



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]: 35.5 out of 50 = 71%. 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 = 9 marks

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

Question 1.1

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

Commented [BB3]: The correct answer is (c)

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 [BB4]: Sub-total = 7.5 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?

The appropriate date for determining a debtor's centre of main interest (**COMI**) is the date of the commencement of the foreign proceedings. [1] The COMI must be readily ascertainable by third parties (including creditors). In cases of a "COMI shift", ie moving the COMI to another jurisdiction, which is in close proximity to the commencement of foreign proceedings, special attention should be put on establishing the appropriate evidence of the COMI. Furthermore, it should be noted that in *Morning Mist Holdis Ltd vs Krys* [½] the Second Circuit of Appeals took a slightly different approach to the date for determination of the debtor's COMI, where the court held that a debtor's COMI should be determined based on its activities at around the time the relevant petition is filed, whereby the court may also consider the period between the commencement of proceedings and the date of the filing in order to ensure COMI manipulations in bad faith. This decision is of particular importance, as the underlying approach has been followed in the UK in *Re Toisa Limited* (2019). [½]

Your answer should also include a discussion on the following:

1. 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] [2.5]

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."*

Article 14 (timely notice): [1] As per the equal treatment principle, foreign creditors should be notified whenever notification is required for local creditors in the enacting state.

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

Article 10 [1] (safe conduct rule): The safe conduct rule provides that the court in the enacting state does not assume jurisdiction over all of the assets of the debtor on the sole ground that the foreign representative has made an application for the recognition of a foreign proceeding.

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

Article 16 [½] (recognition presumptions) and in particular the presumption regarding the concept of COMI (COMI is not defined in the MLCBI), providing that the court is entitled to presume that the debtor's registered office / habitual residence for individuals also is its COMI.

Article 16(3) MLCBI

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.**

By summary the Court of Appeal held that an English court could only properly grant the indefinite Moratorium Continuation if it were satisfied that (1) the stay would have to be necessary to protect the interests of IBA's creditors and, (2) the stay would have to be an appropriate way of achieving such protection. In the underlying case both requisites were not met. Also, the Court of Appeal argued that the information obligation on the foreign representative pursuant to article 18 of the MLCBI required the foreign proceeding to still be in existence and the foreign representative still being in office.

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.

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 of the MLCBI; any relief granted must be consistent with the domestic insolvency proceedings; furthermore, if the foreign main proceeding is recognised in the enacting state as such, article 20 MLCBI does not apply.

In the exercise of its functions, the foreign representative must co-operate to the maximum extent possible and is entitled to directly communicate with foreign courts and foreign representatives; Articles 26 et seq of the MLCBI (see also Practice Guide).

Furthermore, Article 18 of the MLCBI stipulates an ongoing obligation to inform the court on developments.

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

Commented [BB5]: Sub-total = 9 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] [2]

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 cooperation, explain how these rights in State A can benefit the foreign representative.

Firstly, the access rights provided to the foreign representative (*FR*) pursuant to Article 9 of the MLCBI give the FR standing before the courts of the enacting state (so-called locus standi) without the need for the foreign proceeding to be recognised in the enacting state. Secondly, Article 11 of the MLCBI provided the FR with standing to open domestic insolvency proceedings in the enacting state (provided that all applicable prerequisites are met), while Article 13 gives the foreign creditors the same rights as creditors domiciled in the enacting state (so-called anti-discrimination principle). Furthermore, the FR is protected by the safe conduct rule as set forth in Article 10 of the MLCBI. The discussed access rights thereby facilitate cooperation. That Cooperation is further facilitated by recognising the foreign

202223-

proceedings which allow the court to provide the FR with appropriate relief. The MLCBI thereby provided a (non-exhaustive) list of means of cooperation. Access rights and recognition should thus be used / applied in conjunction with co-operation as procedural tools to facilitate cross border insolvencies.

Your answer should include a discussion on the following:

- **Cooperation:** Similar to access rights, the cooperation provisions in the MLCBI (articles 25-27) also operate independently of recognition and it is not a prerequisite to the use of the cooperation provisions that recognition of the foreign proceedings is obtained in advance. Courts in State A can freely cooperate with the foreign representative without having to worry whether the status in State B of the foreign representative can be recognised in State A.
- **Save Time & Costs:** The key benefits of both the access provisions and the cooperation provisions are that they save time and therefore also costs, as a result of which value destruction can be avoided and value enhancement is being promoted.

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.

The evidential requirements for recognition of foreign proceedings are provided for in Article 15 of the MLCBI. Such requirements include:

- The FR must be appointed as FR under the proceedings he seeks recognition for;
- The application for recognition shall be accompanied by (1) a certified copy of the decision commencing the foreign proceeding and appointing the foreign representative; OR (2) a certificate from the foreign court affirming the existence of the foreign proceeding and of the appointment of the foreign representative; OR (3) in the absence of evidence referred to in (1) or (2) any other evidence as acceptable for the court. [1]
- The application for recognition shall be accompanied by a statement identifying all foreign proceedings in respect of the debtor that are known to the FR;
- The court may require a translation of documents supplied in support of the application for recognition into an official language of the enacting State.

Article 16 of the MLCBI provides for presumptions concerning the recognition of proceedings, including presumptions relating to the evidential requirements described above and the debtor's COMI. [1]

Further, Article 17 of the MLCBI stipulates that the decision regarding the recognition must be made as early as possible. The recognition can, however, be modified, challenged, or terminated if it is shown that the grounds for the recognition have either never applied or ceased to apply. Recognition can, furthermore, be denied due to public grounds in the enacting state, ensuring that the enacting state's fundamental legal principles are upheld. [1]

202223-

There is no reciprocity requirement with respect to a recognition (noting that certain jurisdictions, such as South Africa, provide however for the same).

Also, the concept of COMI, which is not defined in the MLCBI, is essential for the recognition of proceedings (also see above regarding the presumption of COMI as per Article 16 of the MLCBI; furthermore, the UNCITRAL Guide to Enactment offers guidance).

Lastly, recognition can be denied due to an abuse of process, which is not stipulated in the MLCBI itself, but decided upon pursuant to domestic laws of the enacting state. An example would be non-disclosure of information or falsely claiming that the COMI of the debtor is in a particular state.

Your answer should also include a 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 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. **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] [3]

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.

Prior to a decision on the recognition, interim relief can be granted pursuant to Article 19 of the MLCBI, [1] provided that such relief is urgently needed. Furthermore, the court can (in its discretion) grant post-recognition relief in accordance with Article 21 of the MLCBI. [1] Pursuant to Article 20 of the MLCBI automatic mandatory relief is granted, provided that the recognised foreign proceeding qualifies as a “foreign mandatory proceeding”. [1]

In granting interim pre-recognition relief pursuant to Article 19 of the MLCBI, or discretionary post-recognition relief pursuant to Article 21 of the MLCBI, the court in the enacting state must be satisfied that the interests of the insolvent’s creditors and other interested parties are adequately protected. In order to assess this requirement, the court can subject the relief to certain conditions, as it considers adequate. Furthermore, the court can – at the request of the FR or any other affected party – modify or even terminate the relief.

The FR obtains a standing (including the right to initiate certain actions) under the laws / proceedings of the enacting state, in order to protect the debtor's assets for the creditors. This is provided for in Articles 23 and 24 of the MLCBI.

Your answer should have also included a 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]

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?

Case law: *Protasov v Derev*, EWHC 392. The court found that under domestic law (in the relevant case English law) forms of protections are offered, so that a relief in the form of a freezing order (or similar injunction) were simply not warranted.

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

Commented [DDB6]: 10 out of 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

202223-

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]; 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].

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 According to the MLCBI, "foreign proceeding" means a collective judicial or administrative proceeding in a foreign state, including an interim proceeding, pursuant to a law relating to insolvency in which proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganization or liquidation. **Article?** The characteristics of such foreign proceedings should be applied cumulatively and should be considered as a whole. The assessment is to be fact based.

- (1) The foreign proceeding must either qualify as judicial or administrative proceeding: According to case law, "proceeding" is a statutory framework that constrains company's actions and that regulates the final distribution of a company's assets. According to the facts above, when entering into liquidation, all powers of the Bank's management and control bodies as well as all banking activities are terminate and the DGF alienates the Bank's property and funds. The liquidation proceedings can therefore be considered as framework (ie statutory of set of general applicable rules) that constrains the action's of the Bank and that regulates the distribution of its assets. **The liquidation therefore qualifies as judicial or administrative proceedings. Yes**
- (2) The foreign proceeding must be collective: In determining whether a proceeding is "collective", a key consideration is, whether substantially all of the assets and liabilities of the debtor are dealt with. According to the above facts, when the Bank entered into liquidation, all money liabilities due to the Bank became/were deemed due and public encumbrances and restrictions on disposal of the Bank's property were terminated and offsetting of counter-claims was prohibited. The commencement of liquidation can, therefore, be considered as an orderly regime that affects the rights and obligations of all creditors and all of the assets of the debtor.

202223-

The liquidation proceedings should therefore also be considered collective.

Yes

- (3) The foreign proceedings must be a proceeding pursuant to a law relating to insolvency or severe financial distress, including laws which are not labelled as insolvency law but that nevertheless deal with insolvency. Considering the facts above, in particular that liquidation was opened due to the Bank's severe financial distress/ insolvency following provisional administration, **Articles 75 et seq of the Law on Banks and Banking Activity can be qualified as law relating to insolvency.** **Yes**
- (4) The foreign proceeding must be a proceeding in which the assets and affairs of the debtor are subject to control or supervision of a foreign court. The MLCBI specifies neither the level of control nor the supervision required to satisfy this aspect. According to case law, that control or supervision may be exercised not only directly by the court, but also indirectly by an insolvency representative where, for example, the insolvency representative itself is subject to control or supervision by the court or other regulatory authority (including cases where liquidators can proceed with their duties largely without court involvement). According to the facts above, with the commencement of liquidation proceedings, the DGF alienates the Bank's property and funds and has the full powers of a liquidator under the law of Country A, including the power to exercise management powers and take over management of the property (including the money) of the bank; the power to compile a register of creditor claims and to seek to satisfy those claims; the power to take steps to find, identify and recover property belonging to the bank etc. **As the assets and the affairs of the Bank are subject to the DGF's control control, the liquidation proceedings should qualify as proceeding in which the assets and affairs of the debtor are subject to control or supervision of a foreign court, including an administrator.** **Good**
- (5) **The liquidation proceedings purpose is the liquidation of the Bank.**

Case law (Agrokor and Sanko Steamship?). Generally a good answer. 7 out of 10

4.1.2 Foreign representative: "Foreign representative" means a person or body, including one appointed on an interim basis, authorized in a foreign proceeding to administer the reorganization or the liquidation of the debtor's assets or affairs or to act as a representative of the foreign proceeding; **Yes**

- (1) **Authorized to administer:** Article 37 of the LBBA establishes that the DGF (or its authorised person, insofar as such powers are delegated), who becomes pursuant to the LBBA automatically the administrator upon commencement of liquidation, 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. The DGF therefore has the power to administrate the estate of the Bank. **The Applicants are authorised to represent the Bank.**
- (2) **Person:** The MLCBI does not define "person" or "body". According to case law, body has been interpreted as an artificial person created by a legal authority. The DGF can be understood as such "artificial Body" created by legal authority. **Therefore, both Ms G as natural person and the DGF meet the requirements.**

Not a bad answer, but perhaps a bit "thin"? 3 out of 10

Suggested answer

The Applicants' standing as a "foreign representative" [max 5 marks]

1. "Foreign representative" is defined by article 2(d) of the MLCBI to mean:

'a person or body, including one appointed on an interim basis, authorised in a foreign proceeding to administer the reorganisation or the liquidation of the debtor's assets or affairs or to act as a representative of the foreign proceeding'

2. Article 16(1) of the MLCBI provides:

'If the decision or certificate referred to in paragraph 2 of article 15 indicates that the foreign proceeding is a proceeding within the meaning of sub-paragraph (i) of article 2 and that the foreign representative is a body or person within the meaning of sub-paragraph (j) of article 2, the court is entitled to so presume.'

3. This application is brought jointly by the DGF and Ms G. The DGF's role as liquidator arises under statute and article 77 of the LBBA provides that the DGF is automatically appointed as liquidator on the day it receives the NB's decision pursuant to article 77 revoking a bank's licence and commencing its liquidation.
4. Article 48(3) of the DGF Law, empowers the DGF to delegate its powers to an "authorised officer" or "authorised person". The "Fund's authorised person" is defined by article 2(1)(17) of the DGF law as: *"an employee of the Fund, who on behalf of the Fund and within the powers provided for by this Law and/or delegated by the Fund, performs actions to ensure the bank's withdrawal from the market during provisional administration of the insolvent bank and/or bank liquidation"*.
5. Article 35(1) of the DGF Law specifies that an authorised person, must have: *"...high professional and moral qualities, impeccable business reputation, complete higher education in the field of economics, finance or law...and professional experience necessary."* An authorised person may not be a creditor of the relevant bank, have a criminal record, have any obligations to the relevant bank, or have any conflict of interest with the bank. Once appointed, the authorised officer is accountable to the DGF for their actions and may exercise the powers delegated to them by the DGF in pursuance of the bank's liquidation.
6. Ms G's appointment was pursuant to a Decision of the Executive Board of the Directors of the DGF, No. 1513 ("Resolution 1513"). Resolution 1513 notes that Ms G is a "leading bank liquidation professional". It delegates to her all liquidation powers in respect of the Bank, set out in the DGF Law and in particular articles 37, 38, 47-52, 521 and 53 of the DGF Law, including the authority to sign all agreements related to the sale of the bank's assets in the manner prescribed by the DGF Law. Resolution 1513 expressly excludes from Ms G's authority the power to claim damages from a related party of the Bank, the power to make a claim against a non-banking financial institution that raised money as loans or deposits from individuals, and the power to arrange for the sale of

the Bank's assets. Each of the excluded powers remains vested in the DGF as the Bank's formally appointed liquidator.

As a result of the sharing of some, but not all of the liquidator's powers and the division of responsibility between Ms G and the DGF, it seems likely that depending on the nature and timing of relief sought from this Court pursuant to the CBIR (if any), the appropriate applicant may, in the future, be either or both of Ms G and the DGF. I am satisfied that subject to the express limitations on Ms G's powers, they are both authorised to administer the liquidation and as such both meet the definition of "*foreign representative*". In my judgment they both had the necessary standing to apply in that capacity, for recognition of the Bank's liquidation.

*** End of Assessment ***