



SUMMATIVE (FORMAL) ASSESSMENT: MODULE 2A

THE UNCITRAL MODEL LAWS RELATING TO INSOLVENCY

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

Commented [DDB1]: 45/50 = 90%. Excellent answer

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 [BB2]: Sub-total = 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 [BB3]: Sub-total = 8 marks

Question 2.1 [maximum 3 marks] [2]

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

Under the MLCBI, the appropriate date for determining the COMI of a debtor is the date of commencement of the foreign proceeding. [1] It is important to note that a debtor's COMI can move and if the change is close in time to commencement of the foreign proceedings it will prove more difficult to establish the appropriate evidence. The COMI should be ascertainable by creditors and other third parties and if the COMI moves close to the commencement date of the foreign proceedings this could prove challenging. In the US judgement of Morning Mist Holdings Ltd vs Kryz (Matter of Fairfield Sentry Ltd) [1] the Second Circuit of Appeals took an alternative approach towards the date for determination of a debtor's COMI. The US court ruled that '(...) a debtor's COMI should be determined based on its activities at or around the time the Chapter 15 petition is filed, as the statutory text suggests. But given the EIR and other international interpretation, which focus on the regularity and ascertainability of the debtor's COMI, a court may consider the period between the commencement of the foreign insolvency proceeding and the filing of the Chapter 15 petition to ensure that a debtor has not manipulated its COMI in bad faith. (...).

Further discussion could have included the following:

The UNCITRAL Guide to Enactment explains (see paragraphs 159 and 160) that the date of commencement of the foreign proceeding is the appropriate date for determining the existence of the COMI of the debtor as well as an establishment of the debtor. Where the business activity of the debtor ceases after the commencement of the foreign proceeding, all that may exist at the time of the application for recognition to indicate the debtor's COMI or establishment is that foreign proceeding and the activity of the foreign representative in administering the insolvency estate. In such a case, determination of the COMI or an establishment by reference to the date of the commencement of those proceedings would produce a clear result. The same reasoning may also apply in the case of reorganisation where, under some laws, it is not the debtor that continues to have a COMI, but rather the reorganised entity. In such a case, the requirement for a foreign proceeding that is taking place in accordance with article 17(2)(a) is clearly satisfied and the foreign proceeding should be entitled to recognition. Moreover, taking the date of commencement to determine COMI provides a test that can be applied with certainty to all insolvency proceedings. [see also pages 28/29 of the Guidance Text]

Question 2.2 [maximum 3 marks] [3]

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

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

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

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

Statement 1 references Article 14 of the Model Law. [1] Article 14 as well as the equal treatment principal require that foreign creditors should be notified when notification is required for local creditors in the enacting state. Article 14, para 3, specifies what should be included in the notification to a foreign creditor of commencement of a proceeding in the enacting state. This should address any conflict with treaty obligations of the enacting state and provides clarification, for secured creditors in particular, as to what actions they should take.

Statement 2 refers to Article 10. [1] Under Article 10, the court in the enacting state does not assume jurisdiction over all of the assets of the debtor solely on the grounds that the foreign representative has made an application for the recognition of the foreign proceeding. Article 10 responds to concerns of foreign representatives and creditors about their exposure to an all-embracing jurisdiction triggered by an application under the Model Law.

Statement 3 references Article 16(3) of the Model Law. [1] According to the interpretation of COMI under the European Insolvency Regulation ("EIR") which is followed for the purposes of the Model Law and Article 16(3) of the Model Law, there is a rebuttable presumption that the location of the registered office of the debtor is the location of its COMI. The court in the enacting state has to assess whether or not an establishment of the debtor exists in the foreign state. The mere fact that the debtor's registered office is in the foreign state, on its own, is insufficient to conclude that the debtor has an establishment in the foreign state.

Question 2.3 [2 marks] [1]

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

In the *IBA* case appeal, the English Court of Appeal held that two things need to be satisfied in order for the court to properly grant the indefinite Moratorium Continuation. The first element of their judgement was that the stay would have to be necessary to protect the interests of *IBA*'s creditors. The second element was that the stay had to be an appropriate way to achieve the protection. As neither of these conditions were satisfied, the English Court of Appeal upheld their decision to not grant the indefinite Moratorium Continuation. The English Court of Appeal held that had the Model Law ever contemplated the continuance of relief after the end of the relevant foreign proceedings, it would have addressed this question and provided the appropriate structure for that purpose. This is centred around Article 18 of the Model Law, with respect to a substantial change in the status of the foreign proceedings and the status of the foreign representatives' own appointment, which requires that the foreign proceedings still be in existence and the foreign representative still be in office.

The primary question in the *IBA* Case was whether the principles of 'modified universalism' as expressed in the common law and in the Model Law allows the court to grant relief calculated to advance those principles without upsetting the Gibb Rule, once properly understaff and confined. More specifically, the question was whether at one and the same time the Gibbs Rule could be formally observed by accepting the continuation of the rights conferred by English law, and yet the principles of modified universalism and the Model Law given effect to by preventing the exercising of those rights by way of a moratorium or stay.

Suggested answer:

- According to the English Court of Appeal, the real issue was whether as a matter of settled practice the UK court should not exercise its power to grant the indefinite moratorium where to do so would (i) in substance prevent the English creditors (that is

the Challenging Creditors) from enforcing their English law rights in accordance with the Gibbs Rule ("Issue 1") and / or (ii) prolong the stay after the Azeri reconstruction has come to an end ("Issue 2").

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

[See pages 39/40 of the Guidance Text]

Question 2.4 [2 marks] [2]

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**.

Under Article 18, the foreign representative is obligated from the time of filing of the foreign proceeding application to inform the court in the enacting State of any substantial change in the status of the recognised foreign proceedings or of the appointment of any foreign representative and of any other foreign proceedings related to the same debtor that the foreign representative is made aware of. Article 29(A) is also relevant in this case.

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

Commented [BB4]: Sub-total = 13 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] [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.

Article 9 of the Model Law references the principle of direct access by a foreign representative to the courts of the enacting State. The foreign representative can benefit from being provided access rights under Article 9 which will give them standing before the courts in State A, without a requirement for the foreign proceedings that have been opened in State B being recognised in State A. This provision removes the requirement for separate proceedings in State A which will result in savings in time and costs as the domestic proceedings would be unnecessary and this will maximise recoveries.

Article 11 of the Model Law focuses on providing standing to the foreign representative in the courts of the enacting State, however it relates to requests to commence domestic insolvency proceedings in the enacting State without otherwise modifying any of the conditions for the opening of such proceedings. The Model Law could empower the courts to extend the coordination between States A and B, if State B did not have the legislative framework to do so, by establishing rules and enabling the courts of both states to be efficient in an effort to achieve the desired outcome. Articles 25-27 of the Model Law further contain provisions relating to cooperation. These are similar to access rights as they are independent of recognition, and it is not a prerequisite that the recognition of the foreign proceedings be obtained in advance.

Question 3.2 [maximum 5 marks] [3]

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

Assuming that both qualify as such, according to articles 2(a) and 2(d) of the MLCBI, State B's foreign

representative must apply to the court of State A for recognition of the foreign proceedings.

The court of State A would require evidence as to the existence of the proceedings in State B and the appointment of the foreign representative such as a certificate verifying such. Article 15 of the MLCBI [1] contains full details of the requirements for recognition

Article 3 of the MLCBI [1] provides that the court of the enacting State should also verify that there are no existing international obligations that may conflict with granting the recognition application under the implemented Model Law in the enacting State. Therefore, the court in State A needs to check that there are no existing international obligations of State A (perhaps under a treaty or otherwise) that could conflict with granted the recognition application.

In order for the recognition application to be successful, the court will have to determine if the COMI of the debtor is in State B, where the foreign proceedings were commenced. Provided this has been determined to be true, the foreign proceedings should be recognised as foreign non-main proceedings.

Other relevant considerations for the recognition application to be successful are if the debtor is an entity that is subject to a special insolvency regime in State B, the foreign representative must determine if the foreign proceedings regarding the debtor are excluded in State A based on Article 1(2) of the implemented Model Law in State A. [1]

You must also discuss 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 of all 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. **Judicial scrutiny:** While the court in State A is able to rely on the rebuttable presumptions set forth in Article 16 of the Model Law, in the context of Article 17 of the Model Law the court will have to assess whether either the COMI or at least an establishment of the debtor is located in State B where the foreign proceedings were opened. If the COMI of the debtor is in State B the foreign proceedings should be recognised as foreign main proceedings and if only an establishment of the debtor is in State B the foreign proceedings should be recognised as foreign non-main

proceedings. Without a COMI or at least an establishment of the debtor in State B, recognition cannot be granted by the court in State A.

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] [5]

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

Article 19 of the MLCBI provides for the granting of urgently needed interim relief upon the application for the recognition of the State B proceedings in State A. The purpose of this relief is to assist in circumstances where relief is urgently required in order to protect the interests of creditors or the debtor's assets. [1]

Article 21 of the MLCBI provides for the granting of discretionary post-recognition relief by State A to the State B proceedings. However, this relief that can be granted by State A is limited. [1]

Pursuant to Article 22 of the MLCBI, any interim relief granted under Article 19 or any post-recognition relief granted under Article 21 require the court in State A to be satisfied that the interests of creditors and any other relevant persons, including the debtor, are adequately protected. The relief may also be subject to certain conditions the court considers appropriate. [1]

The court in State A should again verify, based on Article 3 of the MLCBI, that there are no existing international obligations of State A (perhaps under a treaty or otherwise) that could potentially conflict with granting the requested relief under the implemented Model Law in State A. [1]

Finally, the Court in State A, under Article 6 of the MLCBI, should also verify that the relief application is not manifestly contrary to the public policy of State A. [1]

Question 3.4 [maximum 1 mark] [1]

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

In the case between Igor Vitalievich Protasov and Khadzhi-Murat Derev, the relevant question raised was if under Article 21 a freezing order was granted as provisional relief under Article 19, and if it could continue subsequent to recognition in the UK of a foreign bankruptcy proceeding as a foreign main proceeding. Article 21 of the Model Law explains how relief that is granted should not interfere with the administration of other insolvency proceedings. Therefore the relief granted under Article 19 should be reviewed by the court to ensure it does not interfere with the post-recognition insolvency proceedings. In Igor Vitalievich and Khadzhi-Murat Derev, the English court found that the English bankruptcy regime offers other forms of protection so that freezing order was not warranted in this case.

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

Commented [DDB5]: 14/15

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]

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**]; (9 marks) and

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] (5 marks).

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

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

4.1.1

As defined by Article 2(A) of the MLCBI, a ‘foreign proceeding’ is ‘a proceeding that is either judicial or administrative, that is collective in nature, that is in a foreign State, that is authorised or conducted under a law relating to insolvency, in which the assets and affairs of the debtors are subject to supervision or control by a foreign court and which proceeding is for the purpose of reorganisation of liquidation’. (1)

In the judgement made by the English court in the Agrokor case, (1) a number of the elements with regards to foreign proceedings were tested. Agrokor was a Croatian company with 50 affiliates that had made an application to the English Court of the Croatian Extraordinary Proceeding to be recognised. The application was opposed by a large creditor. Questions were raised in this case that a relevant in the case of DGF and whether they qualify as a foreign proceeding. (1)

Following the decision made by the NB to revoke the licence of the Bank, DGF was obliged under Article 77 of the LBBA to commence liquidation proceedings against the Bank. These proceedings are administrative in nature as they would be classed under the legal process of the LBBA and DGF Law. This is one element of the definition of a foreign proceeding under Article 2(A).

The law is relating to insolvency in this case. Under Agrokor, it was ruled that the Model Law does not require ‘insolvency law’ as a label and that it is sufficient if the law deals with or addresses insolvency or severe financial distress. This condition is satisfied as the LBBA and the DGF Law are both established in Country A and satisfy the requirement for ‘law relating to insolvency’.

Regarding court supervision, the level of court supervision required under the Model Law is relatively low so considering this the control and supervision of the LBBA and DGF would suffice to meet the requirements. Recognition of the insolvency laws of Country A as foreign proceedings would not be contrary to English public policy so this condition would be met. (1)

With reference to the ‘liquidation’ element of the definition, under Article 77 of the LBA the purpose of the liquidation is for DGF to acquire full powers of a liquidator under Country

A's law and be responsible for the winding down of the affairs of the bank through liquidation. This therefore meets the criteria for the 'liquidation' element of the definition.

With regard to the 'foreign court' element of the definition, the term 'foreign court' is defined in Article 2(e) (1) of the MLCBI and refers to 'a judicial or other authority competent to control or supervise a foreign proceeding'. (1) The Guide to Enactment notes that 'a foreign proceeding that meets the requisites of Article 2(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) also includes non-judicial authorities. (1) In *Sanko Steamship Co Ltd*, it was noted that a foreign proceeding may be recognised where the control or supervision of the proceeding is undertaken by a non-judicial administrative body. The DGF has control of all of the bank's assets and overall control of the liquidation. Articles 3(3) and 3(7) of the DGF Law reference its independence, confirming that it is an economically independent institution with a separate balance sheet and accounts from the NB. The assets and affairs of the bank are subject to DGF's control, who is an official body that exercises its powers in the liquidation free from any intervention, and which should therefore be considered a 'foreign court'. (1)

Good answer

4.1.2

As defined by Article 2(d) of the MLCBI, a 'foreign representative' is 'a person or body, including one appointed on an interim basis, authorised in a foreign proceeding to administer the reorganisation or the liquidation of the debtor's assets or affairs or to act as a representative of the foreign proceedings'. (1)

Under Article 16(1) of the MLCBI, 'if the decision or certificate referred to in paragraph 2 of article 15 indicates that the foreign proceeding is a proceeding within the meaning of subparagraph (i) of article 2 and that foreign representative is a body or person within the meaning of subparagraph (j) of article 2, the court is entitled to so presume'. (1)

The application has been brought jointly by both Ms G and the DGF. Article 77 of the LBBA provides that DGF is automatically appointed as liquidator on the day it receives the NB's decision pursuant to Article 77 revoking a bank's licence and commencing its liquidation. (1)

DGF is enabled to delegate its powers to an 'authorised person' under Article 48(3) of the DGF Law. Article 2(1)(17) of the DGF Law, defines the 'Fund's authorised person' as 'an employee of the Fund, who on behalf of the Fund, and within the powers provided for by the 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.' (1)

This authorised person cannot be a creditor of the relevant bank, have a criminal records, have any obligations to the relevant bank, or have any conflict of interest with the relevant bank. Once the authorised person is appointed, they are accountable to DGF for their actions and may exercise the powers appointed to them by DGF in pursuance of the bank's liquidation.

Ms G's appointment was pursuant to a Decision of the Executive Board of the Directors of the DGF, No. 1513 ("Resolution 1513"). Per Resolution 1513, Ms G is a 'leading bank liquidation professional' and it delegates to her all liquidation powers in respect of the bank, as set out in the DGF Law (in particular articles 37, 28, 47-53 and 521) which includes the authority to sign all agreements related to the sale of the bank's assets. Per Resolution 1513, Ms G does not have the authority to claim damages from a related part of the bank, the power to make a claim against a non-banking financial institution that raised money as loans or deposits from individuals, or the power to arrange for the sale of the bank's assets. These powers remain vested in the DGF and the former liquidator of the bank.

Due to the sharing of some, however not all, of the liquidator's powers and the division or responsibility between Ms G and DGF, it is likely that, depending on the nature and timing of relief sought from the court, the appropriate applicant in the future could be either or both of Ms G and DGF. (1)

Good answer

*** End of Assessment ***