



SUMMATIVE (FORMAL) ASSESSMENT: MODULE 2A

THE UNCITRAL MODEL LAWS RELATING TO INSOLVENCY

Commented [SL1]: TOTAL = 21

42%

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 = 6 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

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

Question 1.2

Commented [SL4]: 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

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

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

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

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

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

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

Question 1.4

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

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

(b) The public policy exception.

(c) The safe conduct rule.

(d) The "hotchpot" rule.

Question 1.5

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

Commented [SL6]: Correct answer is (d).

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 [SL7]: SUBTOTAL = 6 MARKS

Question 2.1 [maximum 3 marks]

Commented [SL8]: 2 marks

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

Also a discussion of US courts: *Morning Mist Holdings Ltd v. Kryz (Matter of Fairfield Sentry Ltd)*.

According to the MLCBI, the date of commencement of the foreign main proceeding should be the date on which the COMI is determined. With regard to the date on which the COMI should be determined, taking into account the evidence to be attached to an application for recognition under Article 15 and the relevance accorded the decision to commence the foreign proceedings and appoint the foreign representative, the date of commencement those proceedings is the appropriate date.

Question 2.2 [maximum 3 marks]

Commented [SL9]: 2 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 3 = art 16(3).

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 refers to Article 14, which sets out what the notice to a foreign creditor of observations on the proceedings in the issuing State should contain.

Statement 2 refers to Article 10, which is intended to ensure that the court in the State of judgement does not assume jurisdiction over all the debtor's assets solely on basis of the foreign representative's application for recognition of foreign proceedings.

Statement 3 refers to Article 31, which provides for a rebuttable presumption that recognition of foreign main proceedings is evidence that the debtor is insolvent.

Question 2.3 [2 marks]

Commented [SL10]: 2 marks

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

The English Court of Appeal dismissed the claim on the grounds that:

- The permanent stay was not necessary to protect the interests of creditors' investments of IBA;
- The scope of the Model Law was limited to procedural aspects of cross-border insolvency cases; and
- It would be inconsistent with the procedural and supportive role of the Model Law for a stay granted under the CBIR 2006 to survive the foreign proceedings to which the stay related.

The English Court of Appeal also highlighted that the issues raised by the provision in Gibbs, which prevents debt obligations governed by English law from being discharged through foreign insolvency proceedings without consent, could in practice have been resolved by promoting a parallel scheme of arrangement or other mechanism in England. IBA, however, chose not to do so.

Question 2.4 [2 marks]

Commented [SL11]: 0 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.

Art 29(a) and art 18 MLCBI

Article 7 provides that the court of the State enacting the law shall:

- Ensure equitable treatment of all holders of claims against or interests in the debtor's property;
- Protect claim holders outside the State of enforcement from disadvantage and inconvenience in the processing of claims in the foreign proceedings;
- Prevent preferential or fraudulent disposition of the debtor's property;
- Distribute the proceeds of the debtor's property in accordance with the order prescribed by this Title; and
- To provide where appropriate, the possibility of a fresh start for the person involved in the foreign proceedings.

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

Commented [SL12]: SUBTOTAL = 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] [$\frac{1}{2}$ out of 4 marks]

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

The rights in State A may benefit the foreign representative as follows:

The court in State A may entrust the foreign representative with the administration or realisation of the debtor's property located in State A in order to protect the value of the property.

The courts in State A may grant a stay of execution on the debtor's assets located in State A. This includes a stay of execution on the debtor's assets. This also includes the stay of the right to transfer or dispose of the assets without the consent of foreign representative.

The court in State B and its foreign representative are entitled to communicate directly with State A or to request information or assistance from it. In addition, the foreign representative may appear before the courts in State A without the need for separate proceedings. [$\frac{1}{2}$] **see the answer opening domestic insolvency proceedings and cooperation below.**

The courts in State A may provide the foreign representative with appropriate and tailored assistance in relation to the debtor's assets if necessary.

Your answer must include a discussion on the following:

- **Legal standing (Article 9 MLCBI): The key access for the foreign representative is set forth in Article 9 MLCBI. In the capacity of foreign representative, the foreign representative has automatic standing before the courts in State A without having to meet any formal requirements such as a license or any consular action. In other words, the "status" in State B of the foreign representative is automatically recognised in State A for the purpose of granting the foreign representative standing before the courts in State A. This allows the foreign representative to safeguard and pursue assets of the debtor estate in State A before its courts.**
- **Opening domestic insolvency proceedings (Article 11 MLCBI): The foreign representative is further specifically entitled to apply for the opening of domestic insolvency proceedings in State A, as reflected in Article 11 of the MLCBI. Whether**

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

- **Cooperation:** *Similar to access rights, the cooperation provisions in the MLCBI (articles 25-27) also operate independently of recognition and it is not a prerequisite to the use of the cooperation provisions that recognition of the foreign proceedings is obtained in advance. Courts in State A can freely cooperate with the foreign representative without having to worry whether the status in State B of the foreign representative can be recognised in State A.*
- **Save Time & Costs:** *The key benefits of both the access provisions and the cooperation provisions are that they save time and therefore also costs, as a result of which value destruction can be avoided and value enhancement is being promoted.*

Question 3.2 [maximum 5 marks] [1.5 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.

In order for an application for recognition in State A to be successful, the foreign representative must first meet the recognition requirements set out in Article 15, that is he or she must apply to the court in State A for recognition of the foreign proceedings [½] and ensure that the application is accompanied by the necessary documents for example a certified copy of the decision to commence the foreign proceedings as well as a statement listing all foreign proceedings in relation to the debtor and, if applicable, a translation of the documents into the official language of State A. [½]

Since the foreign proceedings and the foreign representative already qualify as such, the court in State A is entitled to assume this in accordance with Article 16. Furthermore, the court is entitled to assume that the documents submitted in support of the application for recognition are authentic and that the debtor's registered office is the centre of the debtor's main interests. In this case, the centre of the debtor's main interest is in State B. ***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.***

According to Article 17, the debtor only has an establishment in State A where some assets are located, and the foreign proceedings are therefore recognised in State A as foreign non-main proceedings. [½]

Although State A does not contain a reciprocity clause, the foreign proceedings can be commenced whether State B grants relief to an insolvency representative from State A.

Article 18 requires the foreign representative, to inform the court in State A of any change in the foreign proceedings or the foreign representative from the time the application for recognition is filed and also to inform the court of any other foreign proceedings relating to the debtor of which the foreign representative becomes aware.

The following is a suggested answer to 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.*
- 3. Sufficient evidence:** *Article 15 of the Model Law sets forth in paragraph 2 what evidence in respect of the commencement of the foreign proceedings and the appointment of the foreign representative must accompany the recognition application. A statement identifying all foreign proceedings in respect of the debtor that are known to the foreign representative must also accompany the recognition application (Article 15(3) of the Model Law).*
- 4. Public policy exception:** *Finally, the court in State A should also ensure based on Article 6 of the Model Law that the recognition application is not manifestly contrary to public policy of State A.*

Question 3.3 [maximum 5 marks] [2 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.

Where relief is urgently required to protect the debtor's property or the creditor's interests, the court in State A may grant interim in accordance with Article 19 from the time the application is made until the application is determined. [½]

The following pre-recognition or provisional remedies are:

- A stay of execution against the debtor's assets;

- Appointment of the foreign representative to manage or realise of the debtor's assets;
- A stay of the right to transfer or dispose of assets of the debtor;
- Providing for the examination of witnesses, the taking of evidence or the giving of information concerning the debtor's assets; and
- Granting additional relief that would made be available to a domestic liquidator under the law of State A. [½]

The following post-recognition relief available are:

- Stay of the commencement or continuation of individual actions or proceedings relating to the debtor's assets to the extent that they have not been stayed under Article 20; [½]
- Stay of enforcement proceedings against the debtor's assets, unless they have been stayed pursuant to Article 20;
- Suspension of the right to transfer or dispose of assets of the debtor not suspended pursuant to Article 20;
- Providing for the examination of witnesses, the taking of evidence or the giving of information concerning the debtor's assets; and
- To grant any additional relief available to a domestic liquidator under the law of State A.
- Transferring the administration or realisation of the debtor's assets to the foreign representative; and
- Extending any interim relief under Article 19.[½]

Your answer must contain a brief discussion on the following elements:

- 1. Adequate protection:** Pursuant to Article 22 of the Model Law any interim relief under Article 19 of the Model Law or any post-recognition relief under Article 21 of the Model Law require the court in State A to be satisfied that the interests of the creditors and the other interested persons, including the debtor, are adequately protected and any relief may be subject to conditions as the court considers appropriate.
- 2. Existing international obligations of State A:** Based on Article 3 of the Model Law, the court in State A should again verify that there are no existing international obligations of State A (under a treaty or otherwise) that may conflict with granting the requested relief under the implemented Model Law in State A.
- 3. Public policy exception:** The court in State A should, based on Article 6 of the Model Law, also again verify that the relief application is not manifestly contrary to public policy of State A.

Question 3.4 [maximum 1 mark] [1 mark]

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

In the judgment in Igor Vitalievich Protasov and Khadzhi-Murat Derev, the Court held that the Model Law aims to place the foreign trustee, foreign representation or bankruptcy manager in the same position as an officer appointed under domestic law, and that recognition of a foreign main proceeding provides the same legal protection as the domestic laws. Unless there are exceptional reasons, the court considers that a freezing order is neither necessary nor justified. [1]

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] [4 out 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 [2 out of 10]

Having considered the present scenario, the winding up of The Commercial Bank for Business Corporation (the Bank) is a foreign proceeding under Article 2(a) for the following reasons: [Here you should have addressed the different elements of the definition set forth in article 2(a) MLCBI]

- The registered office of the Bank is in Country A, which has not adopted the MLCBI including the CBIR 2006, the English-adopted version of the MLCBI. Therefore, Country A is a foreign state.
- Mr. Z, the majority shareholder, holds shares in companies registered in England, which suggests that there are related entities that have adopted the CBIR 2006 and the Deposit Guarantee Fund (DGF) liquidator may have to bring claims against these companies.
- The Bank may have been involved in a multi-million dollar fraud involving companies registered in England. If this turns out to be true, the liquidator will have to make claims against these companies.
- These proceedings are about the liquidation of the Bank. ["for the purpose of reorganisation and liquidation" element?]

The court is allowed to rely on the presumption that the documents submitted in support of the application, such as National Bank's winding-up protocols, DGF Resolution 1513 and the creditors' list of claims approved by DGF totalling USD 1.113billion. [article 15 MLCBI]

The court must decide whether to open foreign main proceedings or foreign non-main proceedings. According to Article 2, a foreign main proceeding is a foreign proceeding that takes place in the debtor's home country or in the place of the debtor's centre of main interest (COMI). A foreign non-main proceeding, on the other hand, is a proceeding other than a foreign main proceeding where the debtor (the Bank) has an establishment in a foreign state.

Based on the above, the liquidator can open foreign non-main proceedings on the following basis:

- The debtor's COMI is located Country A, which has not adopted the MLCBI and therefore cannot be recognised as a foreign main proceeding.
- The Bank holds shares in related companies registered in England through its majority shareholder.
- The fraud involves companies registered in England.

The court may grant relief to the liquidator under Article 21 after recognition. It is important that the interests of creditors are adequately protected and that the sovereignty of the national laws of Country A, that is laws of LBBA and DGF, are preserved under Article 6.

Unfortunately, your response does not directly answers Q 4.1.1. which asks you to address (using where appropriate guidance and clarification and including source references) from the various elements of "foreign proceeding" (as defined in article 2(a) of the MLCBI), apply the facts and conclude whether each element has been 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]. [2 out of 5]

A foreign representative is a person or entity authorised to administer or act as a representative of the foreign proceedings.

The representative’s authority is either to manage the liquidation of the debtor’s assets or affairs or to act as a representative of the foreign proceedings.

The reliefs available to the foreign representative are subject to compliance with the procedural rules of the country in which the proceedings were commenced, in this case Country A, and the applicable notification requirements.

Although Ms G has been appointed liquidator of the Bank, Resolution 1513 prohibits her from claims for damages against the related parties and non-banking financial institutions and from arranging the sale of the Bank’s assets. These powers remain with DGF.

Therefore, DGF will be recognised as the foreign representative for the foreign non-main proceedings.

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

1. Article 16(1) of the MLCBI provides:

‘If the decision or certificate referred to in paragraph 2 of article 15 indicates that the foreign proceeding is a proceeding within the meaning of sub-paragraph (i) of article 2 and that the foreign representative is a body or person within the meaning of sub-paragraph (j) of article 2, the court is entitled to so presume.’

2. This application is brought jointly by the DGF and Ms G. The DGF’s role as liquidator arises under statute and article 77 of the LBBA provides that the DGF is automatically appointed as liquidator on the day it receives the NB’s decision pursuant to article 77 revoking a bank’s licence and commencing its liquidation.

3. Article 48(3) of the DGF Law, empowers the DGF to delegate its powers to an “authorised officer” or “authorised person”. The “Fund’s authorised person” is defined by article 2(1)(17) of the DGF law as: “an employee of the Fund, who on behalf of the Fund and within the powers provided for by this Law and/or delegated by the Fund, performs actions to ensure the bank’s withdrawal from the market during provisional administration of the insolvent bank and/or bank liquidation”.

4. Article 35(1) of the DGF Law specifies that an authorised person, must have: “...high professional and moral qualities, impeccable business reputation, complete higher education in the field of economics, finance or law...and professional experience necessary.” An authorised person may not be a creditor of the relevant bank, have a criminal record, have any obligations to the relevant bank, or have any conflict of interest with the bank. Once appointed, the authorised officer is accountable to the DGF for their actions and may exercise the powers delegated to them by the DGF in pursuance of the bank’s liquidation.

5. Ms G’s appointment was pursuant to a Decision of the Executive Board of the Directors of the DGF, No. 1513 (“Resolution 1513”). Resolution 1513 notes that Ms G is a “leading bank liquidation professional”. It delegates to her all liquidation powers in respect of the Bank, set out in the DGF Law and in particular articles 37, 38, 47-52, 521 and 53 of the DGF Law, including the authority to sign all agreements related to the sale of the bank’s assets in the manner prescribed by the DGF Law. Resolution 1513 expressly excludes from Ms G’s authority the power to claim damages from a related party of the Bank, the power to make a claim against a non-banking financial institution that raised money as loans or deposits from individuals, and the power to

arrange for the sale of the Bank's assets. Each of the excluded powers remains vested in the DGF as the Bank's formally appointed liquidator.

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

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 *