



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]: 46.5/50 = 93% Excellent, well done.

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 = 8.5 marks

Question 2.1 [maximum 3 marks] [1.5]

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

The appropriate date for determining the COMI of a debtor is the date on which the foreign proceeding commences. [1] If a debtor's COMI moves in a time period close to the commencement of foreign proceedings it will be harder to establish the appropriate evidence, particularly the requirement that the debtor's COMI must be readily ascertainable by third parties such as creditors.

In the case of *Morning Mist Holdings Ltd v Kryz (Matter of Fairfield Sentry Ltd)* the US Second Court of Appeals' approach [½] was that the COMI should be determined on the date on or around the time of the Chapter 15 petition. A court may want to consider the period between the commencement of foreign proceedings and the filing of the Chapter 15 proceeding to make sure the COMI has not been manipulated.

Suggested answer:

1. The MLCBI does not expressly indicate the relevant date for determining the COMI of the debtor. The same is true with respect to determining the existence of an establishment. However, the UNCITRAL Guide to Enactment suggests that the date of commencement of the foreign proceedings is the appropriate date for determining the existence of the COMI or an establishment of the debtor (see paragraph 143 of The Judicial Perspective).
2. 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]
3. However, US courts may take a slightly different approach based on the *Morning Mist Holdings Ltd v. Kryz (Matter of Fairfield Sentry Ltd)* (2nd Cir Appeals April 16, 2013) (which

was recently followed in the UK in *Re Toisa Limited* – see footnote 94 on page 28 of the Guidance Text). The US court will most likely consider the date of the recognition application pursuant to the US Chapter 15 as the appropriate date for determining the COMI or the existence of an establishment.

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 - **Article 14 - Notification of foreign creditors [1]** provides that foreign creditors are entitled to individual notification of the commencement of the local proceedings and a timeline to file claims in those proceedings, amongst other things, and states what the notifications should include. Article 14 also includes the 'equal treatment' principle, that foreign creditors should be notified whenever local creditors are notified.

Statement 2 - **Article 10 - Limited Jurisdiction [1]** provides for a 'safe conduct rule' whereby it ensures that the court in the enacting State doesn't assume jurisdiction over all of the debtor's assets just because the foreign representative has made an application for recognition of a foreign proceeding. This addresses concerns about exposure to an all-embracing jurisdiction triggered by an application under the Model Law.

Statement 3 - Model Law does not have a definition of COMI. **Article 16 - Presumptions concerning recognition** paragraph 3 [1] provides that a debtor's registered office, or an individual's habitual residence, is presumed to be the COMI except if there is proof to the contrary. This therefore evidences that this presumption can be rebutted.

Question 2.3 [2 marks] [2]

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 considered the real issue of the case to be whether granting the indefinite Moratorium Continuation would (a) prevent the English creditors (Challenging Creditors) from enforcing their English law rights in accordance with

the Gibbs Rule (the Gibbs Rule being that a debt governed by English law cannot be discharged/compromised by a foreign insolvency proceeding if the creditors do not submit to that foreign insolvency proceeding); and/or (b) prolong the stay after the Azeri reconstruction has come to an end. The Court of Appeal answered both (a) and (b) in favour of the Challenging Creditors.

Regarding point (a), the Court of Appeal felt that it could only grant the Moratorium Continuation if it was satisfied that the stay would be necessary to protect the interests of IBA's creditors, and the stay would have to be an appropriate way of achieving such protection. The Court of Appeal held that neither of these two points were satisfied because the IBA creditors needed no further protection for the foreign proceeding to achieve its purpose and that a parallel scheme of arrangement in the UK could have been used.

Regarding point (b), as per the information obligation in Article 18, the Court of Appeal considered the strong implication was that once a foreign proceeding comes to an end or the foreign representative no longer holds office there is no scope for further orders in support of the foreign proceeding and any relief granted would be terminated.

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**.

Article 29(a) states that any relief granted under articles 19 or 21 must be consistent with the domestic insolvency proceeding and, in the case of recognising a foreign main proceeding, the automatic relief of Article 20 does not apply.

Article 18 provides that the foreign representative shall inform the enacting State's court promptly of (a) any substantial change in status in either the recognised foreign proceeding or the foreign representative's appointment; and (b) any other foreign proceeding regarding the same debtor that the foreign representative becomes aware of.

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

Commented [BB4]: Sub-total = 15 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 allows for a foreign representative to apply directly to a court of an enacting State. This means that the foreign representative of the foreign proceeding opened in State B can have standing in the court of State A without needing to get recognition of the foreign proceeding in State A. These access rights should benefit the foreign representative by saving time and costs so as not to diminish the funds available to distribute creditors.

Similarly, Article 11 focuses on providing standing in the courts of the enacting State to the foreign representative, without the need for prior recognition, but in this case it is related to commencing a domestic insolvency proceeding.

Articles 25-27 deal with co-operation and co-ordination between judges in different jurisdictions which benefits foreign representatives by enabling courts and insolvency representatives from multiple countries to be efficient and achieve optimal results. It also aims to help promote consistency of treatment of stakeholders across the different jurisdictions which in turn should enhance transparency and predictability in cross border insolvency proceedings. Co-operation does not require prior recognition of the foreign proceedings and therefore can occur at an earlier stage, and even before an application for recognition.

Question 3.2 [maximum 5 marks] [5]

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

Assuming that the foreign proceeding opened in State B and the foreign representative both qualify under articles 2(a) and 2(d), then the foreign representative may apply for court recognition in State A. As per article 15, [1] this application should be accompanied by either (a) a certified copy of the decision to commence the foreign proceedings and appoint the foreign representative, or (b) a certificate from the foreign court confirming the existence of the foreign proceeding and appointment of the foreign representative, or (c) any other evidence proving the foreign proceeding exists and the foreign representative was appointed. The application should also include a statement identifying all foreign proceedings known to the foreign representative regarding the same debtor. [1]

Article 1(2) provides that the enacting State can exclude certain proceedings from the application of the Model Law, which is also applicable to the application of foreign proceedings. The debtor in the foreign proceedings in State B should not be on State A's list of excluded entity types for the recognition application to be successful. [1]

Article 3 states that if there is a conflict between the enacted Model Law with a treaty or other form of multi state agreement, then that treaty/multi state agreement will prevail. The foreign representative should check if State A has any existing agreements in place that would conflict with allowing recognition of the foreign proceeding. [1]

A further consideration would be whether the foreign proceeding would be a foreign main proceeding or foreign non-main proceeding as per article 17(2). This would be dependent on whether the COMI is located in State B or whether it has an establishment in State B. This determination will have an impact on the type of relief available. [1]

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 provides that the court in State A can grant interim relief on an urgent basis upon application from the foreign representative of the foreign proceeding in State B. This relief can be granted prior to recognition of the foreign proceedings. [1]

Article 21 gives the court of State A discretionary power, at the request of the foreign representative and where required to protect the debtor's assets or the interest of the creditors, to grant several forms of relief, including but not limited to, staying execution against the debtors' assets or extending any interim relief granted under article 19. [1]

An appropriate balance should be struck between the relief granted to the foreign representative and the interest of the people affected by said relief. Article 22 provides that consideration should be given to ensure there is adequate protection for the creditors and other interested parties, e.g. the debtor, when granting relief under articles 19 and 21. The court of State A can tailor the relief how it sees fit. [1]

The court in State A should also confirm that there are no existing treaties or multi-state agreements that may conflict with granting relief under the Model Law that is implemented, as per article 3. [1]

Another consideration when deciding to grant relief should be that it would not be manifestly contrary to the public policy of State A, as per article 6. [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?

Article 21 paragraph 2 provides that the enacting State's court has discretionary power to hand all or part of the debtor's assets located in the enacting State to the foreign representative at their request, as long as the court is satisfied that the interests of the creditors in the enacting State are adequately protected. Article 19 paragraph 4 states that the interim relief provided should not interfere with a foreign main proceeding.

In the case *Igor Vitalievich Protasov v Khadzhi-Murat Derev* the English court considered whether under article 21 of the MLCBI a worldwide freezing order, that was granted as interim relief under article 19, could continue following recognition in the UK of a foreign main bankruptcy proceeding in Russia. The English court found that the freezing order was not warranted due to other forms of protection being available under the English bankruptcy regime.

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

Commented [DDB5]: 13/15

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]; (8 out of 10) 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 out of 5).

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

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

4.1.1

To determine if the Bank's liquidation comprises a foreign proceeding within the meaning of article 2(a) we must consider the following seven elements:

- 1) It is a proceeding (including interim proceeding);
- 2) It is either judicial or administrative;
- 3) It is collective in nature;
- 4) It is in a foreign state;
- 5) It is authorised or conducted under a law relating to insolvency;
- 6) The assets and affairs of the debtor are subject to control or supervision by a foreign court; and
- 7) The proceeding is for the purpose of reorganisation or liquidation.

Good summary above

According to Article 77 of the LBBA, the DGF automatically becomes liquidator of a bank on the date it receives confirmation of the NB's decision to revoke a bank's licence and the DGF therefore acquires the full powers of a liquidator under the law of Country A. On 17 December 2015 NB formally revokes the Bank's banking licence and the following day the DGF commences liquidation proceedings. Therefore, it can be considered that element 1 is satisfied. **Yes**

An administrative proceeding is a legal process that does not require a judge and it usually carried out by a governmental body. The DGF is a governmental body of Country A and the relevant legal framework, article 77 of the LBBA, provides that the DGF automatically becomes liquidator once the NB revokes its licence. Therefore, this evidences that the procedure is administrative and satisfies element 2 above. **Yes**

To be considered collective in nature, a key consideration is whether substantially all of the assets and liabilities are dealt with in the proceeding. In this instance, the DGF passed a resolution on 17 September 2015 to withdraw the Bank from the market following the NB revoking the Bank's banking licence. It appears that the Bank's assets are all being dealt with in this proceeding and therefore it can be considered that element 3 above is satisfied.

Yes

Element 4 above can also be considered satisfied due to the liquidation procedure taking place in Country A, which is separate to the English court that they are seeking recognition in, evidenced by the fact that Country A has not adopted MLCBI whereas England has. Yes

The Model Law doesn't require the label "insolvency law" for a law to be considered to be related to insolvency. Element 5 can be satisfied if insolvency is one of the grounds that the commencement of the proceedings is based on. Article 76 of the LBBA provides the criteria under which a bank can be classified as insolvent and article 77 allows for a liquidator to be appointed once the banking licence is revoked. Therefore, in this case, this element is considered satisfied. Good

Court supervision under Model Law may be potential rather than actual, and may be indirect rather than direct. The definition of a foreign court under article 2(a) is "a judicial or other authority competent to control or supervise a foreign proceeding" which allows for governmental units acting in a regulatory capacity. Therefore, it can be considered that element 6 is satisfied. Yes

The final element can also be satisfied due to the fact that the purpose of the foreign proceeding is to liquidate the Bank. Okay

Case law? (Agrokor / Sanko Steamship)

4.1.2

The definition of a foreign representative under article 2(d) of the Model Law is "a person or body, including one appointed on an interim basis, that is authorised in a foreign proceeding to administer the reorganisation or liquidation of the debtor's assets or affairs or to act as a representative of the foreign proceeding". Yes

Article 16 of the Model Law provides that if the evidence of the commencement of foreign proceedings, that is included in the foreign recognition application, indicates that the foreign proceeding is a proceeding under article 2(a) and the foreign representative is a person or body under article 2(d) then the court is entitled to presume so. Yes

The foreign recognition application is brought by Ms G and the DGF. DGF are appointed automatically as liquidator of the Bank following the NB revoking the Bank's banking licence as per article 77 of the LBBA. Article 48(3) of the DGF Law empowers the DGF to delegate its powers to an "authorised officer" or "authorised person". Article 2(1)(17) of the DGF Law defines an authorised person 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 the criteria for the authorised person. **Yes**

Ms G was appointed via Resolution 1513 that notes Ms G is a "leading bank liquidation professional". The resolution also delegates to Ms G all liquidating powers in respect of the Bank under the DGF Law except for the power to sell the Bank's assets and make certain claims which remain vested with DGF. **Yes**

Therefore, it can be considered that DGF and Ms G fall within the definition of foreign representative under Model Law.

Good answer

*** End of Assessment ***