



SUMMATIVE (FORMAL) ASSESSMENT: MODULE 2A

THE UNCITRAL MODEL LAWS RELATING TO INSOLVENCY

Commented [BB1]: TOTAL = 38.5 MARKS

77%

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

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

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

INSTRUCTIONS FOR COMPLETION AND SUBMISSION OF ASSESSMENT

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

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

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

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

ANSWER ALL THE QUESTIONS

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

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

Commented [SL2]: SUBTOTAL = 8 MARKS

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

Question 1.1

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

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

Question 1.2

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

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

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

Question 1.3

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

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

- (a) *The registered office of the debtor is not in the jurisdiction where the foreign proceedings were opened, but the debtor has an establishment in the jurisdiction of the enacting State.*
- (b) *The registered office of the debtor is in the jurisdiction of the enacting State, but the debtor has an establishment in the jurisdiction where the foreign proceedings were opened.*
- (c) *The debtor has neither its COMI nor an establishment in the jurisdiction where the foreign proceedings were opened.*
- (d) ***The debtor has neither its COMI nor an establishment in the jurisdiction of the enacting State.***

Question 1.4

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

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

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

- (a) The foreign main proceedings in South Africa will not be recognised in the UK because the UK is not a designated country under South Africa's principle of reciprocity, but the foreign non-main proceedings in Argentina will be recognised in the UK despite Argentina not having implemented the Model Law.*
- (b) Both the foreign main proceedings in South Africa and the foreign non-main proceedings in Argentina will not be recognised in the UK because the UK has no principle of reciprocity and Argentina has not implemented the Model Law.*
- (c) Both the foreign main proceedings in South Africa and the foreign non-main proceedings in Argentina will be recognised in the UK.*
- (d) None of the statements in (a), (b) or (c) are correct.**

Question 1.6

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

- (a) No interim relief based on Article 19 of the Model Law is available if concurrent domestic insolvency proceedings and foreign proceedings exist at the time of the application of the foreign proceedings in the enacting State.*
- (b) In the case of a foreign main proceeding, automatic relief under Article 20 of the Model Law applies if concurrent domestic insolvency proceedings and foreign proceedings exist at the time of the application of the foreign proceedings in the enacting State.*
- (c) The commencement of domestic insolvency proceedings prevents or terminates the recognition of a foreign proceeding.*
- (d) If only after recognition of the foreign proceedings concurrent domestic insolvency proceedings are opened, then any post-recognition relief granted based on Article 21 of the Model Law will not be either adjusted or terminated if consistent with the domestic insolvency proceedings.**

Question 1.7

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

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

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

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

(d) All of the above.

Question 1.8

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

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

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

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

(d) All of the above.

Question 1.9

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

(a) Court proceedings.

(b) Arbitral Tribunals.

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

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

Question 1.10

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

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

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

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

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

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

Question 2.1 [maximum 3 marks]

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

A Debtor's COMI is determined with reference to the date of commencement of the foreign proceeding. COMI is not a defined term in the Model Law, but the Guide to Enactment provides that the two key factors in determining COMI are (i) the location of the debtor's "central administration" and (ii) whether that location is "readily ascertainable" by the Debtor's Creditors. This is similar to the EIR definition of COMI. With that in mind, it may well be that when a Debtor has purported to change its COMI close to the date of commencement of the foreign proceeding, the second factor cannot be met. As such, even if a Debtor moves its central administration (thereby purporting to move its COMI), if its Creditors are not able to readily ascertain that that administration has moved, the Debtor's COMI is likely to remain in the previous place as the second limb has not and cannot be satisfied.

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 refers to article 14, also known as the timely notice provision, which requires foreign creditors to be given individual notice of the domestic proceedings.

Statement 2 refers to the safe conduct rule (the rule that the Court of an enacting state cannot assume jurisdiction over all of the assets of the Debtor based solely on the application of a foreign office-holder for recognition) as set out in article 10.

Commented [SL5]: SUBTOTAL = 8.5 MARKS

Commented [SL6]: 2 marks

Also, US courts, chap 15 and *Morning Mist Holdings Ltd v. Kryz (Matter of Fairfield Sentry Ltd)*.

Commented [SL7]: 2.5 marks

Statement 3 = Art 16(3)

Statement 3 refers to article 16, which provides *inter alia* that the Court of the enacting state is entitled to presume (in the absence of evidence to the contrary) that the Debtor's COMI is its registered office (entity) or place of habitual residence (individual). COMI is a key concept, but is not defined in the Model Law as discussed at question 2.1 above.

Question 2.3 [2 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.

In the IBA case, the Debtor was an Azeri company, OJSC International Bank of Azerbaijan (IBA). Its insolvency representative had been recognised in England & Wales in prior recognition proceedings, and sought relief under article 21. In essence, the position was that a scheme had been agreed in respect of the Debtor's debts pursuant to Azeri law and within the envelope of the Azeri restructuring/reorganisation proceedings. However, some of the debt was governed by English law and could, in accordance with the Rule in Gibbs, therefore not be compromised by means of the Azeri scheme. The "challenging creditors" who held the unpaid English debt had not submitted to the Azeri proceedings or consented to the Azeri scheme, but the Azeri scheme purported to bind them pursuant to Azeri law.

The Azeri representative sought an extension of the Article 20 moratorium, the aim being to prevent the challenging creditors from suing on the English debt indefinitely and thus effectively forcing them into the Azeri scheme. This relief was rejected at first instance, and this was upheld on appeal with the Court of Appeal finding that the indefinite moratorium would only be granted where it was necessary to protect the interest of IBA's creditors, and appropriate to achieve that protection by way of moratorium. The Court of Appeal found that on the evidence, the indefinite moratorium was not necessary save to prevent a "far too indirect and imponderable" risk that IBA may become unable to satisfy its new (restructured) corporate bonds. This was not sufficient to meet the test of necessity, and the claim to relief therefore failed. The Court of Appeal noted that the option existed for IBA to commence an English law governed scheme of arrangement to deal with the English debt (thereby sidestepping the Rule in Gibbs), but noted that the Debtor had declined to do so.

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.

Pursuant to article 29(a), the court must satisfy itself that any post-recognition relief in respect of the foreign main proceeding (based on article 21) is consistent with the domestic proceedings given that the concurrency of the proceedings arose when the application for recognition of the foreign main proceeding was made (i.e. the domestic proceeding was already in existence at that time). The Court should also note that the automatic relief in article 20 will not apply in this situation.

The foreign representative owes the Court in the enacting state an ongoing duty, pursuant to article 18, to promptly inform the Court of (i) substantial changes in the status of the foreign proceeding or the representative's appointment; and (ii) any other foreign proceedings (whether main or non-main) in respect of the same debtor of which the representative becomes aware.

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

Commented [BB10]: SUB TOTAL = 9.5 MARKS

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

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

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

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

*Pursuant to articles 9 and 11, the foreign representative would enjoy *locus standi* in State A without the need for a recognition application. [1] Article 9 would enable the foreign representative to access the courts of State A generally, where he could for example engage in proceedings to preserve the Debtor's assets. Article 11 would enable the foreign representative to request the commencement of a domestic insolvency proceeding in State A against the Debtor. [1]*

Pursuant to article 12, the foreign representative would also enjoy standing before the Courts of State A but only where (i) the foreign proceeding in State B has been recognised by the Courts of State A and (ii) a domestic insolvency proceeding in respect of the debtor exists in State A. In that situation, the foreign representative would have standing to address the Courts of State A by way of petition, submissions or request on matters regarding the protection, realisation or distribution of the

Debtor's assets in State A, or relating to the co-ordination of the foreign and domestic proceedings.

In terms of article 25, the Courts of State A are obliged to co-operate to the maximum extent possible with the foreign representative, including by all of the means listed in article 27 (and the Practice Guide). [½]

It can be seen that the foreign representative would enjoy some powers above (such as co-operation from State A's courts and standing to bring insolvency or non-insolvency proceedings in State A) without the need for a recognition application. [½] however, should there be a separate domestic insolvency proceeding in State A in which the foreign representative wishes to participate, or should he wish to enjoy additional powers such as calling for witnesses etc., he would be best advised to make a recognition application in State A.

For full marks your response should also include the benefits of both the access provisions and the cooperation provisions - they save time and costs which in turn avoid value destruction and, in certain cases may even facilitate value creation.

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.

Assuming that the foreign proceeding and foreign representative meet the necessary thresholds of the definitions in article 2, the foreign representative must make application to the Court of State A for recognition pursuant to article 15. [½] The application must be accompanied by a certified copy of the decision commencing the State B proceeding or appointing the foreign representative, or a certificate from the Court of State B confirming the existence of the State B proceeding or the appointment of the foreign representative, or (in the absence of either of the above) and other evidence acceptable to the Court of State A that the State B proceeding exists or the foreign representative has been appointed in State B. The Court of State A may require these documents to be translated into the official language of State A, if needed. [½]

The foreign representative must also ensure that the recognition application includes a statement setting out all other foreign proceedings in respect of the Debtor of which he is aware.

*In considering the application, the Court of State A will be entitled to rely on presumptions set out in article 16, namely *inter alia* that the documents produced are authentic, even if they have not been legalised (apostilled), and, in the absence of evidence to the contrary, that the debtor's COMI is where its registered office is located. [1] Also refer to Article 17*

Assuming all of the above can be proved (and the application is in the appropriate Court in State A), unless there are any public policy reasons that would trigger the article 6 "public policy exception", [1] the Court of State A should grant the recognition application at the earliest opportunity pursuant to article 17. The location of the debtor's COMI will determine whether the State B proceedings are recognised as foreign main or foreign non-main proceedings.

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

- 1. Exclusions:** *If the debtor is an entity that is subject to a special insolvency regime in State B, the foreign representative should first check if the foreign proceedings regarding that type of a debtor are excluded in State A based on Article 1(2) of the implemented Model Law in State A.*
- 2. Restrictions: Existing international obligations of State A:** *Based on Article 3 of the Model Law, the court in State A should also check if there are no existing international obligations of State A (under a treaty or otherwise) that may conflict with granting the recognition application under the implemented Model Law in State A.*
- 3. Judicial scrutiny:** *While the court in State A is able to rely on the rebuttable presumptions set forth in Article 16 of the Model Law, in the context of Article 17 of the Model Law the court will have to assess whether either the COMI or at least an establishment of the debtor is located in State B where the foreign proceedings were opened. If the COMI of the debtor is in State B the foreign proceedings should be recognised as foreign main proceedings and if only an establishment of the debtor is in State B the foreign proceedings should be recognised as foreign non-main proceedings. Without a COMI or at least an establishment of the debtor in State B, recognition cannot be granted by the court in State A.*

Question 3.3 [maximum 5 marks] [2.5 out of 5 marks]

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

Article 19 provides for pre-recognition relief, which can be sought on an urgent basis after filing of the recognition application but prior to that application being heard/determined by the Court of State A. This is appropriate where the relief is required to protect the debtor's assets or the creditors' interests, and is available whether the State B proceedings are foreign main or non-main proceedings. Examples

of the relief available under article 19 include a stay of execution, taking steps to have the value of perishable goods or assets otherwise subject to devaluation preserved or protected (whether by the foreign representative or another appointee) or granting certain relief that would be available post-recognition pursuant to article 21.

Article 21 provides for discretionary "appropriate relief" to be granted when foreign proceedings are recognised. These can be main or non-main proceedings, and the Court of State A would have discretionary power regarding what relief is granted (at the request of the foreign representative). The relief available pursuant to article 21 is aimed at protecting the debtor's assets or the creditors' interests, as is the case for interim relief pursuant to article 19. Examples include suspending the debtor's right to transfer or deal with assets, allowing for witness examinations or gathering of evidence, or granting any other relief available to domestic representatives.

Article 20 provides for automatic relief which applies where a foreign main proceeding only is recognised (and where there is no concurrence of proceedings). This automatic relief encompasses a stay of commencement or continuation of legal proceedings (litigation and arbitration), a stay of execution of the debtor's assets, and a suspension of the debtor's right to transfer, encumber or dispose of assets.

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

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

Question 3.4 [maximum 1 mark] [1 mark]

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

In the case of *Protasov v Derev* [2021] EWHC 392 (Ch), Mr Justice Johnson found that the aim of the Model Law is to have foreign representatives enjoy the same powers as domestic insolvency representatives. Having a worldwide freezing order (WFO) continue post-recognition would allow the foreign representative to enjoy a right/remedy not available to a domestic office-holder (since under domestic legislation an English representative has no entitlement to a WFO, but does have other

remedies available to her). Accordingly, in the absence of compelling reasons, there is no basis upon which to allow an interim WFO granted pursuant to article 19 to continue post-recognition.

QUESTION 4 (fact-based application-type question) [15 marks in total]

Commented [BB11]: SUB TOTAL = 12.5 MARKS

Read the following facts very carefully before answering the questions that follow.

(1) Background

The Commercial Bank for Business Corporation (the Bank) has operated since 1991. The Bank's registered office is situated in Country A, which has not adopted the MLCBI. As of 13 August 2015, the Bank's majority ultimate beneficial owner was Mr Z, who held approximately 95% of the Bank's shares through various corporate entities (including some registered in England).

The Bank entered provisional administration on 17 September 2015 and liquidation on 17 December 2015. Investigations into the Bank have revealed that it appears to have been potentially involved in a multi-million dollar fraud resulting in monies being sent to many overseas companies, including entities incorporated and registered in England.

Proceedings were commenced in the High Court of England and Wales (Chancery Division) against various defendants on 11 February 2021 (the English Proceedings).

An affidavit (the Affidavit) sets out a detailed summary of the legislation of Country A's specific insolvency procedure for Banks. The procedure involves initial input from the National Bank (the NB) and at the time that the Bank entered liquidation, followed by a number of stages:

Classification of the bank as troubled

The NB may classify a bank as "troubled" if it meets at least one of the criteria set down by article 75 of the Law of Country A on Banks and Banking Activity (LBBA) or for any of the reasons specified in its regulations.

Once declared "troubled", the relevant bank has 180 days within which to bring its activities in line with the NB's requirements. At the end of that period, the NB must either recognise the Bank as compliant, or must classify it as insolvent.

Classification of the bank as insolvent

The NB is obliged to classify a bank as insolvent if it meets the criteria set out in article 76 of the LBBA, which includes:

- (i) the bank's regulatory capital amount or standard capital ratios have reduced to one-third of the minimum level specified by law;**
- (ii) within five consecutive working days, the bank has failed to meet 2% or more of its obligations to depositors or creditors; and**
- (iii) the bank, having been declared as troubled, then fails to comply with an order or decision of the NB and / or a request by the NB to remedy violations of the banking law.**

The NB has the ability to classify a bank as insolvent without necessarily needing to first go through the troubled stage. Article 77 of the LBBA accordingly provides that a bank can be liquidated by the NB directly, revoking its licence.

Provisional administration

The Deposit Guarantee Fund (DGF) is a governmental body of Country A tasked principally with providing deposit insurance to bank depositors in Country A. However, the Affidavit explained that the DGF is also responsible for the process of withdrawing insolvent banks from the market and winding down their operations via liquidation. Its powers include those related to early detection and intervention, and the power to act in a bank's interim or provisional administration and its ultimate liquidation.

Pursuant to article 34 of the DGF Law, once a bank has been classified as insolvent, the DGF will begin the process of removing it from the market. This is often achieved with an initial period of provisional administration. During this period:

- (i) the DGF (acting via an authorised officer) begins the process of directly administering the bank's affairs. Articles 35(5) and 36(1) of the DGF Law provide that during provisional administration, the DGF shall have full and exclusive rights to manage the bank and all powers of the bank's management.**
- (ii) Article 36(5) establishes a moratorium which prevents, *inter alia*: the claims of depositors or creditors being satisfied; execution or enforcement against the bank's assets; encumbrances and restrictions being created over the bank's property; and interest being charged.**

Liquidation

Liquidation follows provisional administration. The DGF is obliged to commence liquidation proceedings against a bank on or before the next working day after the NB's decision to revoke the bank's licence.

Article 77 of the LBBA provides that the DGF automatically becomes liquidator of a bank on the date it receives confirmation of the NB's decision to revoke the bank's licence. At that point, the DGF acquires the full powers of a liquidator under the law of Country A.

When the bank enters liquidation, all powers of the bank's management and control bodies are terminated (as are the provisional administrators' powers if the bank is first in provisional administration); all banking activities are terminated; all money liabilities due to the bank are deemed to become due; and, among other things, the DGF alienates the bank's property and funds. Public encumbrances and restrictions on disposal of bank property are terminated and offsetting of counter-claims is prohibited.

As liquidator, the DGF has extensive powers, including the power to investigate the bank's history and bring claims against parties believed to have caused its downfall. Those powers include:

- (i) the power to exercise management powers and take over management of the property (including the money) of the bank;**
- (ii) the power to compile a register of creditor claims and to seek to satisfy those claims;**
- (iii) the power to take steps to find, identify and recover property belonging to the bank;**
- (iv) the power to dismiss employees and withdraw from/terminate contracts;**
- (v) the power to dispose of the bank's assets; and**
- (vi) the power to exercise "such other powers as are necessary to complete the liquidation of a bank".**

The DGF also has powers of sale, distribution and the power to bring claims for compensation against persons for harm inflicted on the insolvent bank.

However, article 48(3) of the DGF Law empowers the DGF to delegate its powers to an "authorised officer" or "authorised person". The "Fund's authorised person" is defined by article 2(1)(17) of the DGF Law as: "an employee of the Fund, who on behalf of the Fund and within the powers provided for by this Law and / or delegated by the Fund,

performs actions to ensure the bank's withdrawal from the market during provisional administration of the insolvent bank and/or bank liquidation".

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

The DGF's independence is addressed at articles 3(3) and 3(7) of the DGF Law which confirm that it is an economically independent institution with separate balance sheet and accounts from the NB and that neither public authorities nor the NB have any right to interfere in the exercise of its functions and powers.

Article 37 establishes that the DGF (or its authorised person, insofar as such powers are delegated) has extensive powers, including powers to exercise managerial and supervisory powers, to enter into contracts, to restrict or terminate the bank's transactions, and to file property and non-property claims with a court.

(2) The Bank's liquidation

The Bank was formally classified by the NB as "troubled" on 19 January 2015. The translated NB resolution records:

"The statistical reports-based analysis of the Bank's compliance with the banking law requirements has found that the Bank has been engaged in risky operations."

Those operations included:

- (i) a breach, for eight consecutive reporting periods, of the NB's minimum capital requirements;**
- (ii) 10 months of loss-making activities;**
- (iii) a reduction in its holding of highly liquid assets;**
- (iv) a critically low balance of funds held with the NB; and**
- (v) 48% of the Bank's liabilities being dependent on individuals and a significant increase in "adversely classified assets" which are understood to be loans, whose full repayment has become questionable.**

Despite initially appearing to improve, by September 2015 the Bank's financial position had deteriorated further with increased losses, a further reduction in regulatory capital and numerous complaints to the NB. On 17 September 2015, the NB classified the Bank as insolvent pursuant to article 76 of the LBBA. On the same day, the DGF passed a resolution commencing the process of withdrawing the Bank from the market and appointing Ms C as interim administrator.

Three months later, on 17 December 2015, the NB formally revoked the Bank's banking licence and resolved that it be liquidated. The following day, the DGF initiated the liquidation procedure and appointed Ms C as the first of the DGF's authorised persons to whom powers of the liquidator were delegated. Ms C was replaced as authorised officer with effect from 17 August 2020 by Ms G.

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

On 14 December 2020, the Bank's liquidation was extended to an indefinite date, described as arising when circumstances rendered the sale of the Bank's assets and satisfaction of creditor's claims, no longer possible.

On 7 September 2020, the DGF resolved to approve an amended list of creditors' claims totalling approximately USD 1.113 billion. The Affidavit states that the Bank's current, estimated deficiency exceeds USD 823 million.

QUESTION 4.1 [maximum 15 marks] [12.5 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 [8 out of 10]

The definition of "foreign proceeding" is contained in article 2, and contains the following elements:

1. A proceeding, which can be final or interim;
2. The proceeding can be either administrative or judicial;
3. The proceeding must be collective in nature;
4. The proceeding must be in a foreign state;
5. The proceeding is authorised or conducted pursuant to "a law relating to insolvency";
6. The assets and affairs of the debtor must be subject to the control of or supervision by a foreign court; and
7. The proceeding must be for the purpose of reorganisation or liquidation.

Taking each in turn:

The first requirement is that there must be a proceeding (including an interim proceeding). The liquidation of the Bank plainly constitutes a proceeding, inasmuch as there is a defined process commenced by the resolution of the NB on 17 December 2015.

Second, the liquidation proceeding is administrative in nature, having been commenced by resolution of the NB following a period in which the Bank was declared troubled and thereafter placed into provisional administration. This course was authorised pursuant to the LBBA.

Third, the proceeding is collective in nature as the DGF is tasked *inter alia* with "winding down" the activities of the Bank pursuant to the DGF Act, including by adjudicating and aiming to satisfy creditor claims.

For full marks we are looking for this element to be addressed in your response 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”.*

Fourth, it is not in dispute that the proceeding takes place in and pursuant to the laws of Country A, meaning that the foreign state requirement is satisfied.

*The fifth requirement is that the law under which the proceeding is conducted must be a law relating to insolvency. While the LBBA and DGF Act do not appear on the materials provided in the Affidavit to deal with general insolvency procedures applicable to ordinary entities, the *Agrokor* case is authority for the proposition that “insolvency law” is not required as a label. In that case, the High Court held that this requirement is satisfied if insolvency is one of the grounds upon which the proceeding could be commenced, even if insolvency could not be shown. In that case, the Court accepted that the *Agrokor* group was in “severe financial distress”. In the present instance, the Bank was declared insolvent on 17 September 2015, pursuant to s76 of the LBBA. This was following a period of financial trouble culminating in September 2015 including material concerns as to the Bank’s liabilities, a reduction in liquid holdings, and breaches of the regulatory capital requirement for a significant period of time. Thus, although the LBBA and DGF Act are not strictly labelled as “insolvency laws”, the fact that the liquidation commenced upon a declaration of insolvency by the NB (and in circumstances of significant financial distress) means that the LBBA and DGF Act meet the requirement of being laws relating to insolvency, such that the liquidation proceeding constitutes a proceeding conducted under a law relating to insolvency in satisfaction of the requirement.*

*The sixth requirement is that the assets or affairs of the debtor must be subject to Court control. Whilst there is no indication in the Affidavit that the Court of Country A enjoys direct control or supervision of the Bank’s assets, the *Agrokor* case supports the view that such control can be potential rather than actual, and indirect rather than direct. In addition, the *Agrokor* case supports the position that vesting of control in a government body does not of itself exclude or negate the supervision of the Court. Accordingly, the fact that powers vest in the DGF pursuant to the DGF Act and the LBBA does not mean that this requirement cannot be complied with. The DGF enjoys, upon liquidation, the full powers of a Country A liquidator. These will presumably include an element of Court supervision, and/or the ability to approach the Court in some instances. On this basis, and in keeping with the *Agrokor* decision, it is likely the case that this requirement is satisfied despite the lack of direct involvement of the Country A courts at this time.*

In addressing this element, please also consider the following:

- 1. The term "foreign court" is defined at article 2(e) of the MLCBI and means: "a judicial or other authority competent to control or supervise a foreign proceeding".**
- 2. The Guide to Enactment notes: "87) A foreign proceeding that meets the requisites of article 2, subparagraph (a), should receive the same treatment irrespective of whether it has been commenced and supervised by a judicial body or an administrative body. Therefore, in order to obviate the need to refer to a foreign non-judicial authority whenever reference is made to a foreign court, the definition of "foreign court" in subparagraph (e) includes also non-judicial authorities."**
- 3. In *Re Sanko Steamship Co Ltd* [2015] EWHC 1031 (Ch) Simon Barker QC, noted that a foreign proceeding may be recognised where the control or supervision of the proceeding is undertaken by a non-judicial administrative body.**
- 4. The Guide to Enactment states: "74) The Model Law specifies neither the level of control or supervision required to satisfy this aspect of the definition nor the time at which that control or supervision should arise. Although it is intended that the control or supervision required under subparagraph (a) should be formal in nature, it may be potential rather than actual. As noted in paragraph 71, a proceeding in which the debtor retains some measure of control over its assets, albeit under court supervision, such as a debtor-in-possession would satisfy this requirement. Control or supervision may be exercised not only directly by the court but also by an insolvency representative where, for example, the insolvency representative is subject to control or supervision by the court. Mere supervision of an insolvency representative by a licensing authority would not be sufficient."**
- 5. In this case the DGF has control of all of the Bank's assets and overall control of the liquidation.**
- 6. The DGF's independence is addressed at articles 3(3) and 3(7) of the DGF Law which confirm that it is an economically independent institution with separate balance sheet and accounts from the NB and that neither public authorities nor the NB have any right to interfere in the exercise of its functions and powers.**
- 7. Article 37 establishes that the DGF (or its authorised person, insofar as such powers are delegated) has extensive powers, including powers to exercise managerial and supervisory powers, to enter into contracts, to restrict or terminate the bank's transactions, and to file property and non-property claims with a court.**
- 8. The assets and affairs of the Bank are subject to the control of the DGF, an official body which exercises its powers in the liquidation free from intervention by government or the NB and which should be considered, for the purposes of the definition set out in article 2(e) of the MLCBI, as a "foreign court".**

*The seventh and final requirement is that the proceeding is for the purpose of liquidation or reorganisation. In the present case the DGF is tasked *inter alia* with settling a list of creditors and paying them out. The Bank is expected to have a large deficit, but the DGF and Ms G are specifically authorised to sell the Bank's assets. More*

generally the LBBA contemplates an insolvent bank being removed from the market. This plainly meets the requirement of a proceeding being aimed at liquidation.

In all the circumstances, the Country A proceeding stands to be recognised as a foreign proceeding. Given that the Bank's registered office is situated in Country A and no evidence to the contrary has been presented in the Affidavit, the Country A proceeding is a foreign main proceeding.

See the above comments. For full marks your response must address in sufficient detail each of the 7 separate elements of the definition of "foreign proceeding" as set forth in article 2(a) of the MLCBI, provide guidance and source references as appropriate and apply the facts.

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 as a person or body, including where appointed on an interim basis, who is authorised in a foreign proceeding to administer the reorganisation or liquidation of the debtor's assets or affairs, or to act as representative of the foreign proceeding.

The DGF (and, by extension, Ms G as its authorised representative) are authorised pursuant to the DGF Act and LBBA to administer the liquidation of the Bank. There is no requirement that the foreign Court make the appointment/authorisation, so it is sufficient that the DGF is appointed pursuant to the relevant legislation.

In addition, the DGF enjoys all of the powers of a liquidator under Country A's laws. Accordingly, it is a foreign representative within the meaning of article 2. The DGF has authorised Ms G to exercise some, but not all, of its powers under the Act. On balance, Ms G retains many of the core power such as the ability to enter into documents for the sale of the Bank's assets, and to act as representative of the DGF in proceedings. Therefore, Ms G also meets the requirements of a foreign representative.

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

While not all facts provided in the fact pattern given for this Question 4 are immediately relevant for your answer, please do use, where appropriate, those relevant facts that directly support your answer.

For the purpose of this question, you may further assume that the Bank is not excluded from the scope of the MLCBI by article 1(2) of the MLCBI.

* End of Assessment *