



SUMMATIVE (FORMAL) ASSESSMENT: MODULE 2A

THE UNCITRAL MODEL LAWS RELATING TO INSOLVENCY

Commented [BB1]: TOTAL = 43 MARKS

86% - excellent achievement!

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

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

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

INSTRUCTIONS FOR COMPLETION AND SUBMISSION OF ASSESSMENT

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

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

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

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

ANSWER ALL THE QUESTIONS

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

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

Commented [SL2]: SUBTOTAL = 10 MARKS

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

Question 1.1

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

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

Question 1.2

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

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

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

Question 1.3

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

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

Question 1.4

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

- (a) *The locus standi/access rules.*
- (b) **The public policy exception.**
- (c) *The safe conduct rule.*
- (d) *The "hotchpot" rule.*

Question 1.5

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

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

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

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

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

Question 1.6

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

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

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

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

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

Question 1.7

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

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

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

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

(d) All of the above.

Question 1.8

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

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

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

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

(d) All of the above.

Question 1.9

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

(a) Court proceedings.

(b) Arbitral Tribunals.

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

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

Question 1.10

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

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

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

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

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

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

Commented [SL3]: SUBTOTAL = 10 MARKS

Question 2.1 [maximum 3 marks]

Commented [SL4]: 3 marks

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

The MLCBI does not state what date should be used when determining the debtor's COMI but paragraphs 157 to 160 of the Guide to Enactment and Interpretation does say that the commencement of the foreign proceeding is the appropriate date. Paragraphs 158 & 159 set out arguments to support this, including the conclusion that the date of commencement of the foreign proceedings ("commencement date") is a clear and certain test that can be applied to all insolvency proceedings.

The courts however will always have to take into account the circumstances of the case and any changes in circumstances between the date of commencement of the foreign proceedings and the date of filing of the application for recognition of those proceedings and make a case by case decision.

Morning Mist Holdings Ltd v Krys (Matter of Fairfield Sentry Ltd) was a US case where the Court determined that it should be the Chapter 15 filing date "as the statutory text suggests". Perhaps getting the same interpretation on the present tense of the wording as the enactment guidance did in paragraph 158 but applying it to the US Bankruptcy Code wording. The judge in this case also raised the potential issue of debtors moving their COMI to gain some advantage of some kind.

In Re Toisa Ltd (which has been commented on but not reported at the time of the commentary), the UK courts also decided the COMI should be determined at the date of filing of the recognition application because, although the company had a registered office in Bermuda, since the commencement of the Bermudian proceedings, the company had been managed from New York and it was the US that Judge Burton determined was the company's COMI.

Question 2.2 [maximum 3 marks]

Commented [SL5]: 3 marks

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

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

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

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

Article 14 - Notification to foreign creditors of a proceeding under [the law of the enacting State]
notification, foreign creditors are also to receive the notification, the foreign creditors are to be notified individually unless the court allows otherwise, and the timescales for filing claims where it is a notification of commencement of the proceedings.

Article 10 - Limited Jurisdiction

Also known as the Safe Conduct Rule, it protects the foreign representative and the foreign assets and affairs of the debtor from the enacting State courts assuming jurisdiction.

Article 16 - Presumptions concerning recognition

The undefined key concept is the debtor's COMI and 16(3) presumes this to be the debtor's registered office (or habitual residence for individuals) unless proved otherwise.

Question 2.3 [2 marks]

Commented [SL6]: 2 marks

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

The English Court of Appeal focused on the issue of whether the indefinite Moratorium Continuation would;

- a) Prevent the challenging creditors from enforcing their English Law contractual rights or
- b) Prolong the stay after the foreign proceeding had ended

The Gibbs Rule holds that foreign proceedings cannot force an English creditor's debt to be discharged or compromised unless the creditor submits to that proceeding. As these creditors did not submit, the stay would have the effect of compromising or discharging the debt without formally doing so. The argument for the indefinite Moratorium Continuation was to protect the creditors of the foreign proceeding and

under article 22 the court has a duty to ensure that the interests of interested parties (including the debtor) are protected.

In this case the court rule that the foreign proceeding creditors were already adequately protected and did not need the relief for further protection.

Regarding the stay continuing in place after the foreign proceeding had ended, the court considered the requirement of the foreign representative to inform the court of substantial changes to the case, or their appointment under article 18 and that this indicated that the foreign proceeding must still be in place for this requirement to be met. The enactment guide says the purpose of Article 18 is to allow the court to modify or terminate the "consequences of recognition", i.e. the relief that comes with recognition. The court of appeal therefore concluded that any relief granted should terminate upon the ending of the foreign proceeding and therefore the moratorium continuation could not be indefinite.

Question 2.4 [2 marks]

Commented [SL7]: 2 marks

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

The automatic stay of article 20 only applies to foreign main proceedings and 29(a)(ii) expressly states that article 20 will not apply. This means that any relief required by the debtor must be requested by the foreign representative and decided upon by the court. Article 21(3) says that the court must be satisfied that the relief being granted only relates to the information or assets relating to that particular proceeding and does not unduly expand the foreign representative's powers or the laws of the foreign state.

Article 18 requires the foreign representative to update the court "promptly" if there are any changes to the status of the case or the representative's appointment, or if any other foreign proceedings come to light.

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

Commented [BB8]: SUB TOTAL = 11.5 MARKS

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

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

Question 3.1 [maximum 4 marks] [3 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.

The foreign representative has the right to access State A's courts directly (Article 9). [1] This allows the foreign representative to apply for relief against actions and to take actions of protection of the assets without having to be qualified or licensed to appear before the court or to engage a suitably qualified and licenced agent to act on the foreign representative's behalf. This will allow the foreign representative to secure the value of the assets in a timely manner without prohibitive costs.

The articles on cooperation are also aimed at avoiding the loss, or loss of value, of the debtors assets [1] which may be caused by lengthy procedures or lack of a framework for the cooperation and coordination between courts. Article 25 allows direct communication by the local court with the FR and the foreign court, Article 26 allows direct communication between the local representative and the foreign representative and foreign court and Article 27 states that cooperation may be carried out by any appropriate means. Articles 25 and 26 also instruct cooperation, using the word "shall". [1]

Your answer must also include a discussion on Article 11 along the following lines: 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] [5 out of 5 marks]

For a recognition application in State A to be successful, the foreign proceeding opened in State B must qualify as a "foreign proceeding" within the meaning of article 2(a) of the MLCBI and the "foreign representative" must qualify as a foreign representative within the meaning of article 2(d) of the MLCBI. Assuming that both qualify as such, list and briefly explain (with reference to the relevant MLCBI articles) any other evidence, restrictions, exclusions and limitations that must be considered,

as well as the judicial scrutiny that must be overcome for a recognition application to be successful.

Article 15 covers the recognition requirements and lists what else must accompany the application:

- *Proof of the commencement of the foreign proceeding - accepting both company resolution appointments and court appointment documents and with an catch-all clause should the particular form of appointment not fit in the first two.*
- *Statement on all known foreign proceedings of the debtor;*
- *Translations of the documents if required [1]*

Article 16 allows the local court to accept these certified copies as authentic.

Article 17 states the conditions where the foreign proceeding shall be recognised:

- *It meets the definitions of article 2 and the evidence of article 15 and*
- *The application has been submitted to the appropriate court (the one named in article 4)*

Article 17 also allows for withdrawal or amendment of the recognition if the grounds for granting were incorrect or have changed.

Other matters to consider are:

- *COMI, as this determines the type of relief and is intrinsically connected to recognition. Article 19 (interim and available to both main and non-main), article 20 (post recognition and automatic for main proceedings) and 21 (post recognition and available on application to the court by main and non-main).*
- *Excluded entities. The foreign representative should ensure that the company in the foreign proceeding is not excluded under article 1(2) which lists types of entities that the law will not apply to and may include entities like financial institutions or utility companies. [1]*
- *Treaties or agreements entered into by State A. Article 3 states that these will prevail over the Model Law if there is a conflict. [1]*
- *Public policy of State A. Article 6 says the courts can refuse an action if it contradicts contrary to State A public policy. [1]*
- *Useful laws of State A. Article 7 allows the court to provide assistance under local laws and does not restrict it to only requested assistance. [1]*

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.

Between application for recognition and decision, Article 19 allows the foreign representative to request interim relief if needed urgently. It is provisional and automatically terminates upon decision regarding recognition, unless extended under article 21. This interim relief includes stay of execution of actions against the debtor's assets, the foreign representative being allowed to release or administer local assets whose value may be in jeopardy, suspend the rights of the debtor to dispose of assets, allow the foreign representative to collect information regarding the debtors affairs, and any other relief available under the local laws.

Article 19 also allows the insertion of notice of relief requirements as per local laws and the court's ability to refuse relief if it would adversely affect a foreign main proceeding.

Article 20 is for post-recognition main proceedings only and is an automatic stay on commencement or continuation of actions, execution against assets and disposal of assets. Local exceptions, limitations and modifications can be inserted. Preservation of a claim is a right, allowing commencement of actions in order to do so but once preserved the stay continues. Local insolvency proceedings are not prevented from being commenced.

Article 21 is also post-recognition and applies to either main or non-main proceedings. The foreign representative must apply to the court for this relief and, other than the relief mentioned above, this article also allows for extension of article 19. The court may also authorise the foreign representative to take possession of local assets, so long as local creditors are not prejudiced by this. Paragraph three restricts the relief to a non-main proceeding to cover only assets or information related to that proceeding; it must not be detrimental to other proceedings, especially the main proceeding.

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

- 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 English case Igor Vitalievich Protasov and Khadzhi-Murat Derev, the judge highlighted that the MLCBI was intended to put the foreign representative in practically the same position as if they had been appointed as a domestic officeholder. As a world-wide freezing order is not available to an English officeholder without specific application and exceptional circumstances the judge refused the extension. He also concluded that the measures that were available under English law were sufficient.

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

Commented [BB9]: SUB TOTAL = 11.5

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] **11.5 out 15**

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

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

4.1.1 whether the Bank's liquidation comprises a "foreign proceeding" within the meaning of article 2(a) of the MLCBI [maximum 10 marks]; and [7 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]. [4.5 out 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.

All abbreviations are as they are defined in the question.

4.1.1

Article 2(a) defines a foreign proceeding as being:

1. Collective in nature **[element 1]**
2. Judicial or administrative **[element 2]** proceeding **[element 3]** of a foreign State **[element 4]**
3. Subject to a law relating to insolvency **[element 5]**
4. Subject to the control or supervision by a foreign court **[element 6]**
5. For the purpose of liquidation or reorganisation **[element 7]**

1. Paragraph 70 of the enactment guide says a key consideration when considering whether a proceeding is collective in nature is whether all, or almost all, of the debtors assets and liabilities are dealt with in the proceeding. It also gives examples of dealing with creditors by giving them a right to submit claims, to receive any distribution available, to get notice of the proceedings and to therefore be able to be directly involved.

The DGF is given extensive powers over all of the debtors assets and liabilities and one of the powers conferred on the DGF as liquidator is to "compile a register of creditor claims and to satisfy those claims". It also has the power of distribution.

The enactment guidance explains that the collective requirement is aimed towards avoiding any proceeding that is being used as a collection tool for an individual or group of creditors and that the Model Law is intended to be a solution for all stakeholders.

There is no mention of notices to creditor, participation in the liquidation by way of creditor committees or any duties of the liquidator to the general body of creditors. Furthermore, the case was initiated by the NB after analysis of the Bank's

activities indication "risky operations" and the DGF's responsibility is the Bank's withdrawal from the market and the winding down of its operations.

As in the Stanford International Bank case, it could be considered that the proceeding was commenced to prevent fraud and not for the purpose of realising assets for the benefit of all creditors and therefore not collective in purpose.

So what is your conclusion? Is this element met or not? See also comments below.

2. *Judicial proceeding is where a judge makes a legal decision about what should happen. Administrative proceeding is where the legal decision does not involve a judge.*

As this proceeding commences following a decision of the NB to classify the Bank as insolvent and the legal process that that classification triggers, this would qualify as an administrative proceeding.

Please also specifically address elements 3 and 4.

3. *The commencement of the proceeding is governed by the LBBA, article 76 of which sets out the criteria for a bank to be declared insolvent. Article 77 authorises the NB to liquidate a bank by directly revoking its license and provides that upon the revoking of a bank's license (directly or after a provisional administration) the DGF automatically becomes liquidator.*

The DGF Law directs the DGF to begin the process of removing from the market the bank classified as insolvent (article 34) and provides the DGF with powers during the provisional administration stage (articles 35 & 36). Upon becoming liquidator the DGF acquires all the powers of a liquidator under County A's laws and article 37 of the DGF Law also provides extensive powers to the DGF to over the bank's affairs.

It could be argued that the LBBA and the DGF Law both relate to the insolvency of banks specifically rather than insolvency in general but that it is still a law relating to insolvency. As in Betcorp (The Judicial Perspective para 80) these laws could be said to cover the whole life-cycle of a bank, including its insolvency.

4. *Article 37 of the DGF Law confers the power to file property and non-property claims with a court. As liquidator the DGF also has the powers to bring claims against parties responsible for the insolvency of the Bank and claim compensation from anyone inflicting harm on the Bank.*

It does appear therefore that the Bank's insolvency will be subject to supervision or control by the court, albeit "potential rather than actual" (The Judicial Perspective para 85).

See comments below.

5. *When a bank is classified as “troubled” it then has 180 days to make changes to bring itself in line with NB’s requirements. Restructuring can be defined as significant modification or operations, debt or structure of an organisation and there is nothing in the question to indicate that these actions cannot be taken during the troubled phase. However the description of the Bank’s deterioration following classification as troubled does imply that any implementation of restructuring would be informal and unsupervised outside the Bank and would not then accepted as such under the MLCBI.*

Once the Bank is classified as insolvent though, the whole purpose of the relevant sections of the LBBA and DGF Law have the purpose of liquidation and winding up of the Bank’s affairs.

In conclusion, the foreign representative appears to have strong arguments for the Bank’s liquidation to qualify as a foreign proceeding under points 2 to 5 of the definition but a court would most likely want more information or evidence to support the opportunity for direct involvement by creditors in order to agree the collective nature of the proceeding and before making a final decision. It appears widely agreed by the courts that the proceeding needs to meet all requirements at the time of the decision on recognition and the application for recognition could therefore be rejected if it failed to meet one aspect.

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.

As for element 1, for the following reasons we believe it can be argued that this element is met:

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".

As for element 6, your response should also have considered 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".

4.1.2

Article 2(d) defines the foreign representative as being:

1. **authorised in a foreign proceeding**
2. **to administer the restructure or liquidation or to representative the foreign proceeding**

1. **The DGF are authorised to liquidate the Bank under the LBBA, article 77, and are obliged to start the liquidation proceedings the day after the NB revokes the Bank's licence. On that date they have the full powers of a liquidator under country A's law.**

Article 48 allows the DGF to appoint an “authorised officer” and article 2 states that this officer can perform action to remove the Bank from the market during provisional administration or bank liquidation.

So both applicants appear duly authorised.

- 2. Ms G has all liquidation powers delegated to her by Resolution 1513 which appoints her, but has three powers expressly excluded. These powers remain with the DGF.*

The discussions around the foreign representative (“FR”) the Digest on Case Law and The Judicial Perspective talks about the FR being appointed at the time of the recognition decision (which both Applicants were) and having authorisation with no requirement to show independence or lack of conflict of interest.

The Judicial Perspective also discusses the requirement to meet foreign proceeding requirements before considering the position of the FR because the wording of article 2 uses foreign proceeding in the definition of FR.

In conclusion it appears that, if the liquidation is recognised as a foreign proceeding then the representatives will be accepted as falling within the FR definition.

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

*** End of Assessment ***