



SUMMATIVE (FORMAL) ASSESSMENT: MODULE 2A

THE UNCITRAL MODEL LAWS RELATING TO INSOLVENCY

Commented [SL1]: TOTAL = 41.5

83%

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

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

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

INSTRUCTIONS FOR COMPLETION AND SUBMISSION OF ASSESSMENT

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

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

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

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

ANSWER ALL THE QUESTIONS

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

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

Commented [SL2]: SUBTOTAL = 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 = 10 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?

First of all, it's important to point out that the COMI is the place where the debtor conducts the administration of its interests on a regular basis and which is ascertainable by third parties. There is a rebuttable presumption that "in the absence of proof to the contrary, the debtor's registered office, or habitual residence in the case of an individual, is presumed to be the centre of the debtor's main interests." (article 16(3) of the MLCBI).

The appropriate date for determining the COMI is the date of commencement of the foreign proceeding, even though there are judicial decisions that took a slightly different approach (such as Morning Mist Holding Ltd v Krys - decision of 2nd Cir Appeals, Apr. 16, 2013, USA).

Regarding the appropriate date, we must be aware that a COMI of a debtor can move. Thus, in principle, the COMI will be established by the date of commencement of the foreign proceeding, regardless the fact the COMI was elsewhere in the past. However, if the COMI is moved to closely of the commencement of the foreign proceeding, questions may be raised whether this change is fraudulent or not, in order to choose a better forum (forum shopping) to commence the insolvency proceeding.

Although the MLCBI has not an explicit rule preventing fraudulent or abusive forum shopping throughout the moving of the COMI, the European Insolvency Regulation (EIR Recast) has a rule. According to article 3 of the EIR Recast, the presumption of the local of the COMI "shall only apply if the individual's principal place of business has not been moved to another Member State within the 3-month period prior to the request for the opening of insolvency 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 - Notification of Foreign creditors of a proceeding (notice requirements / timely notice) - article 14 of the MLCBI.

Statement 2 - Limited jurisdiction - article 10 of the MLCBI.

Statement 3 - Centre of the debtor's main interests (COMI) - article 16 (3) of the MLCBI.

Question 2.3 [2 marks]

Commented [SL6]: 2 marks

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

The IBA Case discuss if the English Court could grant the requirement for an indefinite Moratorium continuation made by Azeri Foreign representative based on article 21 of the MLCBI, which would prevent English creditors to claim their credits against the debtor. The Court denied the motion based on the Gibbs Rule, which stands that, generally speaking, a debt governed by English Law cannot be discharged or modify by a foreign insolvency proceeding.

Due to the appeal, the case was re-examined by the English Court of Appeal that concluded that the English Court could only grant the indefinite Moratorium continuation if two conditions were met: (i) the stay must be necessary to protect the interests of the creditors of IBA and (ii) the stay should be also appropriate way of achieving such protection. Nevertheless, The Court of Appeal concludes that neither of these conditions were satisfied since the measure would not benefit English creditors and these claims would not jeopardize the restructuring plan approved on the foreign proceeding. The Court of Appeals also said that the debtor could try to approve a restructuring plan in the United Kingdom.

Finally, the Court of Appeals also mentioned the information obligation of the foreign representative set forth in article 18 of the MLCBI. This article establishes an ongoing duty to inform the court of subsequent relevant information in the foreign proceeding. The English Court concluded that article 18 of the MLCBI requires the foreign proceeding to still exist and the foreign representative still be in office. Thus, the English Court concluded that the MLCBI did not contemplate the continuance of

the relief after the end of the foreign proceeding, otherwise it would have addressed the question explicitly and provided appropriate instruments for that purpose.

Question 2.4 [2 marks]

Commented [SL7]: 2 marks

In terms of relief, what should the court in an enacting State, where a domestic proceeding has already been opened in respect of the debtor, do after recognition of a foreign main proceeding? In your answer you should mention the most relevant article of the MLCBI. What (ongoing) duty of information does the foreign representative in the foreign main proceeding have towards the court in the enacting State? Here too you are required to mention the most relevant article of the MLCBI.

This issue is set forth in article 29 (a), items (i) and (ii) of the MLCBI, which determines that "when the proceeding in this State is taking place at the time the application for recognition of the foreign proceeding is filed," any relief granted under article 19 or 21 must be consistent with the proceeding in the enacting state and if the foreign proceeding is recognized in the enacting state as foreign main proceeding, article 20 does not apply. The reason for this is that the domestic insolvency has primacy over the foreign proceeding.

Besides, article 18 of the MLCBI determines that from the time of filing the application for recognition of the foreign proceeding, the foreign representative shall inform the court immediately of any substantive change in the foreign proceeding and the foreign representative's appointment and the existence any other foreign proceedings regarding the same debtor.

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

Commented [SL8]: SUBTOTAL = 11.5 MARKS

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

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

Question 3.1 [maximum 4 marks] [3 out of 4 marks]

The foreign representative is considering his options to secure the value of the debtor's assets located in State A. With reference to the Model Law's provisions on access and co-operation, explain how these rights in State A can benefit the foreign representative.

One of the goals of transnational insolvency is to increase the efficiency and the fairness of the proceedings throughout co-ordination and communication among the different proceedings. By the co-ordination of the proceedings, are avoid piecemeal sale of goods, which reduces the value of the estate. The coordination also prevents conflicts of different countries' decisions, which lead to a greater efficiency. Also, fairness is also a goal, since creditors are treated equally, regardless of if they are domestic or foreign creditors. The MLCBI intends to save time, money and leads to a fair treatment among the creditors.

The MLCBI deals with (i) access - providing access of foreign representatives and creditors to courts, (ii) recognition - recognition of foreign proceedings, (iii) relief - providing appropriate relief and (iv) co-operation - enabling co-operation with foreign courts and foreign representatives.

Art. 9 of the MLCBI sets forth the right of direct access, enabling the foreign representative to apply directly to a court in the enacting state. [1]

Once the foreign proceeding is recognised, the foreign representative may request to open a domestic insolvency proceeding. According to article 11 of the MLCBI, "a foreign representative is entitled to apply to commence a proceeding under the law of the enacting state relating to insolvency if the conditions for commencing such a proceeding are otherwise met". [1] The opening of a local proceeding will depend on (i) if the above-mentioned conditions are met and (ii) if the opening of the local proceeding is necessary or not. For example, if the foreign representative can obtain a relief (articles 19, 20 or 21 of the MLCBI), the opening of a domestic proceeding may not be necessary and just be a waste of time and money. However, if the relief is not obtained, a domestic proceeding may be worthy.

It's also important to point out that the co-operation rules of the MLCBI (articles 25/27) are essential to a good outcome and these provisions operate independently of recognition of the foreign proceeding. The co-operation in the MLCBI doesn't depend on reciprocity. Thus, State A can co-operate with State B, regardless of if State B would not co-operate with State A in a similar situation. [1]

For full marks your answer should include:

- **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] [2.5 out of 5 marks]

For a recognition application in State A to be successful, the foreign proceeding opened in State B must qualify as a "foreign proceeding" within the meaning of article 2(a) of the MLCBI and the "foreign representative" must qualify as a foreign representative within the meaning of article 2(d) of the MLCBI. Assuming that both

qualify as such, list and briefly explain (with reference to the relevant MLCBI articles) any other evidence, restrictions, exclusions and limitations that must be considered, as well as the judicial scrutiny that must be overcome for a recognition application to be successful.

There are some restrictions, exclusions and limitations that should be considered for a recognition application to be successful.

First of all, article 1 (2) of the MLCBI establishes that some proceedings that are subject to special insolvency regimes may be excluded from the scope of the Model Law. For example, it is very common that national legislators exclude some entities from the ordinary insolvency law, such as banks or insurance companies due to the systemic risk. Thus, the foreign representative must check if in his specific case the proceeding is excluded or not, in light of article 1 (2) of the MLCBI. [1]

Besides, the main concern of the insolvency foreign representative is whether or not the recognition application is manifestly contrary to public policy of State A (article 6 of the MLCBI). The public policy exception is a safeguard of the enacting state to protect its sovereignty and some matters of fundamental importance for the enacting State. The public policy exception is probably the most frequent reason for denial of recognition a foreign proceeding. [1]

Finally, the MLCBI sets forth in its article 3 the principle of prevalence of other international obligations. Hence, if the MLCBI conflicts with an obligation arising out of any treaty or other form of agreement to which the enacting state is a party, the requirements of the treaty or agreement will prevail. Thus, the foreign representative must check if there are any international obligation of the enacting state that prevents him from recognizing the foreign proceeding in State A. [½]

With reference to the question, your answer should have also included a brief discussion on the following elements:

- 1. 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.**
- 2. 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).**
- 3. 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] [5 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.

Regarding the pre-recognition relief, reference must be made to article 19 of MLCBI, which sets forth the relief that may be granted upon application for recognition of a foreign proceeding. This is an interim relief that may be granted from the time of filing an application for recognition until the application is decided. The foreign representative may request this urgent relief to protect the assets of the debtor or the interests of the creditors. Among the reliefs available, the court may (article 19 (1 - items "a", "b", and "c") (i) stay the execution against the debtor's assets, (ii) entrust the administration or realization of all or part of the debtor's assets located in the enacting State or (iii) any other relief available in paragraph 1 (c), (d) and (g) of article 21 of the MLCBI. The relief granted under article 19 terminates when the application for recognition is decided upon (article 19 (3)).

After the recognition of the foreign proceeding, the post-recognition relief will depend on the type of the foreign proceeding that is recognized. If it is a foreign main-proceeding (which is: the COMI is located where the foreign proceeding was opened), there are the following automatic effects established in article 20 (1) (items "a", "b" and "c") of the MLCBI: "(a) Commencement or continuation of individual actions or individual proceedings concerning the debtor's assets, rights, obligations or liabilities is stayed; (b) Execution against the debtor's assets is stayed; and (c) The right to transfer, encumber or otherwise dispose of any assets of the debtor is suspended".

On the other hand, if the foreign proceeding is a non-main proceeding, there are no automatic relief. Even though, a relief may be granted upon recognition this foreign proceeding on the grounds of article 21 of the MLCBI. However, the foreign representative must prove that the relief is necessary to protect the assets of the debtor or the interests of the creditors. The reliefs available are exemplified in article 21 (1) (items "a", "b", "c", "d", "e", "f" and "g") of the MLCBI.

It must be pointed out that the court may, at the request of the foreign representative or a person affected by relief granted under article 19 or 21, or at its own motion, modify or terminate such relief to protect the creditors or other interested persons (article 22 (3) of the MLCBI).

Finally, in any of the reliefs above mentioned, there are two circumstances that may limit the relief. The relief may be denied (or the relief may be limited) if there is a manifestly violation of the country's public policy (article 6 of the MLCBI). The same could happen if there is an international obligation of the State that would conflict with the requested relief. Article 3 of the MLCBI provides the preference of international obligation of the State over the rules of the MLCBI.

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?

Regarding the pre-recognition relief, reference must be made to article 19 of MLCBI, which sets forth the relief that may be granted upon application for recognition of a foreign proceeding. This is an interim relief that may be granted from the time of filing an application for recognition until the application is decided. The foreign representative may request this urgent relief to protect the assets of the debtor or the interests of the creditors. The relief granted under article 19 terminates when the application for recognition is decided upon (article 19 (3)).

Considering that, a worldwide freezing order granted as pre-recognition interim relief ex article 19 MLCBI is unlikely to continue post-recognition ex article 21 MLCBI because article 21 provides other forms of protection which mean that a relief in the form of a freezing order or similar injunction is simply not warranted. This was decided in a recent English Case between Igor Vitalievich Protasov and Khadzhi-Murat Derev. (Order of 24 February 2021 by Mr Justice Adam Johnson [2021] EWHC 392 (CH) (the Protasov v. Derev Case).

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 out of 15]

Prior to any determination made in the English Proceedings, Ms G, in her capacity as authorised officer of the Deposit Guarantee Fund (or DGF) of Country A in respect of the liquidation of the Commercial Bank for Business Corporation (the Bank), together with the DGF (the Applicants), applied for recognition of the liquidation of the Bank before the English court based on the Cross-Border Insolvency Regulations 2006 (CBIR), the English adopted version of the MLCBI.

Assuming you are the judge in the English court considering this recognition application, you are required to discuss:

4.1.1 whether the Bank's liquidation comprises a "foreign proceeding" within the meaning of article 2(a) of the MLCBI [maximum 10 marks]; and [6.5 out of 10]

"Foreign proceeding" is a key term of the Model Law and it is defined as follows:

"Foreign proceeding" means a collective [separate element 1] judicial or administrative [separate element 2] proceeding [separate element 3] in a foreign State [separate element 4], including an interim proceeding, pursuant to a law relating to insolvency [separate element 5] in which proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign court [separate element 6], for the purpose of reorganization or liquidation [separate element 7]" (article 2 (a) of MLCBI).

We must examine this definition is parts, as it was made in the Agrokor case.

The Guide to Enactment and Interpretation of the MLCBI ("The Guide") explains what a collective proceeding [element 1] in its paragraphs 69 to 72 is. In short, a collective proceeding means a proceeding that deals with all the debt of the debtor as a whole. It's a proceeding to treat collectively of all the debtor's obligations. It's not a proceeding of a single creditor against the debtor, but instead is a proceeding involving the debtor and all its creditors. The goal is to achieve a global solution for

all the stakeholders of an insolvency proceeding. It must be pointed out that some national laws exclude some creditors of this proceeding. However, those creditors are an exception, and the proceeding is still considered a collective proceeding.

A foreign proceeding must be pursuant to a law relating to insolvency [element 5], which is explained in paragraph 73 of the Guide. The applicable law doesn't need to be labelled as insolvency law, but has to "deals with or addresses insolvency or severe financial distress". According to the Guide: "The purpose was to find a description that was sufficiently broad to encompass a range of insolvency rules irrespective of the type of statute or law in which they might be contained and irrespective of whether the law that contained the rules related exclusively to insolvency". So, the debtor must seek to restructure the financial affairs of the entity or liquidate the entity and not only dissolve its legal status. The simple dissolution of a solvent company is not a insolvency proceeding.

A foreign proceeding must be subject to the control or supervision of by a foreign court [element 6]. However, by "court", it could be a judicial or an administrative authority, according to the definition in article 2 (e) of the MLCBI. The Guide is also explicit in admitting an administrative authority to be considered a foreign court (paragraph 87). Besides, is common in different countries that insolvencies related to banks are overseen by administrative authorities.

The Guide to Enactment and Interpretation of the MLCBI explains what a control or supervision by a foreign court in its paragraphs 74 to 76 is. The assets and affairs of the debtor are subject to control or supervision of the foreign court. In the case above mentioned, DGF has control of all the assets of the financial institution and control its liquidation. Besides, DGF is an administrative authority, but independent from the government.

Finally, the foreign proceeding must be for the purpose of reorganisation or liquidation [element 7]. This matter is explained in paragraphs 77 and 78 of the Guide.

There are two main forms of insolvency. The classical one is liquidation, which is selling the assets of the debtor and to pay the creditors according to its legal preferences. Once the debtor is not able to pay its creditors, anyone of them can ask to liquidate the debtors' assets. The liquidation causes the end of the debtor's activity. Another type of insolvency is the reorganisation, when the activity of the debtor may be rescued through the implementation of some measures ("hair cut" of the debt, more time to pay the claims, selling some assets, among others). The reorganisation plan must be approved by the creditors and the decision applies to all of them, including the dissenting ones.

All the circumstances above are met in the insolvency proceeding of the Commercial Bank for Business Corporation. Thus, the bank's liquidation is a foreign proceeding under article 2 (a) of the MLCBI.

As highlighted in the definition above, there are 7 separate elements to the “foreign proceeding” that each must be addressed in your response. For full marks, each element must be addressed with sufficient detail, guidance and source references should be provided as appropriate and you should apply each element to the facts. In your response, not all elements have been addressed and there is little application to the facts. For the “subject to control or supervision by a foreign court” element, we are looking for something 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".

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.

"Foreign representative" is a key term of the Model Law and it is defined as follows:

"Foreign representative" means a person or body, including one appointed on an interim basis, authorized in a foreign proceeding to administer the reorganization or the liquidation of the debtor's assets or affairs or to act as a representative of the foreign proceeding" (article 2 (d) of MLCBI).

The Guide to Enactment and Interpretation of the MLCBI explains what a foreign representative is in paragraph 86.

The foreign representative may be a person or a body authorized in the foreign proceeding to administer those proceedings "which would include seeking recognition, relief and cooperation in another jurisdiction, or they may simply be a person authorized specifically for the purposes of representing those proceedings." It's important to point out that there is no need of a specific decision of the foreign proceeding appointing the foreign representative. This decision may or may not exist. For example, in reorganization proceeding (mainly those that the debtor is in possession - DIP), the representative is normally debtor himself or his legal representative, regardless of any court decision. This will depend on the law of the country in which the insolvency proceeding was opened and it is seeking recognition. On the other hand, in a bankruptcy are normally appointed (by judicial or administrative decision) trustees to manage the assets of the debtor.

The appointment is made on an interim basis, which means that the foreign representative may be replaced if it is necessary.

The recognition of someone as foreign representative allows him to apply directly to a court in the State in which is seeking recognition (article 9 of the MLCBI). The

foreign representative may apply for the commencement of a local proceeding (article 10 of the MLCBI), may ask for a relief (articles 19, 20 and 21 of the MLCBI) or to sell the assets in that country to pay the creditors, among other powers granted by the MLCBI.

Article 15 (2) of the MLCBI requires either a certified copy of the decision appointing the representative, a certificate affirming the appointment or other evidence of that appointment that is acceptable to the receiving court.

In light of the above, we conclude that the Applicants fall within the description of "foreign representatives" as defined by article 2(d) of the MLCBI.

For full marks your response should address each element in sufficient detail, provide guidance and source references, as appropriate and apply the facts. Your answer is a bit light on application of the facts. In that regard, we would be looking for something along the following lines:

- 1. This application is brought jointly by the DGF and Ms G. The DGF's role as liquidator arises under statute and article 77 of the LBBA provides that the DGF is automatically appointed as liquidator on the day it receives the NB's decision pursuant to article 77 revoking a bank's licence and commencing its liquidation.**
- 2. Article 48(3) of the DGF Law, empowers the DGF to delegate its powers to an "authorised officer" or "authorised person". The "Fund's authorised person" is defined by article 2(1)(17) of the DGF law as: "an employee of the Fund, who on behalf of the Fund and within the powers provided for by this Law and/or delegated by the Fund, performs actions to ensure the bank's withdrawal from the market during provisional administration of the insolvent bank and/or bank liquidation".**
- 3. Article 35(1) of the DGF Law specifies that an authorised person, must have: "...high professional and moral qualities, impeccable business reputation, complete higher education in the field of economics, finance or law...and professional experience necessary." An authorised person may not be a creditor of the relevant bank, have a criminal record, have any obligations to the relevant bank, or have any conflict of interest with the bank. Once appointed, the authorised officer is accountable to the DGF for their actions and may exercise the powers delegated to them by the DGF in pursuance of the bank's liquidation.**
- 4. Ms G's appointment was pursuant to a Decision of the Executive Board of the Directors of the DGF, No. 1513 ("Resolution 1513"). Resolution 1513 notes that Ms G is a "leading bank liquidation professional". It delegates to her all liquidation powers in respect of the Bank, set out in the DGF Law and in particular articles 37, 38, 47-52, 521 and 53 of the DGF Law, including the authority to sign all agreements related to the sale of the bank's assets in the manner prescribed by the DGF Law. Resolution 1513 expressly excludes from Ms G's authority the power to claim damages from a related party of the Bank, the power to make a claim against a non-banking financial institution that**

raised money as loans or deposits from individuals, and the power to arrange for the sale of the Bank's assets. Each of the excluded powers remains vested in the DGF as the Bank's formally appointed liquidator.

- 5. As a result of the sharing of some, but not all of the liquidator's powers and the division of responsibility between Ms G and the DGF, it seems likely that depending on the nature and timing of relief sought from this Court pursuant to the CBIR (if any), the appropriate applicant may, in the future, be either or both of Ms G and the DGF. I am satisfied that subject to the express limitations on Ms G's powers, they are both authorised to administer the liquidation and as such both meet the definition of "foreign representative". In my judgment they both had the necessary standing to apply in that capacity, for recognition of the Bank's liquidation.*

** End of Assessment **