



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.**
5. **Before you will be allowed to upload / submit your assessment via the portal on the Foundation Certificate web pages, you will be required to confirm / certify that you are the person who completed the assessment and that the work submitted is your own, original work. Please see the part of the Course Handbook that deals with plagiarism and dishonesty in the submission of assessments. Please note that copying and pasting from the Guidance Text into your answer is prohibited and constitutes plagiarism. You must write the answers to the questions in your own words.**
- 6.1 **If you selected Module 2A as one of your compulsory modules (see the e-mail that was sent to you when your place on the course was confirmed), the final time and date for the submission of this assessment is 23:00 (11 pm) GMT on 1 March 2023. The assessment submission portal will close at 23:00 (11 pm) GMT on 1 March 2023. No submissions can be made after the portal has closed and no further uploading of documents will be allowed, no matter the circumstances.**
- 6.2 **If you selected Module 2A as one of your elective modules (see the e-mail that was sent to you when your place on the course was confirmed), you have a choice as to when you may submit this assessment. You may either submit the assessment by 23:00 (11 pm) GMT on 1 March 2023 or by 23:00 (11 pm) BST (GMT +1) on 31 July 2023. If you elect to submit by 1 March 2023, you may not**

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

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

ANSWER ALL THE QUESTIONS

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

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

Commented [SL2]: SUBTOTAL = 8 MARKS

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

Question 1.1

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

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

Question 1.2

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

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.

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

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

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

(d) All of the above.

Question 1.8

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

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

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

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

(d) All of the above.

Question 1.9

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

(a) Court proceedings.

(b) Arbitral Tribunals.

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

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

Question 1.10

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

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

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

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

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

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

Question 2.1 [maximum 3 marks]

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

Under the MLCBI, the appropriate date for determining the COMI of a debtor is the date of the commencement of the foreign proceeding. This usually provides a clear bright-line that allows third parties (such as creditors of the debtor) to readily ascertain the COMI. Where the debtor's purported COMI shifted shortly prior to the commencement of foreign proceedings, then this may pose additional evidential issues and the consideration of further factors.

Question 2.2 [maximum 3 marks]

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

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

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

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

Statement 1: Article 14: equal treatment of creditors and ensuring the notification of foreign creditors whenever notification is required for local creditors in the enacting State.

Statement 2: Article 10: the Safe Conduct Rule, which ensures that the enacting State court does not assume jurisdiction over all assets of the debtor solely on the ground that the foreign representative has made an application for the recognition of a foreign proceeding.

Statement 3: Article 16, paragraph 3: in the absence of proof to the contrary (i.e. a rebuttable presumption) the debtor's registered office / habitual residence is presumed to be the centre of the debtor's main interests.

Question 2.3 [2 marks]

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Commented [SL5]: SUBTOTAL = 9 MARKS

Commented [SL6]: 2 marks

Also, discussion of US position: Chap 15 and *Morning Mist Holdings Ltd v. Krys (Matter of Fairfield Sentry Ltd)*.

Commented [SL7]: 3 marks

Commented [SL8]: 2 marks

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

The IBA case appeal concerned the first instance decision of Mr Justice Hildyard and his decision that, relevantly: (i) the English Court did not have jurisdiction by virtue of the Model Law and the CBIR to vary or discharge substantive rights conferred under English law by the use of procedural relief that would, in essence, conform of the rights of English creditors with what they would have been under Azeri law; and (ii) notwithstanding the above, he may not have exercised his discretion in favour of the Azeri foreign representative, due to the balancing of interests pursuant to Article 22 of the Model Law.

On appeal, the English Court of Appeal upheld the first instance decision. On the jurisdiction point (which was the focus of the English Court of Appeal's decision), the English Court of Appeal decided that the court should not, as a matter of settled practice, grant the indefinite Moratorium Continuation if the granting of such relief would:

1. in substance, prevent English creditors (i.e. the Challenging Creditors) from enforcing their English law rights in accordance with the Gibbs Rule - to do so in this case would have failed both requisite criteria, being (i) that the indefinite Moratorium Continuation would be necessary to protect the interests of IBA's creditors; and (ii) that the indefinite Moratorium would have been an appropriate way of protecting those interests, because the IBA's creditors needed no further protection in order for the foreign proceeding to achieve its purpose; and
2. prolong the stay after the conclusion of the restructuring in Azerbaijan - on this issue, the English Court of Appeal drew the strong implication from the Model Law (and the silence on the very issue) that, once the foreign proceeding has come to an end and the foreign representative is *functus officio*, then there is no scope for further orders to support the foreign proceeding. On this basis, any relief previously granted under the Model Law should also terminate.

Question 2.4 [2 marks]

Commented [SL9]: 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.

In circumstances where a domestic proceeding has already commenced in respect of the debtor, the court in the enacting State should, after recognition of a foreign main proceeding, ensure that any relief granted in connection with the recognition of the foreign main proceeding (whether interim pursuant to Article 19, post-recognition pursuant to Article 21 or otherwise), must be consistent with the domestic insolvency proceedings - see Article 29 subparagraph (a);

The ongoing duty of information that the foreign representative in the foreign main proceeding have towards the court in the enacting State is set out in Article 18, and requires the foreign representative, from the time of filing the application for recognition, to inform the court promptly of:

- 1. any substantial change in the status of the recognised foreign proceeding or status of the foreign representative's appointment (Article 18 subparagraph (a)); and*
- 2. any other foreign proceedings regarding the same debtor that becomes known to the foreign representative (Article 18 subparagraph (b)).*

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

Commented [SL10]: SUBTOTAL = 11 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] [4 out of 4 marks]

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

The principle of access in the Model Law is embodied in Articles 9 to 14. Fundamentally through Article 9, which expressly states that a foreign representative is entitled to apply directly to the court in State A. This allows the foreign representative to have standing in the court in State A without burdensome (and usually slow) formalities such as licenses or consular action. [1] Similarly, the foreign representative has standing as of right without having to first seek recognition of the foreign proceeding. The benefits of the Model Law's provisions on access is the speedy and cost-effective manner in which the foreign representative can begin to take steps to secure the value of the Debtor's assets located in State A. [1] The

subsequent articles support this fundamental issue on standing, for instance by way of the Safe Conduct Rule (Article 10) and the Anti-discrimination principle (Article 13), which protects the interests of foreign creditors.

The principle of co-operation in the Model Law is embodied in Articles 25 to 27. Without such Articles, it might be expected that State A would not otherwise have the legislative framework dealing with co-operation and co-ordination between courts/judges in different jurisdictions. These Articles expressly provide for direct communication between courts and insolvency representatives [1]. Co-operation in this manner promotes efficiency, maximises the chances to achieve the best result and encourages consistency of treatment between jurisdictions. All of this is beneficial to the foreign representative as it facilitates a timely, cost-efficient, transparent and predictable outcome with respect to securing the value of the Debtor's assets. [1]

A well answered question!

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.

Other items to be considered include:

- 1. Adequate evidence of the existence of the foreign proceeding / foreign representative (Article 15 paragraph 2), as shown by: [½]*
 - a. a certified copy of the decision commencing the foreign proceeding and appointing the foreign representative; or*
 - b. a certificate from the court in State B affirming the existence of the foreign proceeding and of the appointment of the foreign representative; or*
 - c. in the absence of a. or b. above, any other evidence acceptable to the court in State A of the existence of the foreign proceeding and the appointment of the foreign representative, [½]*

The court is also able to presume the truth of the contents of the evidence above (Article 16);

2. A statement identifying all foreign proceedings in respect of the Debtor that are known to the foreign representative (Article 15 paragraph 3);
3. The COMI of the Debtor (see Article 16 paragraph 3 on the rebuttable presumption based on its registered office / habitual residence) as at the date of commencement of the foreign proceeding; and [1]
4. Whether there are public policy grounds in State A to deny a request for recognition on the basis that it would be "manifestly contrary" to the public policy of State A (Article 6). [1]

Assuming the above in Article 15 paragraph 2 is satisfied, the judicial scrutiny should be low in a recognition application and recognition should be granted as a matter of course.

It is also noted that the foreign representative has a duty of full and frank disclosure to the court in State A, as well as an ongoing obligation to update the court of any substantial developments (Article 18).

Your answer must include a brief discussion on the following elements which were asked in the question:

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] [3 out of 5 marks]

As far as relief is concerned, briefly explain (with reference to the relevant MLCBI articles) what pre- and post-recognition relief can be considered in the context of the MLCBI. Also address which restrictions, limitations or conditions should be considered in this context. For the purposes of this question, it can be assumed that there is no concurrence of proceedings.

Pre-recognition relief

Pre-recognition relief (i.e. upon application but prior to recognition) is set out in Article 19, and includes:

1. Staying execution against the Debtor's assets;

2. *Entrusting the administration or realisation of all or part of the Debtor's assets in State A to the foreign representative (or another);*
3. *Suspending the right to transfer, encumber or otherwise dispose of assets of the Debtor;*
4. *Providing for the examination of witnesses and other forms of taking evidence; and*
5. *Granting any additional relief that may be available under the laws of State A.*

This pre-recognition relief terminates when the application for recognition is decided upon, unless extended under Article 21 paragraph 1(f) (see Article 19 paragraph 3).

The Court in State A may also refuse to grant any relief if such relief would interfere with the administration of a foreign main proceeding (see Article 19 paragraph 4).

Post-recognition relief

Post-recognition relief is set out in Article 21, and includes:

1. *Staying the commencement or continuation of actions/proceedings concerning the Debtor's estate (to the extent not already stayed pursuant to the automatic mandatory relief under Article 20);*
2. *Staying execution against the Debtor's assets (to the extent not already stayed pursuant to the automatic mandatory relief under Article 20);*
3. *Suspending the right to transfer, encumber or otherwise dispose of assets of the Debtor (to the extent not already suspended under the automatic mandatory relief under Article 20);*
4. *Providing for the examination of witnesses and other forms of taking evidence;*
5. *Entrusting the administration or realisation of all or part of the Debtor's assets in State A to the foreign representative (or another);*
6. *Extending relief granted under Article 19 (per the above);*
7. *Granting any additional relief that may be available under the laws of State A.*

The court may also entrust the distribution of all or part of the Debtor's assets in State A to the foreign representative (or another), provided that the court is satisfied that the interests of creditors in State A are adequately protected (see Article 21 paragraph 2).

In granting any post-recognition relief to a foreign representative of a foreign non-main proceeding, the court must be satisfied that the relief relates to assets that, under the law of State A, should be administered in the foreign non-main proceeding or concerns information required in that proceeding (see Article 21 paragraph 3).

Your answer must also include a brief discussion on the following:

1. ***Existing international obligations of State A:*** *Based on Article 3 of the Model Law, the court in State A should again verify that there are no existing international obligations of State A (under a treaty or otherwise) that may conflict with granting the requested relief under the implemented Model Law in State A.*

2. Public policy exception: The court in State A should, based on Article 6 of the Model Law, also again verify that the relief application is not manifestly contrary to public policy of State A.

Question 3.4 [maximum 1 mark] [1 mark]

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

A worldwide freezing order granted as pre-recognition interim relief is unlikely to continue post-recognition for the reasons set out in the English case of Protasov v Derev [2021] EWHC 392 (Ch). In that case, the English Court found that, whilst it had jurisdiction to order a worldwide freezing order post-recognition, that jurisdiction was subject to the same court's powers, prohibitions, limitations and conditions as would apply under English law (i.e. under the English Insolvency Act 1986). On this basis, the English Court found that the Insolvency Act 1986 and the English insolvency regime offered other forms of protection and that a worldwide freezing order would not be warranted absent any exceptional reason. Therefore, unless such exception reasons exist, such a worldwide freezing order granted pre-recognition is unlikely to continue post-recognition.

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] [13.5 out of 15]

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

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

4.1.1 whether the Bank's liquidation comprises a "foreign proceeding" within the meaning of article 2(a) of the MLCBI [maximum 10 marks]; and [9 out of 10]

A "foreign proceeding" is defined in article 2(a) of the MLCBI as meaning:

"a collective judicial or administrative proceeding in a foreign State, including an interim proceeding, pursuant to a law relating to insolvency in which proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganization or liquidation"

There are therefore seven distinct factors that the English Court must be satisfied in respect of the Bank's liquidation for it to be within the meaning of "foreign proceeding". These are:

- 1. a proceeding (which includes an interim proceeding);**
- 2. that is either judicial or administrative;**
- 3. that is collective in nature;**
- 4. that is in a foreign State;**
- 5. that is pursuant to a law relating to insolvency;**
- 6. in which the assets and affairs of the Bank are subject to control or supervision by a foreign court; and**
- 7. that the proceeding is for the purpose of reorganisation or liquidation.**

Each of these factors are dealt with briefly below.

1. A proceeding (which includes an interim proceeding):

The liquidation of the Bank is a proceeding because it is the enforcement of law albeit not via the Court system but rather via administrative forums (as to which see below).

2. That is either judicial or administrative:

The liquidation of the bank is an administrative proceeding, invoking the powers given to the NB and DGF pursuant to the laws in Country A.

3. That is collective in nature:

The liquidation of the Bank is collective in nature since it is not used merely as a collection device for a subset of creditors. Rather, the liquidation deals with substantially all of the assets and liabilities of the Bank and the ultimate removal of the insolvent Bank from the market for the purposes of liquidation.

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

1. UNCITRAL's guide for judiciary, "The Model Law on Insolvency: The Judicial Perspective" (2013) explains the requirement for proceedings to be "collective":

"The UNCITRAL Model Law was intended to apply only to particular types of insolvency proceedings. The Guide to Enactment and Interpretation indicates that the notion of a "collective" insolvency proceeding is based on the desirability of achieving a coordinated, global solution for all stakeholders of an insolvency proceeding. It is not intended that the Model Law be used merely as a collection device for a particular creditor or group of creditors who might have initiated a collection proceeding in another State, or as a tool for gathering up assets in a winding up or conservation proceeding that does not also include provision for addressing the claims of creditors. The Model Law may be an appropriate tool for certain kinds of actions that serve a regulatory purpose, such as receiverships for such publicly regulated entities as insurance companies or brokerage firms, provided the proceeding is collective as that term is used in the Model Law."

2. The Guide to Enactment and Interpretation of the UNCITRAL Model Law (2014) explains that when:

"evaluating whether a given proceeding is *collective* for the purpose of the Model Law, a key consideration is whether substantially all of the assets and liabilities of the debtor are dealt with in the proceeding, subject to local priorities and statutory exceptions, and to local exclusions relating to the rights of secured creditors. A proceeding should not be considered to fail the test of collectivity purely because a class of creditors' rights is unaffected by it."

3. Based on the facts provided the understanding is that *all* of the Bank's creditors are entitled to claim in the liquidation and that their claims are met from available assets, according to the statutory order of priorities. Consequently, the conclusion can be reached that the Bank's liquidation is a "*collective proceeding*".

4. That is in a foreign State

The liquidation of the Bank commenced in Country A, which is a foreign state to the United Kingdom.

5. That is pursuant to a law relating to insolvency;

This criteria was drafted deliberately broad to ensure that it would encompass a wide range of insolvency rules irrespective of where the rules might be contained, whether it was labelled as such and whether the law that contained the rules related exclusively to insolvency.

In this case, insolvency is pursuant to the LBBA, which itself is focussed on Banks and Banking Activity, i.e. not exclusively addressing insolvency. However, section 76 of the LBBA, which is the triggering mechanism before the appointment of DGF as provisional administrator and then liquidator, is on the basis of insolvency. Insolvency in-turn is based on certain statutory pre-conditions or at the discretion of the NB directly. On this basis, the liquidation of the Bank was pursuant to a law relating to insolvency.

6. In which the assets and affairs of the Bank are subject to control or supervision by a foreign court

Whilst the reference is to a "foreign court", it is accepted in *The Judicial Perspective* that this refers to both a judicial body and an administrative body, so as to ensure that liquidations controlled or supervised by non-judicial bodies would still fall within the definition of "foreign proceedings". This is a sensible approach, given that one of the earlier factors referred to above was to assess whether the proceedings were judicial or administrative, implying that an administratively controlled/supervised proceeding should also be captured as a "foreign proceeding".

The MLCBI is silent as to the degree of control or supervision required, and is generally considered to be relatively low. Indeed, it may be sufficient that such control or supervision could be potential rather than actual.

In this case, upon liquidation, the DGF automatically and formally becomes liquidator and obtains the full powers of a liquidator under the law of Country A. On this basis, the assets and affairs of the Bank are in the sole control of DGF. DGF, being the administrative governmental body of Country A, is therefore in control of the assets and affairs of the Bank upon liquidation, meeting this factor.

7. That the proceeding is for the purpose of reorganisation or liquidation:

In order for the Bank's liquidation to be classified as a foreign proceeding, it must be for the stated purpose of reorganisation or liquidation.

According to the Affidavit, the DGF is responsible for the "process of withdrawing insolvent banks from the market and winding down their operations via liquidation". Accordingly, the DGF, as liquidator, is clearly dealing with the assets and affairs of the Bank for the purpose of liquidation. This is also seen under the powers given to the DGF, which go beyond asset preservation, but includes (i) the power to compile a register of creditor claims and to seek to satisfy those claims; (ii) the power to dispose of the Bank's assets; and (iii) such other powers as are necessary to complete the liquidation of the Bank.

In these circumstances, the proceedings are for the purpose of a liquidation.

Accordingly, all of the factors necessary to establish a foreign proceeding are met.

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]

A "foreign representative" is defined in article 2(a) of the MLCBI as meaning:

" 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"

There are therefore three distinct factors that the English Court must be satisfied in respect of the Applicants for them to be within the meaning of "foreign representative". These are:

1. a person or body, including one appointed on an interim basis;
2. authorised in a foreign proceeding; and
3. to administer the reorganisation or liquidation of the Bank's assets or affairs or to act as representative of the foreign proceeding.

Each of these factors are dealt with briefly below.

1. A person or body, including one appointed on an interim basis:

Ms G, in her capacity as authorised officer of DGF of Country A in respect of the liquidation of the Bank, together with DGF, both meet the definition of foreign representatives.

Ms G is duly appointed by DGF to act as authorised officer by way of Resolution 1513. To the extent described in the Affidavit, Ms G meets the requisite characteristics prescribed in Article 35(1) of the DGF Law, and there is no evidence to the contrary that she is not so duly appointed as a matter of law in Country A.

Similarly, DFG is the statutory liquidator pursuant to Article 77 of the LBBA and is automatically appointed as liquidator according to that provision.

2. Authorised in a foreign proceeding:

Ms G's authority comes from the delegation of powers of DGF (as liquidator) pursuant to Article 48(3) of the DGF Law. DGF's authority comes from Article 77 of the LBBA. On this basis, both have been duly authorised in the foreign proceeding (the definition of which is addressed in answer to 4.1.1 above).

For completeness, the MLCBI does not require or specify that the foreign representative must be authorised by the foreign court.

3. To administer the reorganisation or liquidation of the Bank's assets or affairs or to act as representative of the foreign proceeding:

The scope of authority for Ms G is broad as she acts on behalf of DGF within the powers provided for by the DGF law and/or delegated by DGF, and may exercise those powers in pursuance of the Bank's liquidation and is accountable to the DGF for her actions. Whilst Resolution 1513 expressly excludes from Ms G's authority certain powers to claim damages, make claims and arrange for the sale of the Bank's assets, the residual broad powers including those contained in Article 37 of the DGF Law (which includes managerial and supervisory powers) are to be used in furtherance of the liquidation of the Bank.

Given the nature of the delegation, all other powers remain vested in DGF as the Bank's formally appointed liquidator. The nature of this role is clearly to administer the liquidation of the Bank's assets or affairs.

On this basis, all of the factors necessary to establish Ms G and DGF as foreign representatives are met.

Excellent response. For full marks, also the assumption of article 16(1) MLCBI should be addressed.

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 *