



SUMMATIVE (FORMAL) ASSESSMENT: MODULE 2A

THE UNCITRAL MODEL LAWS RELATING TO INSOLVENCY

Commented [SL1]: TOTAL = 40

80%

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

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

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

## INSTRUCTIONS FOR COMPLETION AND SUBMISSION OF ASSESSMENT

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

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

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

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

**ANSWER ALL THE QUESTIONS**

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

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

Commented [SL2]: SUBTOTAL = 10 MARKS

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

Question 1.1

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

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

Question 1.2

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

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

**(d) All of the above.**

Question 1.3

**Which of the following challenges to a recognition application under the Model Law is most likely to be successful?**

**(a) The registered office of the debtor is not in the jurisdiction where the foreign proceedings were opened, but the debtor has an establishment in the jurisdiction of the enacting State.**

**(b) The registered office of the debtor is in the jurisdiction of the enacting State, but the debtor has an establishment in the jurisdiction where the foreign proceedings were opened.**

**(c) The debtor has neither its COMI nor an establishment in the jurisdiction where the foreign proceedings were opened.**

**(d) The debtor has neither its COMI nor an establishment in the jurisdiction of the enacting State.**

Question 1.4

**Which of the following rules or concepts set forth in the Model Law ensures that fundamental principles of law are upheld?**

**(a) The *locus standi*/access rules.**

**(b) The public policy exception.**

**(c) The safe conduct rule.**

**(d) The "hotchpot" rule.**

Question 1.5

**For a debtor with its COMI in South Africa and an establishment in Argentina, foreign main proceedings are opened in South Africa and foreign non-main proceedings are opened in Argentina. Both the South African foreign representative and the Argentinian foreign representative have applied for recognition before the relevant court in the UK. Please note that South Africa has implemented the Model Law subject to the so-called principle of reciprocity (based on country designation), Argentina has not implemented the Model Law and the UK has implemented the Model Law without any so-called principle of reciprocity. In this scenario, which of the following statements is the most correct one?**

*(a) The foreign main proceedings in South Africa will not be recognised in the UK because the UK is not a designated country under South Africa's principle of reciprocity, but the foreign non-main proceedings in Argentina will be recognised in the UK despite Argentina not having implemented the Model Law.*

*(b) Both the foreign main proceedings in South Africa and the foreign non-main proceedings in Argentina will not be recognised in the UK because the UK has no principle of reciprocity and Argentina has not implemented the Model Law.*

*(c) Both the foreign main proceedings in South Africa and the foreign non-main proceedings in Argentina will be recognised in the UK.*

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

Question 1.6

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

*(a) No interim relief based on Article 19 of the Model Law is available if concurrent domestic insolvency proceedings and foreign proceedings exist at the time of the application of the foreign proceedings in the enacting State.*

*(b) In the case of a foreign main proceeding, automatic relief under Article 20 of the Model Law applies if concurrent domestic insolvency proceedings and foreign proceedings exist at the time of the application of the foreign proceedings in the enacting State.*

*(c) The commencement of domestic insolvency proceedings prevents or terminates the recognition of a foreign proceeding.*

*(d) If only after recognition of the foreign proceedings concurrent domestic insolvency proceedings are opened, then any post-recognition relief granted based on Article 21 of the Model Law will not be either adjusted or terminated if consistent with the domestic insolvency proceedings.*

Question 1.7

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

*(a) The court must be satisfied that the interests of the creditors and other interested parties, excluding the debtor, are adequately protected.*

**(b) The court should consider whether the relief requested is necessary for the protection of the assets of the debtor or the interests of the creditors and strike an appropriate balance between the relief that may be granted and the persons that may be affected.**

**(c) The court should be satisfied that the foreign proceeding is a main proceeding.**

**(d) All of the above.**

Question 1.8

**Which of the statements below regarding the Centre of Main Interest (COMI) and the Model Law is correct?**

**(a) COMI is not a defined term in the Model Law.**

**(b) For a corporate debtor, the Model Law does contain a rebuttable presumption that the debtor's registered office is its COMI.**

**(c) For an individual debtor, the Model Law does contain a rebuttable presumption that the debtor's habitual residence is its COMI.**

**(d) All of the above.**

Question 1.9

**An automatic stay of execution according to article 20 in the Model Law covers:**

**(a) Court proceedings.**

**(b) Arbitral Tribunals.**

**(c) Both (a) and (b).**

**(d) Neither (a) nor (b).**

Question 1.10

**Article 13 grants access to the creditors in a foreign proceeding. Which of the following statements correctly describes the protection granted in Article 13?**

**(a) A foreign creditor has the same rights regarding the commencement of, and participation in, a proceeding as creditors in this State.**

**(b) A foreign creditor has the same rights as it has in its home state.**

(c) All foreign creditors' claims are, as a minimum, considered to be unsecured claims.

(d) Article 13 contains a uniform ranking system to avoid discrimination.

QUESTION 2 (direct questions) [10 marks in total]

Commented [SL3]: SUBTOTAL = 9 MARKS

Question 2.1 [maximum 3 marks]

Commented [SL4]: 3 marks

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

*The MLCBI does not expressly state the appropriate date for determining the COMI of a debtor. The Guide to Enactment and Interpretation ("GEI") for the MLCBI provides at para 159 that the appropriate date should be the date of commencement of the foreign proceedings in respect of the debtor.*

*The US courts have taken a different approach in *Morning Mist Holdings Ltd v Kryz (Matter of Fairfield Sentry Ltd)*(2nd Cir Appeals Apr. 16, 2013). There, the court held that the period between the commencement of the foreign proceedings and the filing of the recognition application could also be considered when determining a debtor's COMI.*

*In my view, the approach taken in the GEI is preferable, given that it provides a clear result that can be applied to all insolvency proceedings. Using the date of the recognition application, while maybe appropriate in some cases, would not be appropriate in cases where: the debtor's activities cease upon the commencement of the foreign proceedings; or the debtor is subject to laws which recognise the COMI of its reorganising entity rather than of the debtor itself following the commencement of the foreign proceedings.*

Question 2.2 [maximum 3 marks]

Commented [SL5]: 3 marks

**The following three (3) statements relate to particular provisions / concepts to be found in the Model Law. Indicate the name of the provision / concept (as well as the relevant Model Law article), addressed in each statement.**

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

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

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

*Statement 1: Article 14, which provides that notice must be given to foreign creditors whenever it is required to be given to local creditors, and sets out the substantive information that such notification must contain.*



*Statement 2: Article 10, which ensures that the court in the enacting state does not assume jurisdiction over all the debtor's assets simply by virtue of the recognition application.*

*Statement 3: Article 16(3), which provides that a debtor's COMI will be presumed to be the place of its habitual residence (for individuals) or its registered office (for a corporation) in the absence of proof to the contrary.*

**Question 2.3** [2 marks]

**Commented [SL6]:** 2 marks

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

*In IBA, the issue was whether the English court should exercise its discretion to grant an indefinite Moratorium Continuation in respect of a debtor who was subject to reconstruction proceedings in Azerbaijan. The problem with an indefinite Moratorium Continuation is that it can be seen to conflict with the rule from Gibbs, which is that a debt governed by English law cannot be discharged or compromised by a foreign insolvency proceeding. In the High Court, it was suggested that the indefinite Moratorium Continuation would not conflict the rule from Gibbs, because under the indefinite Moratorium Continuation, the English debts would not technically be "discharged", they would simply be rendered unenforceable. The High Court rejected this suggestion. While the Court of Appeal disagreed with the High Court on the question of jurisdiction under Article 21, the Court of Appeal agreed that granting the indefinite Moratorium Continuation would in substance prevent English creditors from enforcing the rights accorded to them by the rule from Gibbs. Thus, it decided that an English court should only exercise its discretion under Article 21 to grant such a continuation if: the stay was necessary to protect the interests of the debtor's creditors; and the stay would be an appropriate way to achieve such protection.*

**Question 2.4** [2 marks]

**Commented [SL7]:** 1 mark

***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.***

Art 29(a)

*After recognition, the court in an enacting state should seek cooperation and coordination with the court in the foreign proceeding pursuant to Article 29.*

*The foreign representative is subject to an ongoing duty to inform the court of the enacting state promptly of any substantial change in the status of the foreign proceeding, or any other foreign proceeding that becomes known to them, pursuant to Article 18.*

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

Commented [SL8]: SUBTOTAL = 9 MARKS

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

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

Question 3.1 [maximum 4 marks] [1 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.**

*Without the Model Law, the foreign representative's ability to secure the value of the debtor's assets in State A would depend on the domestic insolvency law of State A. Also, his access to State A's courts could be subject to certain requirements imposed by State A. Further, depending on the domestic law of State A, making an application to their courts may prejudice the foreign representative's rights in respect of the debtor's assets within State A's jurisdiction. With the Model Law, however, the foreign representative is able to rely on the rights conferred by Articles 9-12 to gain access to State A's courts: (a) without having to satisfy formal requirements; (b) without prejudicing his rights in respect of the debtor's assets in State A; and (c) to commence insolvency proceedings in State A under its domestic law. [1] For a foreign representative considering his options, (a) and (b) would be especially helpful. Further, Article 25(1) obliges the courts in State A to cooperate with the foreign representative "to the maximum extent possible". For a foreign representative considering his options, what is likely to be most beneficial is cooperation in the form of communication of information pursuant to Article 27(b).*

**Your answer should include the following:**

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

*standing before the courts in State A. This allows the foreign representative to safeguard and pursue assets of the debtor estate in State A before its courts.*

- ***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?*
- ***Cooperation:*** *Similar to access rights, the cooperation provisions in the MLCBI (articles 25-27) also operate independently of recognition and it is not a prerequisite to the use of the cooperation provisions that recognition of the foreign proceedings is obtained in advance. Courts in State A can freely cooperate with the foreign representative without having to worry whether the status in State B of the foreign representative can be recognised in State A.*
- ***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 relevant Articles would be Articles 15-17.*

*First, the foreign representative will have to comply with the formal requirements in Article 15. He will have to provide in his recognition application: (a) a certified copy of the decision commencing the proceeding in State B and appointing the foreign representative; (b) a certificate from State B’s court affirming the existence of the proceeding in State B and the foreign representative’s appointment as such; or (c) any other evidence acceptable to the court to confirm the existence of the proceeding in State B and the foreign representative’s appointment as such. [½] The “other evidence” referred to in (c) could constitute copies of minutes, court orders, reports to creditors, correspondence with relevant authorities concerning the foreign proceedings*

or registration of the foreign representative as the debtor's liquidator. The courts have also considered that, in order to rely on the catch-all in (c), the foreign representative will have to explain why the documents in (a) and (b) are not available. He will also have to provide a statement identifying all other foreign proceedings known to him. All such documents may need to be translated into State A's official language. [½]

Next, the foreign representative will have to convince the court in State A that the substantive requirements under Article 17(2) are met. He will have to first consider whether or not State B is the debtor's COMI. [½] If so, he will have to convince the court in State A that this is the case such that the State B proceeding can be recognised as a foreign main proceeding pursuant to Article 17(2)(a). In determining whether State B is the debtor's COMI, the court in State A will first consider whether the debtor's registered office is in State B. If it is, then Article 16(3) gives rise to a rebuttable presumption that State B is the debtor's COMI. If, instead, the foreign representative wishes to have State B recognised as the debtor's COMI despite the fact that its registered office is in another jurisdiction, he will have to *prove* that State B is the debtor's COMI. [½] Principally, the court in State A will be concerned with where the central administration of the debtor takes place, and whether that is readily ascertainable by creditors. The court may also have regard to other secondary factors, but ultimately its decision will be a holistic one based on all the circumstances.

If the foreign representative considers that State B is *not* the debtor's COMI, he will have to then show that the debtor has an establishment in State B such that the State B proceedings can be recognised as foreign non-main proceedings pursuant to Article 17(2)(b). "Establishment" is defined in Article 2(f) as "any place of operations where the debtor carries out a non-transitory economic activity with human means and goods or services."

Finally, the foreign representative will have to consider the exclusion in Article 6, which provides that the court in State A may refuse to recognise the foreign proceeding in State B if it would be manifestly contrary to the public policy of State A. [1] The courts have recognised that this exception should be construed narrowly by virtue of the word "manifestly". One example of recognition being denied on this ground could be where the foreign representative pursued the proceeding in State B contrary to an automatic stay in prior insolvency proceedings commenced in State A.

**With reference to the question, your answer must include the following elements:**

- 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.**

Question 3.3 [maximum 5 marks] [4 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 is provided for under Article 19. Article 19 recognises that relief may be necessary to urgently protect the assets of the debtor in State A. Thus, it provides the foreign representative with relief for the period between the making of the recognition application and the determination of the recognition application. Under Article 19, the foreign representative can obtain a stay of execution against the debtor's assets in State A, the entrusting of the debtor's assets in State A to him or another person designated by the court to protect and preserve their value, a suspension of the right to transfer encumber or otherwise dispose of the debtor's assets, the examination of witnesses and taking of evidence, and any other relief that is available in under State A's laws. Relief under Article 19 will not be granted if such relief would interfere with the administration of a foreign main proceeding (Article 19(4)).*

*Post recognition relief is governed by Articles 20 and 21. Article 20 sets out relief that is automatically granted upon the recognition of a foreign main proceeding. There will be a stay of execution in State A against the debtor's assets, a stay of commencing or continuing individual actions against the debtor's assets, and a suspension of the right to transfer encumber or otherwise dispose of the debtor's assets.*

*Article 21 involves post recognition relief that is discretionary. It applies to both foreign non-main and foreign main proceedings. In addition to the relief provided by Article 20, Article 21 also allows for the examination of witnesses and taking of evidence, the entrusting of the debtor's assets of the foreign representative, any relief available under State A's laws or the extension of pre-recognition relief. In granting relief under this Article, State A's court will have to be satisfied that the relief relates to assets which, under State A law, should be administered in the foreign non-main proceedings or concerns information required in that proceeding.*

*In choosing whether to grant relief under Article 21, State A may have regard to its own law. For example, in the *IBA* case, the UK Court of Appeal declined to grant relief under Article 21 because doing so would be in conflict with the common law rule applicable in the UK.*

**For full marks your answer could have included a brief discussion on the following:**  
**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.**

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?**

*Once a state recognises a foreign main proceeding, the insolvency infrastructure of that state will be available to the foreign representative, including the avenues to obtain the protection which was initially provided by the interim freezing order. There will therefore (other than in exceptional cases) no longer be any need for a worldwide freezing order, nor would such an order be justified. This was what the UK court decided in *Igor Vitalievich Protasov v Kadzhi-Murat Derev* [2021] EWHC 392 (CH).*

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] [12 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 [7.5 out of 10]**

**To be a "foreign proceeding" under Article 2(a), the Bank's liquidation must be:**

- (a) a collective judicial or administrative proceeding;**
- (b) pursuant to a law relating to insolvency;**
- (c) in which the assets and affairs of the Bank are subject to control or supervision of a foreign court;**
- (d) for the purpose of reorganisation or liquidation.**

**I will deal with each of these requirements in turn.**

Collective judicial or administrative proceeding

**As per [69]-[70] of the GEI, the MLCBI only covers "collective" proceedings, given that its purpose is to achieve a coordinated, global, solution for all stakeholders in insolvency proceedings. It is not intended to be utilised by individual creditors or groups of creditors who have commenced proceedings against the debtor in another state. When determining whether proceedings are "collective" the court will consider whether substantially all of the assets and liabilities of the debtor are dealt with in the proceeding, subject to local priorities, statutory exceptions, and local exclusions relating to the rights of secured creditors.**

**In my view, the Bank's liquidation is a collective proceeding. Cases have considered that collective proceedings involve the imposition of an orderly regime that affects the rights of all creditors, and all the assets of the debtor. Once liquidation of the Bank commences, DGF alienates its property and funds. Further, public encumbrances and restrictions on disposal of bank property are terminated, and offsetting of counter-claims is prohibited. DGF also has the power to dispose of the Bank's assets and to take steps to recover the Bank's property. Creditors are also prevented from executing or enforcing claims against the Bank's property under Article 36(5) of the DGF Law in the administration period prior to liquidation. Finally, it is also relevant that the Bank's liquidation commences upon revocation of its license by the NB - it does not commence upon the petition of an individual creditor. All of these facts point towards the Bank's liquidation being collective in nature. The Bank's liquidation is not one whereby a creditor, or a group of creditors, enforces and recovers their debt as against the Bank. However, one point which I may require more information is the role that creditors have in the Bank's liquidation. It is not apparent on the facts provided what their role is, or if they have one. Their participation need not be explicitly provided for in the DGF Law, but it must be the case that at least in practice, creditors are able to**

*have a say in proceedings. The courts have considered the participation of creditors to be a requirement of collective proceedings.*

*While the proceedings may not be considered judicial due to the limited role of the courts, they are undoubtedly administrative in that they are carried out by a statutorily authorised body, and governed by a statute.*

***This element is addressed in a well-reasoned manner. It contains, however, 3 separate elements: the “proceeding” element, the “collective nature element” and the “judicial or administrative” element. Your response does not address the “proceeding” element separately.***

Law relating to insolvency

*The foreign proceedings must also be pursuant to a law relating to insolvency. The law need not be specifically labelled as insolvency law, but it must deal with insolvency or financial distress (GEI at para 73). In my view, this is true of the LBBA and the DGF Law. These statutes deal with financial distress and insolvency - the liquidation of the Bank is triggered first by the NB’s identification of the Bank as insolvent under article 76 or 77 of the LBBA. This then brings in the DGF pursuant to art 34 of the DGF Law. Once the DGF is involved, it is clear that the Bank’s liquidation is not a simple process aimed at dissolving its legal status. Instead, the DGF embarks on a complicated process which involves taking control of the Bank’s assets, dealing with creditors’ claims and recovering assets from third parties. Thus, I would say that the Bank’s liquidation occurs pursuant to laws relating to insolvency.*

Assets and affairs subject to control or supervision of foreign court

*In the Bank’s liquidation, it is clear that the DGF (or its delegate) has control over the assets and affairs of the Bank. Upon liquidation, all powers of the bank’s management and control bodies are terminated and the DGF alienates the bank’s property and funds. For the Bank’s liquidation to be considered a foreign proceeding under Article 2(a), however, it must be shown that the assets and affairs are subject to control of Country A’s court. Para 74 of the GEI recognises that control or supervision exercised by an insolvency representative who is in turn subject to control or supervision by the court would be sufficient. I note that articles 3(3) and 3(7) of the DGF Law provide that neither the public authorities nor the NB have any right to interfere in the exercise of its powers. This does not mention whether the DGF is subject to the supervision of the court in the exercise of its powers. However, given that the DGF’s role is statutory, it is likely that the courts retain a supervisory role over the DGF, and are able to determine whether it has fulfilled its statutory functions/properly exercised its statutory powers. Thus, on the facts provided, I would say that it is likely that the courts of Country A have oversight over DGF’s administration of Bank’s liquidation, and that therefore this requirement is satisfied.*

**For full marks, your response should address each element with sufficient detail, provide guidance and source references as appropriate and apply the facts. For this element, we are missing the following additional points in your answer:**

- 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.**

#### Purpose of reorganisation or liquidation

**The GEI provides, as a contrast to proceedings for the purpose of reorganisation or liquidation, the following examples: proceedings designed to prevent dissipation and waste; proceedings to prevent detriment to investors rather than to all creditors; or proceedings in which the powers and duties imposed on the foreign representative are more limited than the powers and duties typically associated with liquidation and reorganisation. In the case of the Bank's liquidation, the DGF's powers and duties are extensive. They are far from confined to the preservation of assets or dissipation of waste. The DGF has the power to compile a register of creditor claims and to seek to satisfy those claims, to recover property belonging to the Bank, to pursue claims**

*against third parties and the general power to do what is necessary to complete the Bank's liquidation. The DGF therefore has the power to take steps to effect the reorganisation and liquidation of the Bank. It would follow that these powers are provided because that is the purpose of the Bank's liquidation.*

#### Conclusion

*Therefore, I would conclude that the Bank's liquidation would constitute a foreign proceeding. Ideally, however, I would require more information on the role of creditors in the Bank's liquidation.*

***Technically, the "in a foreign State" element is a separate element which is not specifically addressed in your response.***

#### **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].[4.5 out of 5]**

*Under Article 2 (d), a foreign representative is someone who is authorised in the foreign proceeding to administer those proceedings.*

*The GEI notes that the foreign representative need not be authorised by the foreign court, and that authorisation by a special agency is sufficient. Thus, it should not pose a problem that the DGF assumes its role automatically through statute, and that Ms G assumes her role through appointment by the DGF, as provided for by statute. In this case, DGF assumed its powers over the Bank's liquidation pursuant to statute: Article 77 of the LBBA. Ms G's authorisation is also statutory - she was appointed by the DGF pursuant to article 48(3) of the DGF Law. This provision essentially allows Ms G to represent DGF and act on its behalf. Both the DGF and Ms G were authorised in the context of the Bank's liquidation.*

*It is also clear that they have been authorised to "administer" the Bank's liquidation. Under Article 77 of the LBBA, DGF has all the powers of a liquidator under Country A's laws. Pursuant to Resolution 1513, Ms G was given all DGF's liquidation powers except for three, which remain vested in DGF. This means that DGF and Ms G collectively hold all the powers of liquidation, though neither of them holds all the powers individually. These powers allow the DGF and Ms G to, on the Bank's behalf, take all the actions necessary to administer its liquidation. This entails significant control over the Bank's assets and affairs. There is no other body that can administer the Bank's liquidation, because there is no other body with such powers. The Bank's control over its own affairs and assets ceased upon the commencement of its liquidation.*

*I note that there is no specific provision in the DGF Law which entitles the DGF or Ms G to act as "representative" of the Bank's liquidation. However, this does not change my answer because it is sufficient that, by virtue of the analysis above, the DGF and Ms G were authorised to administer the Bank's liquidation. The requirements of administration of liquidation and representation of liquidation are disjunctive.*

***For full marks your response should also address the assumption in article 16(1) of the MLCBI.***

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.***

\* End of Assessment \*