



SUMMATIVE (FORMAL) ASSESSMENT: MODULE 2A

THE UNCITRAL MODEL LAWS RELATING TO INSOLVENCY

Commented [BB1]: TOTAL = 28.5 MARKS

57%

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 = 9 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

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

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

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

Question 1.2

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

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

(d) All of the above.

Question 1.3

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

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

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

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

Question 1.4

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

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

(b) The public policy exception.

(c) The safe conduct rule.

(d) The "hotchpot" rule.

Question 1.5

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

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

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

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

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

Question 1.6

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

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

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

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

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

Question 1.7

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

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

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

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

(d) All of the above.

Question 1.8

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

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

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

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

(d) All of the above.

Question 1.9

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

(a) Court proceedings.

(b) Arbitral Tribunals.

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

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

Question 1.10

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

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

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

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

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

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

Question 2.1 [maximum 3 marks]

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

The key date to consider when determining the COMI of a debtor is the date of the commencement of the foreign proceeding. There are a range of factors which can be taken into account when determining the COMI under the model Law. The two main factors are location where the central administration of the debtor takes place; and which is readily ascertainable by creditors as such. As location of the central administration of a debtor takes place can change, it is important when determining where the COMI of a business is near the time of the commencement of proceedings. If a business was to change its location of central administration within close proximity to the commencement of proceedings, it will be harder to establish that the COMI must be readily ascertainable by third parties. Accordingly, the commencement date of proceedings provides a certainty with appropriate flexibility in order to properly determine the COMI of a debtor.

Question 2.2 [maximum 3 marks]

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

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

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

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

Statement 1: Article 14 – relates to the concept of access

Statement 2: Article 10 – also relates to the concept of access

Statement 3: Article 16 – relates to the concept of recognition

Question 2.3 [2 marks]

Commented [SL4]: SUBTOTAL = 5 MARKS

Commented [SL5]: 2 marks

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

Commented [SL6]: 2.5 marks

Statement 3 - Art 16(3)

Commented [SL7]: 0.5 marks

· According to the English Court of Appeal, the real issue was whether as a matter of settled practice the UK court should not exercise its power to grant the indefinite moratorium where to do so would (i) in substance prevent the English creditors (that is the Challenging Creditors) from enforcing their English law rights in accordance with the Gibbs Rule ("Issue 1") and / or (ii) prolong the stay after the Azeri reconstruction has come to an end ("Issue 2").

· In respect of each issue, the English Court of Appeal held that:

1. **Issue 1:** The UK court would need to be convinced that (a) the indefinite stay is necessary to protect the interests of IBA's creditors and (b) an indefinite stay is the appropriate way of achieving such protection. The factual evidence that can be brought before the court will ultimately decide Issue 1.
2. **Issue 2:** Based on Article 18 of the MLCBI, the English Court of Appeal in the IBA case appeal held that had the MLCBI ever contemplated the continuance of relief after the end of the relevant foreign proceeding, it would have addressed the question explicitly and provided appropriate machinery for that purpose.

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 Court of appeal upheld the lower Court's decision not to impose an indefinite stay on the basis that the information obligation on the foreign proceeding and the status foreign representatives own appointment requires the foreign proceeding to be to be in existence and the representative in office. As the restructuring was complete, the implication is that the Court determined that there was no scope available to continue the moratorium and that relief previously granted under the model law should be terminated.

Question 2.4 [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.

The Court in the enacting state should review any interim relief that has been granted in the enacting state to determine whether it is consistent with the relief available in the foreign main proceeding. If the relief is not consistent, it should be terminated or varied in accordance with article 30(b).

Under article 13, the foreign representative has a duty to promptly inform the court in the enacting state of any substantial change in the status of the recognised foreign proceeding or the status of their appointments; and any other foreign proceeding regarding the same debtor that becomes known to the foreign representative.

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

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 marks out of 4]

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.

202223-935.assessment2A

Page 9

Commented [SL8]: 0 marks

Arts 29(a) and 18

Commented [BB9]: SUB TOTAL = 7 MARKS

The Model Law's provisions on access provide foreign representatives with locus standi, or the ability to be heard, in proceedings commenced in enacting states. In particular, Article 9 expresses the principle of direct access by a foreign representative to courts of the enacting state. [1] This Article is of direct relevance in this circumstance given no recognition of the foreign proceeding opened in state B is required for the foreign representative to have access to the court of the enacting state. By providing standing, the foreign representative may seek appropriate relief in the enacting state, without being required to deal with cumbersome and time consuming formalities often required when seeking access to foreign courts. This is of particular benefit as time is often of the essence. [1] value destruction can be avoided, and this may facilitate value creation

The Model Law's provisions on co-operation mean that the enacting state will enable both courts and insolvency representatives to be efficient and achieve optimal outcomes. [1] As with the access provisions, the co-operation provisions also avoid time consuming processes by empowering courts to co-operate and co-ordinate. Article 25(1) would likely benefit the foreign representative in these circumstances as it requires the court in state A to co-operate with the foreign representative to the maximum extent possible.

For full marks you must include Article 11 and a discussion on: 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?

Question 3.2 [maximum 5 marks] [2 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 the "foreign proceeding" and "foreign representative" requirements are met, there are a number of additional matters that the Court may consider when determining whether to grant the recognition application.

A critical consideration for determining whether a recognition should be granted is whether the COMI exists in the foreign jurisdiction, or alternatively whether there is an

establishment in the foreign jurisdiction. If neither of these conditions are met, the recognition application will be refused. The primary considerations for determining COMI are the location where the central administration of the debtor takes place and which is readily ascertainable as such. There are additional factors that the court may consider, such as the location of the debtors books and records, where financing was organised, the location of its banks and many other factual circumstances. [½] - in your discussion you must make reference to the relevant Article and in this instance, it is Article 17

As noted, if there is insufficient evidence that the COMI is in the foreign jurisdiction, the Court will also consider whether there is an establishment when considering whether to grant the recognition application. Evidence of a place of operations where the debtor carries out a non-transitory activity with human means and goods or services will be required to satisfy the Court that an establishment exists in the foreign jurisdiction. Mere evidence of assets will likely be insufficient evidence to demonstrate an establishment and in those circumstances, a recognition application will likely be declined. [½] - you must make reference to article this provision relates to – Article 15 deals with evidence

The public policy exception set out in Article 6 may also be invoked to prevent a recognition application from succeeding. Evidence of an abuse of process may justify the denial of a recognition application based on the public policy exception. [1]

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

- 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.

Pre-recognition

Urgent interim relief may be available prior to recognition under article 19, provided the interests of creditors' are adequately protected.

Such relief might include a stay of execution of the debtors assets in State A, or entrusting the debtor's assets to a designated individual in State A in order to preserve value of the assets.

Pre-recognition relief may be refused in State A if it were to interfere with the administration of a foreign main proceeding in state B.

Post-recognition

Article 20 provides automatic mandatory relief in the form of a stay in cases of where a foreign main proceeding is extant. However, in the present circumstances, proceedings would need to be commenced in State A.

Post-recognition relief may be granted pursuant to article 21. Such relief might include suspending the right to transfer or dispose of assets, examining witnesses or taking evidence concerning the assets, affairs, rights obligations or liabilities.

Additional relief may also be available to domestic liquidator/ office holder under the laws of the enacting state in the present context. However, any relief granted in State A must not be inconsistent with that which is available in State B.

Your answer dealt with pre-recognition and post-recognition, your answer should have also included a discussion along the following lines:

- 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] [0 marks]

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

A worldwide freezing order made under article 19 is unlikely to continue post recognition because proceedings are yet to be commenced in State A. Accordingly, the Court does not have the power to grant relief pursuant to Article 21, as was the case *Fibria Celulose S/A v Pan Ocean Co Ltd* [2014] EWHC 2124 (Ch).

Suggested answer:

A recent English case between *Igor Vitalievich Protasov and Khadzhi-Murat Derev* [Order of 24 February 2021 by Mr Justice Adam Johnson, [2021] EWHC 392 (CH)] exactly addressed the question.

While the English court held to have jurisdiction in the strict sense to grant such post-recognition discretionary relief, it found that relevant restrictions and limitations existed which served to inhibit the proper exercise of that jurisdiction. The English court found that the English bankruptcy regime offers other forms of protection which mean that relief in the form of a freezing order or similar injunction is simply not warranted. According to the court, "(...) the scheme of the Model Law is intended to put the foreign trustee or bankruptcy manager in the same position, as far as practicable, as an officeholder appointed under domestic law, and consistent with that, the effect of recognition of a foreign main proceeding is to bring into play the same wide infrastructure of the insolvency legislation. Absent some exceptional reason, a freezing order or other similar order will not in my view be required or justified.

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

Commented [BB10]: SUB TOTAL = 7.5 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] [7.5 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 [4.5 out of 10]

4.1.2 whether the Applicants fall within the description of "foreign representatives" as defined by article 2(d) of the MLCBI [maximum 5 marks]. [3 out of 5]

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

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

4.1.1 Whether the Bank's liquidation comprises a "foreign proceeding" within the meaning of article 2(a) of the MLCBI

In order for the Bank's liquidation to comprise a "foreign proceeding" within the meaning of article 2(a) of the MLCBI it is necessary to consider whether:

1. it is a proceeding [element 1] of a foreign State [element 2] that is either judicial or administrative [element 3] that is collective in nature [element 4];
2. it is authorised or conducted under a law relating to insolvency [element 5];
3. the assets and affairs are subject to control or supervision by a foreign court [element 6];
4. the proceeding is for the purpose of reorganisation or liquidation [element 7].

1: Is the proceeding judicial or administrative that is collective in nature?

The Bank's liquidation is a process commenced pursuant to legislation of Country A. In summary, the first stage requires a declaration of insolvency pursuant to the LBBA.

Once declared insolvent, the entity is placed under the control of the DGF, or an authorised individual, pursuant to the DGF Law.

The process is administrative in nature, in that Ms C (as empowered under article 48(3) of the DGF Law) had taken control over the banks affairs pursuant to Articles 35(5) and 36(1) of the DGF Law. Ms G now has the powers of Ms C pursuant to Resolution 1513.

The process is also collective in nature as the liquidation involve consolidation of the Banks assets and liabilities. Accordingly, the first requirement is satisfied.

See comments below.

2: Is the Bank's liquidation authorised or conducted under a law relating to insolvency?

The legislation giving rise to the Bank's liquidation, the LBBA and the DGF Law, plainly deal with matters relating to insolvency.

The LBBA deals with or addresses insolvency or severe financial distress. For example, the LBBA permits an NB to declare a bank insolvent in circumstances where capital requirements are not satisfied, or where obligations to creditors are not met. Failure to satisfy debts as they fall due or poor balance sheet status are both common indicators of insolvency.

Further, the liquidator has powers under the DGF Law to exercise control over management of the bank's property, to compile a register of creditor claims and seek to satisfy them, to identify and recovery property belonging to the bank, to dismiss employees and withdraw for contacts, to dispose of the banks assets and other such powers necessary to complete liquidation. These powers are aimed at dealing with issues that arise in insolvency proceedings.

The Bank's liquidation is therefore conducted under a law relating to insolvency.

3: Are the assets and affairs of the Bank subject to control or supervision by a foreign court?

The level of Court supervision required by the Model Law is relatively low. Under the CBIR (which applies here), the supervision required can be potential, rather than actual and indirect rather than direct.

The powers provided to the NB under the LBBA do not seem to require any intervention of the Court. While 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, again there is no suggestion that such proceeding require intervention or supervision by any Court.

Accordingly, it is unlikely that the third element would be satisfied in the circumstances.

You conclude that the "subject to control or supervision by a foreign court" has not been met. For the following reasons, we would take a different position on this:

1. The term "*foreign court*" is defined at article 2(e) of the MLCBI and means: "*a judicial or other authority competent to control or supervise a foreign proceeding*".
2. The Guide to Enactment notes: "*87) A foreign proceeding that meets the requisites of article 2, subparagraph (a), should receive the same treatment irrespective of whether it has been commenced and supervised by a judicial body or an administrative body.*"

Therefore, in order to obviate the need to refer to a foreign non-judicial authority whenever reference is made to a foreign court, the definition of "foreign court" in subparagraph (e) includes also non-judicial authorities."

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

4: is the proceeding is for the purpose of reorganisation or liquidation?

As set out in the factual background, the DGF is a governmental body tasked principally with providing deposit insurance to bank depositors in Country A. However, the DGF is also responsible for the process of withdrawing insolvent banks from the market and winding down their operations via liquidation. Further, 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.

The fact that the DGF has these secondary responsibilities regarding insolvency, and is provided with powers to achieve these aims, indicates that the purpose of the Bank's liquidation is for the purposes of reorganisation or liquidation. Accordingly, element 4 would be satisfied in the circumstances.

The liquidation proceedings have come to a halt in a practical sense, despite the indefinite extension of the liquidation on 14 December 2020. Accordingly, even if the process were to be recognised by the English Court, it may be that the Court permits claims to proceed against the bank. As set out in the IBA case, a permanent stay cannot be employed as a way around the Gibbs Rule (which holds that debts governed by English law cannot be discharged or compromised by a foreign insolvency proceeding).

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.

In your response you have not specifically addressed each of the 7 elements and the elements you do specifically discuss in your response have not been addressed with the level of detail (including guidance, source references and application of the facts) we are looking for. For example, for the “collective nature” element, we would be looking for a 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*”.

4.1.2 whether the Applicants fall within the description of “foreign representatives” as defined by article 2(d) of the MLCBI

For a representative to qualify as a “foreign representative” within the meaning of the Model Law, they need to meet the following elements:

1. they must be an appointed person or body authorised in the foreign proceeding; and
2. the authorisation of the representative is either to administer the reorganisation or liquidation of the debtors assets or affairs or to act as representative of the foreign proceeding.

Does Ms G meet the requirements of article 2(d)?

Ms G was appointed pursuant to Resolution 1513. As noted to Resolution 1513 empowers Ms G to exercise all liquidation powers in respect of the Bank set out in the DGF Law.

However, article 48(3) of the DGF Law empowers the DGF to delegate its powers to an “authorised officer” or “authorised person”. Further, 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”. Ms G is not an employee of the Fund, nor was she delegated her powers by the Fund. [Where in the fact pattern provided is this stipulated?] Further, Ms G’s actions are preventative of the bank’s withdrawal from the market.

Similarly, the fact that Ms G was appointed by the Bank [The fact pattern stipulates that “Ms G’s appointment was pursuant to the decision of the executive board of directors of the DGF, nr 1513”, not by the Bank] suggests a conflict of interest in breach of Article 35(1). [Based on the fact pattern provided, such a “conflict of interest suggestion” should not arise] This is demonstrated by the fact that resolution 1513 prevents Ms G from pursuing individuals related to the Bank in circumstances where there is evidence available to suggest that such individuals have caused harm to the bank.

Further, there is no evidence to demonstrate that Ms G satisfies the educational or good character requirements of Article 35(1). [This can be stipulated from the statement made in the fact pattern that Ms G is a “leading bank liquidation professional”]

Ms G does not meet the requirements of article 2(d) and is not a foreign representative. [See comments above and below]

Does the DGF meet the requirements of article 2(d)?

The DGF delegated its powers to Ms C. Accordingly, while the DGF could be an authorised body, it is not currently “appointed” in the foreign proceeding, such that the first element of article 2(d) is not satisfied.

The second element would be satisfied as the DGF’s role is to administer the liquidation of the Bank’s assets. However, as both requirements are not satisfied, the DGF is not a foreign representative.

While your expressed concerns about a potential conflict of interest in respect of Ms G. are noted (and responded to above), we believe it possible – based on the fact pattern provided - to argue that both applicants qualify as “foreign representative” along the following lines:

1. “Foreign representative” is defined by article 2(d) of the MLCBI to mean: ‘a person or body, including one appointed on an interim basis, authorised in a foreign proceeding to administer the reorganisation or the liquidation of the debtor’s assets or affairs or to act as a representative of the foreign proceeding’
2. 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.’
3. 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.

4. 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"*.
5. 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.
6. 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.
7. 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 our judgment they both had the necessary standing to apply in that capacity, for recognition of the Bank's liquidation.

*** End of Assessment ***