



SUMMATIVE (FORMAL) ASSESSMENT: MODULE 2A

THE UNCITRAL MODEL LAWS RELATING TO INSOLVENCY

Commented [BB1]: TOTAL = 23.5 MARKS

47%

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 = 7 MARKS

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

Question 1.1

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

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

Question 1.2

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

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

(d) All of the above.

Question 1.3

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

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

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

Question 1.4

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

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

Question 1.5

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

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

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

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

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

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

Question 1.6

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

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

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

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

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

Question 1.7

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

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

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

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

(d) All of the above.

Question 1.8

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

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

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

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

(d) All of the above.

Question 1.9

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

(a) Court proceedings.

(b) Arbitral Tribunals.

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

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

Question 1.10

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

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

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

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

(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 [SL6]: SUBTOTAL = 8 MARKS

Question 2.1 [maximum 3 marks]

Commented [SL7]: 3 marks

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

The appropriate date to determine the centre of the debtor's main interest ("COMI") is the date of commencement of foreign proceedings; this applies whether the debtor has a relevant establishment or not. The COMI is essential to determine in the initial stages of any cross-border insolvency proceedings as it establishes which State can hold the main proceeding if multiple insolvency proceedings are commenced at same time. Notwithstanding, the COMI of the debtor can be changed if it is close to the time of the commencement of foreign proceedings, if proper evidence is provided and especially if the new proposed COMI is accessible to the creditors.

The US court differs from the above rationale in certain circumstances as the Second Circuit of Appeals issued an opinion that "a debtor's COMI should be determined based on its activities at or around the time the Chapter 15 petition [i.e., the US implementation of the Model Law] is filed, as the statutory text suggests". The US court continues to emphasize that the appropriate date to determine the COMI should be based on the debtor's activities within the period between the commencement of foreign proceedings and filing of a Chapter 15 petition in the US rather than fixed on the date of commencement of foreign proceedings.

The US court's approach regarding the appropriate date to determine the COMI has been followed in at least one instance in recent cross-border insolvency proceedings in the UK. Though the judgement is currently unpublished, it acknowledges a desire to have a more fluid approach to determining the date the COMI using the approach that the US have taken.

Question 2.2 [maximum 3 marks]

Commented [SL8]: 2 marks

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

3 = art 16(3)

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

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

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

Statement 1 relates to the timely notice of creditors conveyed in article 14 of the Model Law. Article 14 details the requirements pertaining to the notification of foreign creditors of a proceeding which further identifies that notice of the commencement of proceedings should be communicated to foreign creditors individually and at the same time as local creditors. This notification to a foreign creditor should, "indicate a reasonable time period for filing claims and specify the place for their filing, indicate whether secured creditors need to file secured claims, and contain any other information required to be included in such a notification to creditors pursuant to the law of this State and the orders of the court."

Statement 2 is in reference to article 10 of the Model Law, entitled Limited Jurisdiction. Article 10 was developed to address the needs of foreign representatives and creditors to guide actions taken regarding foreign assets. The "safe conduct" rule is introduced to ensure "that the court in the enacting State does not assume jurisdiction over all the assets of the debtor on the sole ground that the foreign representative has made an application for recognition of a foreign proceeding." The rule is conditional and only proposed to safeguard against disorderly and unfair conduct during the period of application of recognition.

Statement 3 is an extract from article 31 of the Model Law which states that "upon recognition of a foreign main proceeding, a rebuttable presumption of insolvency of the debtor for the purpose of commencing a proceeding in the enacting State" adequate proof. The rebuttable presumption that the debtor is insolvent in this instance is only applicable to recognition of foreign main proceedings rather than that of foreign non-main proceedings. The article goes further to assert that if there is no evidence to prove that the debtor is solvent, the court of the enacting State with recognition.

Question 2.3 [2 marks]

Commented [SL9]: 2 marks

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

In the Matter of the OJSC International Bank of Azerbaijan and the CBIR 2006 (the "IBA case"), a foreign representative from the Azeri restructuring plan of IBA requested relief in accordance with Article 21 of the Model Law. The article states that "upon recognition of a foreign proceeding, whether main or non-

main, where necessary to protect the assets of the debtor or the interests of the creditors, the court may, at the request of the foreign representative, grant any appropriate relief."

Consequently, the foreign representative requested an indefinite continuation of the automatic moratorium (the "Moratorium Continuation Application") that would be put in place following the earlier approval of recognition in the English Court. Soon thereafter, two creditors of IBA (the "Challenging Creditors") who held claims against the estate which were governed by English Law and who did not submit to the Azeri proceedings, opposed the request.

The submission of the Moratorium Continuation Application was intended to aid in the avoidance of issues brought on by the Gibbs Rule in relation to Challenging Creditors. The Gibbs Rule would prevent a tidy completion of the Azeri restructuring plan as the claims of the Challenging Creditors cannot be discharged under according to the English law the Azeri plan. Mr Justice Hildyard ultimately determined based on his opinion that the requested relief of a permanent stay of proceedings cannot be used to circumvent the Gibbs Rule.

An appeal was made to the English Court of Appeal, which upheld its initial judgement from Mr Justice Hildyard and further concentrated on the opinion that the English court did not have jurisdiction to grant the indefinite continuation of the automatic moratorium. The English court determined that it could not grant the Moratorium Continuation as evidence showed that the stay was not pertinent to the protection of interests of IBA's creditors and the estate assets and that the foreign representatives had several alternate options to achieve the proposed protection.

Furthermore, the English Court of Appeals stated that upon conclusion of the Azerbaijan restructuring plan, the foreign representative is released from their obligations. Therefore, provisions in article 18 of the Model Law which require foreign proceedings to be ongoing and foreign representatives to be in office would negate any hypothetical judgement in favour of the Moratorium Continuance Application.

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.

Commented [SL10]: 1 mark

Art 29(a) and art 18 (discussed)

Upon recognition of a foreign main proceeding, the court in an enacting State, where a domestic court has already been opened should consider the practices set out in article 21 of the Model Law. Article 21(1) of the Model Law allows the court in the enacting State to have discretionary power to grant appropriate relief, if requested by the foreign representative.

Additionally, article 21(2) of the Model Law states that:

"(...) the court may, at the request of the foreign representative, entrust the distribution of all or part of the debtor's assets located in this State to the foreign representative, or another person designated by the court, provided that the court is satisfied that the interest of the creditors in this State are adequately protected."

According to article 18 of the Model Law, the foreign representative has a duty to inform the court in an enacting State of any subsequent changes pertaining to the foreign proceeding, upon filing for application of recognition or recognition approval. The foreign representative must notify the court of any changes in the status of the foreign proceeding, status of the representatives' appointment, or of any information obtained by the foreign representative of additional foreign proceedings.

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

Commented [BB11]: SUB TOTAL = 8.5 MARKS

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

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

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

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

Articles 25-27 of the Model Law delves into all co-operating and co-ordinating aspects of cross-border insolvency and the role that the Model Law plays in providing a framework that offers solutions and promotes an orderly approach for courts in different jurisdictions. The framework that the Model Law has developed, provides solutions that can benefit the foreign representative of the State B proceeding in his attempt to explore options to secure the value of the debtor's assets located in State A. Article 25 of the Model Law emphasizes direct

communication between insolvency representatives and that co-operation as much as possible shall be granted to foreign courts or foreign representatives. Co-operation can occur at all stages of cross-border insolvency proceedings, as it is not dependent upon recognition approval. [1]

Similarly, article 9 of the Model Law explicitly states that “a foreign representative is entitled to apply directly to a court in this State,” thus the access rights in article 9, provides the foreign representative standing before the courts in the enacting State without any need for an open foreign proceeding. [1] Article 11 of the Model Law also states that “a foreign representative is entitled to apply to commence a proceeding under [identify laws of the enacting State relating to insolvency] if the conditions for commencing such a proceeding are otherwise met.” Therefore, a foreign representative can be given standing to open domestic insolvency proceeding in the enacting state. [1]

Seeking recognition under the implemented Model Law of State A could be a favourable option because recognition approval in certain instances would allow the foreign representative additional tools and protection in the form of relief that they would not have otherwise to have. The recognition would give the foreign representative the ability to gain rights that would allow the tracking of transaction, evidence or even the delivery of information related to the debtor’s estate that is pertinent to the location and value of the debtor’s assets in State A.

In your answer to obtain full marks you must briefly discuss the benefits of both of the access and cooperation provisions that they save time and therefore also costs, as a result of which value destruction can be avoided and value enhancement promoted.

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.

Article 15 of the Model Law, entitled Application of recognition of a foreign proceeding, introduces the requirements by way of evidence needed for a recognition application of a foreign proceeding.

Pursuant to the article 15 of the Model Law:

- *“A foreign representative may apply to the court for recognition of the foreign proceeding in which the foreign representative has been appointed.”*
- *“An application for recognition shall be” provided including a certified copy the order approving a foreign proceeding, e.g., a winding-up order, a certified copy of the order of appointment, a certificate from the foreign court confirming the existence of the foreign proceeding and appointment of foreign representative, or appropriate evidence affirming the existence of the foreign proceeding and appointment.*
- *“An application for recognition shall also be accompanied by a statement identifying all foreign proceedings in respect of the debtor that are known to the foreign representative.”*
- *Translate documents in support of the application for recognition considering that States have different official languages [1]*

*In order for an ideal outcome for the application, the foreign representative must follow the requirements listed above in an orderly manner and submit them punctually. The further success of the recognition application of a foreign proceeding relies on the compliance with the conditions of article 17 of the Model Law which are subject to many other articles of the Model Law, such as article 6, 2, 15, 16 etc. **You need to briefly discuss Article 6 to be awarded a mark.** A judgement on the recognition of a foreign proceeding is based off the foreign representative’s ability to provide evidence that a foreign main proceeding is taking place in the State where the debtor’s COMI is and that a foreign non-main proceeding is taking place where the debtor has establishment. [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. **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] [2.5 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.

The court of an enacting State can extend urgent interim pre-recognition relief upon application for a foreign proceeding pursuant to article 19(2) of the Model Law. Based on article 19(4), this interim relief can be refused if it interferes with a foreign main proceeding. Pursuant to article 21(1) of the Model Law, the court can provide discretionary post-recognition relief. Both the interim relief and discretionary relief can be granted in the form of a moratorium, given that this has not already been provided automatically, and the extension of interim relief granted in pre-recognition proceedings.

The analysis of requests for relief can become complicated, and this can be seen in the interaction between articles 7 and 21. Court approval is initially needed to “determine whether the relief requested by a foreign representative falls into one of the enumerated categories of article 21.” If relief falls outside the scope of article 21 then article 7 can be used as a “catch-all.”

Article 22 of the Model Law proposes the protection of creditors and other interested parties. Within its provision it states, “the court may subject relief granted under article 19 or 21 to conditions it considers appropriate” and “at the request of the foreign representative or a person affected by relief granted under article 19 or 21, or at its own motion, modify or terminate such relief.” Therefore, under certain conditions a foreign representative with proof that a relief is no longer needed or that a granted relief is hindering the realization of assets of the estates or further harming the creditors, can be altered to terminated.

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

- 1. Existing international obligations of State A:** Based on Article 3 of the Model Law, the court in State A should again verify that there are no existing international obligations of State A (under a treaty or otherwise) that may conflict with granting the requested relief under the implemented Model Law in State A.
- 2. Public policy exception:** The court in State A should, based on Article 6 of the Model Law, also again verify that the relief application is not manifestly contrary to public policy of State A.

Question 3.4 [maximum 1 mark] [1 mark]

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

On 24 February 2021, a judgement was published in relation to an English case between Igor Vitalievich Protasov and Khadzhi-Murat Derev. Provisions of a worldwide freezing order were conveyed in the ex article 21 of the Model Law. The significance of the case comes through its questioning of a worldwide freezing orders scope to be able to grant provisional relief under article 19 of the Model Law and if it could follow UK recognition of a Russian bankruptcy as a foreign main proceeding.

A worldwide freezing order granted as pre-recognition interim relief was deemed to be unwarranted as the English court stated that there are other avenues of protection provided by the English bankruptcy regime. Mr Justice Adam Johnson expressed that in his opinion the case did not provide any evidence that "(...) absent some exceptional reason, a freezing order or other similar order will not be required or justified."

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

Commented [BB12]: SUB TOTAL = 0 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] [0 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 [0 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]. [0 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 full marks your response must address in sufficient detail each of the separate elements of the definition of "foreign proceeding" as set forth in article 2(a) of the MLCBI and the definition of "foreign representative" as set forth in article 2(d) of the MLCBI respectively, provide guidance and source references as appropriate and apply the facts. Unfortunately, you have not provided any response and therefore no marks can be rewarded.

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

* End of Assessment *