Court would agree that such an extreme measure such as a worldwide freezing order is proportionate once the foreign representative has received recognition and taken the immediate steps to deal with the assets concerned. As demonstrated by the English case Protasov v Derev, the judge ruled that post-recognition the foreign representative could make use of various tools under English law to accomplish his goals without the need for the severe worldwide freezing order.

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] [10.5 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 [7 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]. [3.5 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.

The application for recognition in the UK proceedings requires that the proceedings in Country A be classified as 'foreign proceedings' pursuant to Article 2(a) of the MLCBI and that those making the application can be defined as 'foreign representatives' pursuant to Article 2(d).

It should be noted that from the outset, Mrs G has standing in the English Court pursuant to Article 9 MLCBI because no recognition is required at this stage.

Defining a proceeding as a 'foreign proceeding' capable of recognition under Article 17 requires consideration of the following elements:

- **The subject of the application must be a proceeding. This can include interim proceedings - the matter of the Bank is clearly a proceeding under the LBBA.**
- **The proceeding may either be judicial or administrative. Given the powers imposed on the DGF and Mrs G, the proceeding is clearly administrative in nature. For example Articles 35(5) and 36(1) of the DGF Law states that the DGF acting via its authorised officer shall have full and exclusive rights to manage the bank.**
- **The proceeding must be collective in nature. The requirement in this regard is that substantially all of the assets and liabilities of the Bank are dealt with in the proceeding. The proceeding with regards to the Bank qualifies because the DGF as liquidator has the power to 'take steps to find, identify and recover property belonging to the bank' and to 'compile a register of creditor claims and seek to satisfy those claims'.**

For full marks, your response should address each element in sufficient detail, provide guidance and source references as appropriate, and apply the facts. For this element we are looking for something 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".**

- **The proceeding must be in a foreign state. This requirement is clearly satisfied.**
- **The proceeding must be authorised or conducted under a law relating to insolvency. In practice the requirement in this regard has been drafted sufficiently broadly to encompass a broad range of laws. The relevant law need not exclusively relate to insolvency nor be called an 'insolvency law'. The LBBA, whilst not being called an 'insolvency law' and whilst dealing with other matters does make specific provision for the insolvency of banks in Country A. As such this element is clearly satisfied. Moreover, the English Court has been clear on its interpretation of this rule in the Sturgeon Central Asia case where it was determined that actual 'insolvency' was required and a solvent wind down was not capable of satisfying this provision. Given the Bank is clearly insolvent with an estimated deficiency of over \$832m this requirement is met.**
- **The proceeding must also be subject to a foreign court. This provision has been clarified to include both actual and potential supervision. The proceeding with respect to the Bank is not directly under the Court's supervision in State A but the representative does have the power to file property and non-property claims with the Court.**

The relevant element here is "subject to the control or supervision by a foreign court". For full marks, your response should be along the following lines:

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

- **Finally, the proceeding must be for the purpose of reorganisation or liquidation. This final requirement is clearly satisfied by the fact that the LBBA provides the NB the ability to classify the bank as 'troubled' per Article 75, impose restrictions and declare the Bank insolvent if appropriate. The English court has previously adjudicated that this provision focuses on the 'purpose' of the foreign law. If it is to deal with insolvency or dealing with financial distress then the provision is satisfied.**

On the facts, it is clear that the proceedings being undertaken with regards to the Bank do satisfy the requirements under Article 2 of the MLCBI.

Per Article 15 MLCBI, Mrs G needs to provide the English court with the following in support of the recognition application:

- **a certified copy of the decision commencing the foreign proceeding and her appointment; or**
- **A certificate from the foreign court affirming the existence of the foreign proceeding and her appointment; or**
- **Any other evidence acceptable to the court of the existence of the foreign proceeding.**

In the circumstances, a certified copy of the NB's decision classifying the Bank as insolvent per Article 76 of the LBBA and a copy of the DGF's resolution of 17 September 2015 appointing Mrs C as interim Administrator, and the subsequent appointment of Mrs G should suffice.

Therefore the English court should have no issue with classifying the proceedings re the Bank as 'foreign proceedings'. The court will have to determine if the proceedings are main foreign proceedings or non-main foreign proceedings by reference to the Bank's COMI. This classification will determine the type of relief Mrs G can request and whether it will be automatically given or at the English court's discretion. Whilst COMI is not defined in the MLCBI, and on review of the different requirements, the fact that

the Bank operated as a 'bank' in Country A means it is likely that the Court will determine the foreign proceedings as 'main' proceedings. The English proceedings centre around the alleged fraudulent activities but this may not be enough to move the COMI to England given the Bank's customers and registered office are in Country A.

With regards to Mrs G and the DGF, in order for the recognition to be granted one or both need to be classified as 'foreign representatives'. The criteria in this regard are:

- **Mrs G and/or the DGF must be 'a person or body, including one appointed on an interim basis';**
- **They must be authorised in the foreign proceeding; and**
- **Their appointment must be to administer the reorganisation or liquidation of the Bank's assets or affairs or to act as representative of the foreign proceeding.**

Provisions 1 and 2 are clearly met by both Mrs G and the DGF. DGF clearly satisfies the first limb of provision 3 as the 'liquidator' and Mrs G satisfies the second limb of this test as the DGF's appointed representative.

Per Article 2(e) MLCBI the DGF and Mrs G need not be appointed by a foreign court. Therefore their appointment under the LBBA is sufficient.

It should be noted that following the making of their application Article 18 MLCBI requires ongoing full and frank disclosure to the English court in respect of any other foreign proceedings Mrs G or the DGF are aware of and any changes in their authorisation.

On balance and as clearly exemplified on the facts, the recognition should be granted, potentially as a foreign main proceeding.

For full marks your response to Q 4.1.2 should be 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 *