



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: 202122-336.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 2022**. The assessment submission portal will close at 23:00 (11 pm) GMT on 1 March 2022. 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 2022** or by **23:00 (11 pm) BST (GMT +1) on 31 July 2022**. If you elect to submit by 1 March 2022, you **may not** submit the assessment again by 31 July 2022 (for example, in order to achieve a higher mark).
7. Prior to being populated with your answers, this assessment consists of **12 pages**.

ANSWER ALL THE QUESTIONS

Total: 33,5 out of 50

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] 4 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 **incorrectly** reflects the main purpose of the Model Law?

- (a) The Model Law provides effective mechanisms for dealing with cases of cross-border insolvency so as to promote a number of objectives, including the protection and maximisation of trade and investment.
- (b) The Model Law provides effective mechanisms for dealing with cases of cross-border insolvency so as to promote a number of objectives, including the fair and efficient administration of cross-border insolvencies that protects the interests of all creditors and other interested persons, not including the debtor.
- (c) The Model Law is a substantive unification of insolvency law so as to promote co-operation between courts of the enacting State and foreign States and facilitation of the rescue of financially troubled businesses.**
- (d) All of the above.

Question 1.2

Which of the following statements is **unlikely** to be a reason for the development of the Model Law?

- (a) The existence of a statutory basis in national (insolvency) laws for co-operation and co-ordination of domestic courts with foreign courts or foreign representatives.
- (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) None 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

“Cross-border insolvencies are inherently chaotic and value evaporates quickly with the passage of time”. Which of the following rules or concepts set forth in the Model Law **best addresses** this feature of cross-border insolvencies?

- (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 Brazil, foreign main proceedings are opened in South Africa and foreign non-main proceedings are opened in Brazil. Both the South African foreign representative and the Brazilian 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), Brazil 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 Brazil will be recognised in the UK despite Brazil not having implemented the Model Law.
- (b) Both the foreign main proceedings in South Africa and the foreign non-main proceedings in Brazil will not be recognised in the UK because the UK has no principle of reciprocity and Brazil has not implemented the Model Law.

(c) Both the foreign main proceedings in South Africa and the foreign non-main proceedings in Brazil 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 consider both (a) and (b).

(d) Neither (a) nor (b) must be considered by the court.

Question 1.8

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

(a) COMI is 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) While (for purposes of the Model Law) the COMI of a debtor can move, the closer such COMI shift is to the commencement of foreign proceedings, the harder it will be to establish that the move was "ascertainable by third parties".

(d) None of the above.

Question 1.9

Which of the following types of relief have, prior to the adoption of the Model Law on Recognition and Enforcement of Insolvency-Related Judgments, been declared beyond the limits of the Model Law?

(a) Enforcement of insolvency-related judgments.

(b) An indefinite moratorium continuation.

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

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

Question 1.10

When for the interpretation of the Model Law “its original origin” is to be considered in accordance with article 8 of the Model Law, which of the following texts is likely to be of relevance?

(a) The UNCITRAL Guide of Enactment and the Practice Guide.

(b) The UNCITRAL Guide of Enactment and the Legislative Guide – Parts One, Two, Three and Four.

(c) The UNCITRAL Guide of Enactment and the Judicial Perspective.

(d) All of the above.

QUESTION 2 (direct questions) [10 marks in total] 7 marks

Question 2.1 [maximum 3 marks] 3 marks

Under the MLCBI, explain what the appropriate date is for determining the COMI of a debtor, or whether an establishment exists.

The appropriate date for establishing COMI or whether an establishment exists is the date of commencement of the foreign proceeding.

An establishment is the place of the debtor’s operations where the debtor undertakes “non-transitory economic activity with human means and goods and services.”¹

However, ascertaining the date can become a tricky issue, especially where it can be demonstrated that COMI has, in relation to the date on which proceedings were opened, moved – the so-called “tourist bankruptcies” approach adopted by debtors.

¹ Silverman, R. J. (2000). Advances in Cross-Border Insolvency Cooperation: The Uncitral Model Law on Cross-Border Insolvency. ILSA Journal of International & Comparative Law, 6(2), 265-272 available online at <https://heinonline.org> (accessed 10th February 2022).

Consider the case of **Morning Mist Holdings Ltd. v. Krys, No. 11-4376 (2d Cir. 2013)** in which the Court held that the debtor's COMI should be determined based on its activities at or around the time the Chapter 15 petition is filed. The Court reiterated the relevant principle, that the debtor's COMI lies where the debtor conducts its regular business, such that it is ascertainable by third parties.²

Thus the establishment of COMI involves an exercise assessing a myriad of factors such as, the place where the head of operations is conducted from, the location of financial organization of the company including where its books of accounts and debts are found, its assets, creditors and the law applicable to most disputes in conjunction with the timing of the commencement of foreign proceedings.

Question 2.2 [maximum 3 marks] 2 marks

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

Statement 1 *"This Article provides guidance in case of concurrence of two foreign non-main proceedings."*

Statement 2 *"The rule in this Article does not affect secured claims."*

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

Statement 1: Article 29: Commencement of a proceeding between the State that has enacted a proceeding and a foreign proceeding - The coordination of proceedings under the State which has enacted the Model Law, and a foreign proceeding. **Art 30 (c)**

Statement 2: Article 32: Rule of payment in concurrent proceedings - The hotchpot rule

Statement 3: Article 16(3): Presumptions concerning recognition - There is a rebuttable presumption that the debtor's registered office is the "centre of its main interests."

Question 2.3 [2 marks] 1 mark

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.**

Following a recognition order (the "Moratorium Continuation Application") granted in terms of the CBIR, the foreign representative then requested an indefinite continuation of the automatic moratorium, which moratorium was conferred by the said order as under Article 21.

Morgan J was asked to grant specific relief under Article 21 viz. "any appropriate relief."

The main issue for decision turned on whether the granting of an indefinite Moratorium Continuation would deprive English creditors from enforcing their English law rights?

² <https://law.justia.com/cases/federal/appellate-courts/ca2/11-4376/11-4376-2013-04-16.html>. Accessed 6th December 2021.

The issue arose out of the fact that IBA's English creditors in the Moratorium Continuation Application did not submit to the foreign proceedings against IBA in Azerbaijan, and so, when IBA was successfully restructured in Azerbaijan, the plan would become binding on all creditors – including the creditors who opposed this application; hence the indefinite stay application.

In its deliberations, the Court considered that a stay, if granted, should be necessary in favour of the protection of IBA's creditors, and further, that the stay would be an appropriate way of achieving that protection.

The English Court of Appeal upheld the decision refusing the application in IBA, finding that the Moratorium Application was not the answer to avoiding the Gibbs Rule because an order of such a nature would prevent the English creditors from ever being able to enforce their claims.

In essence, Morgan J found that the relief requested could not be granted because the remedy was not available in a domestic insolvency.

Issue 2 should also be addressed:

ANSWER

- According to the English Court of Appeal, the real issue was whether as a matter of settled practice the UK 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] 1 mark

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**.

Where a proceeding has been recognized as a foreign *main* (my emphasis) proceeding, then, in terms of Article 21 of the Model Law, the Court will grant post-recognition relief including:-

1. Staying legal actions and execution against the debtor's assets, as well as individual actions against the debtor;
2. Suspending the rights to alienate or encumber any of the debtor's assets;
3. Manage the debtor's assets; and

3. Allowing the foreign representative to participate in local proceedings by the examination of witnesses, taking of evidence, and facilitating the discovery of information.

The Court may also extend the interim relief made under Article 19 and/or make any additional relief it sees fit.

The correct answer is art. 29 (a) on concurrent proceedings

In terms of Article 18, the foreign representative has a duty to keep the court informed of any updates, including if any other foreign non-main proceedings have already been opened against the debtor, or are anticipated to be opened.

More importantly, the foreign representative has an ongoing duty to inform the Court of any changes in the status of the foreign proceeding or the status of the representative.

This duty is emphasized also in The Judicial Perspective which commands the duty of disclosure by a foreign representative in foreign proceedings.

QUESTION 3 (essay-type questions) [15 marks in total] 7,5 marks

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

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

Question 3.1 [maximum 4 marks] 4 marks

Prior to making a recognition application in State A, explain how access and co-ordination rights in State A can benefit the foreign representative?

ACCESS:³

Articles 9 – 14 of the Model Law removes fundamental challenges for the foreign representative relating to jurisdiction and standing.⁴

Article 9 specifically gives power to foreign representatives seeking assistance from other relevant jurisdictions.

In terms of Articles 9 - 12 of the Model Law, any foreign representative - even without commencing recognition proceedings - may be afforded access to a court in three ways which will be outlined below.

Direct access under Article 9, is the prized route for the foreign representative because no recognition of the judgment in the State which has enacted the Model Law is necessary. Thus, the office-holder achieves immediate standing. This speedy procedure is beneficial to the foreign representative where quick action is essential. The representative, usually represented by a local lawyer simply attends a court in the normal fashion to commence a local insolvency proceeding.⁵

³Trichardt, A 'The UNCITRAL Model Law on Cross-Border Insolvency' (2002) 6 *Flinders Journal of Law Reform* 95

⁴ Berends, Andre J. "The UNCITRAL Model Law on Cross-Border Insolvency: A Comprehensive Overview." *Tulane Journal of International and Comparative Law*, (1998) 6 p309-400 at 338. Available online at <https://heinonline.org> accessed 13th February 2022.

⁵ *Ibid* Berends

Under Article 11, access to initiate proceedings can be provided to the foreign representative but a domestic insolvency proceeding must first be said to exist in the enacting State.

Article 12 confers participation rights upon the foreign representative after recognition.

It is beneficial to the foreign representative that *locus standi* is not dependent on prior recognition of the foreign proceeding, for reasons relating to urgency and preservation of the debtor's assets.

Standing avoids communications through more “time-consuming and cumbersome, and less predictable, procedures that could work against the ideals of a coordinated administration of an insolvency, which ultimately aims to preserve assets against dissipation or concealment.”⁶

CO-OPERATION:⁷

Co-operation is enumerated under Articles 25 – 27 of the Model Law.

Article 25(1) entitles a court to communicate directly with, or offer assistance, or request information from a foreign court or representative.

Article 26 deals with the cooperation of domestic representatives with foreign courts and representatives.

As cooperation may be implemented in any “appropriate means,” Article 27 lists the non-exclusive methods which may be employed in communication, although the courts are given a wide measure of latitude in its choice of implementation.

Under Articles 25 and 26 cooperation is not merely encouraged but mandatory, and direct communication expressly authorized.

The Model Law further emphasises co-operation by compelling courts and domestic office-holders to cooperate “to the maximum extent possible”⁸ with foreign courts and office-holders.

This is indispensable to the effectiveness of the Model Law because communication is fundamental to achieving the goals of the Model Law. The direct communication channel⁹ created by a representative is beneficial to the foreign representative “where a court may find it difficult to act absent specific statutory discretion.”¹⁰ To this may be added, in urgent situations where communication via letter or diplomatic channels may be time-consuming.¹¹ Communication therefore serves to ensure the prevention of dissipation of assets, or the maximization of their value, or to find the best solution for their reorganization.

It may be noted that cooperation is not a pre-requisite to recognition in terms of Article 17 and so, cross-border judicial co-operation is required irrespective if the foreign proceedings have been recognized or not. This can fundamentally improve the manner of resolution between States, especially where no proceedings are opened in a State, but the debtor has assets in that State.

In conclusion, the Articles outlined above underpin various routes to acquiring relief, or to contribute to a cohesive facilitation of proceedings for the foreign representative which

⁶ Herrmann, G. "International Cross-Border." *International Business Lawyer*, (1996) vol. 24, no. 5, p. 218-219. Available online at <https://heinonline.org> accessed 14th February 2022.

⁷ Trichardt note 3 above at 122.

⁸ Silverman note 1 above at 265.

⁹ Article 26(2) of the Model Law.

¹⁰ Article 26(1) of the Model Law.

¹¹ Berends, Andre J note 4 above at 378.

effectively maximizes distribution to creditors in equal proportion thereby fulfilling the goals of the Model Law.

Question 3.2 [maximum 5 marks] 1,5 marks

For a recognition application in State A to be successful, the foreign proceeding opened in State B must qualify as a “foreign proceeding” within the meaning of article 2(a) of the MLCBI and the “foreign representative” must qualify as a foreign representative within the meaning of article 2(d) of the MLCBI. Assuming 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 recognition of an application is governed by Chapter 3 of the Model Law which lays out important provisions regarding the requirements for recognition, the ensuing recognition and thereafter, its effects.

Requirements:

At the outset, the process of recognition begins with the fulfilment of the core procedural requirements as laid out in Article 15.

These are that the application must contain one or more of the following:-

- A certified copy of the decision commencing the foreign proceedings and appointing the foreign representative; or
- A certificate from the foreign court affirming the existence of the foreign proceeding and the appointment of the foreign representative; or
- Where there is none of the above, any other acceptable evidence authenticating the existence of the foreign proceedings.

Judicial Scrutiny:

Since for purposes of this question, the criteria in Article 2(a) and (d) are fulfilled, then the court, in considering the application is entitled under Article 16 to presume two things, *inter alia* that the documents submitted are authentic – whether or not they have been legalized - and that the debtor’s registered address is the centre of his/her main interests.

Article 16(1)(c) is a ‘catch-all’ clause and provides flexibility for the court in the absence of documents above, to review additional evidence at its discretion.

The documents submitted to the court should provide a statement by the foreign representative of all the foreign proceedings known to the representative against the debtor. This is because, the Court will need to know what type of relief to grant in the application.

The Court will consider this statement in conjunction with Article 22 and must be satisfied before granting relief in terms of Article 19 or 21, that all creditors and other interested parties are protected.

Once satisfied, the Court will grant any relief as enumerated under Articles 19, 20 or 21 and read with Article 4 – dependant on the factual matrix presented to the court.

Dependant on the type of relief, the foreign representative will have the power to stay actions and/or executions against the debtor and/or his assets, to participate in local proceedings by examining witnesses, taking evidence and managing the debtor’s assets.

Where the proceeding has been recognized as a foreign main proceeding, automatic mandatory relief under Article 20 is granted.

Restrictions, Exclusions and Limitations:

Although recognition can be granted, usually at the earliest possible time, it is also subject to termination or modification depending on the absence of requisite evidence, or where the foreign proceeding ceases to exist.

For example, the continuation of recognition of a foreign non-main proceeding will cease to exist where the foreign main proceedings have already been terminated.

Where foreign non main proceedings are recognized or opened, the relief granted such as the application for an avoidance is restricted to the assets which under local law, should be subject to the non-main proceeding.

The following should also be addressed:

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. Judicial scrutiny: While the court in State A is able to rely on the rebuttable presumptions set forth in Article 16 of the Model Law, in the context of Article 17 of the Model Law the court will have to assess whether either the COMI or at least an establishment of the debtor is located in State B where the foreign proceedings were opened. If the COMI of the debtor is in State B the foreign proceedings should be recognised as foreign main proceedings and if only an establishment of the debtor is in State B the foreign proceedings should be recognised as foreign non-main proceedings. Without a COMI or at least an establishment of the debtor in State B, recognition cannot be granted by the court in State A.
4. Public policy exception: Finally, the court in State A should also ensure based on Article 6 of the Model Law that the recognition application is not manifestly contrary to public policy of State A.

Question 3.3 [maximum 5 marks] 2 marks

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

PRE-RECOGNITION RELIEF:

Article 19:

Pre-recognition or interim relief is enumerated under Article 19 of the MLCBI. This relief includes a stay of execution against the debtor's assets, and entrusting the debtor's assets which may be perishable, or prone to devaluation, or otherwise in jeopardy to a foreign representative.

Article 19 relief includes any post-recognition relief in terms of Article 21:

- suspending the right to transfer, encumbering or disposing of property;
- providing for the examination of witnesses, taking of evidence, or delivery of information regarding the debtor's assets, affairs, rights, obligations or liabilities; and
- additional relief as domestically applied in the laws of the enacting State.

An appropriate notice of the interim relief granted is generally made known by the enacting State.

Limitations: The granting of interim relief will be refused when the order will interfere with the administration of a foreign main proceeding or is manifestly contrary to public policy.

POST-RECOGNITION RELIEF:

Article 21:

Post-recognition relief encompasses all the types of relief as found in Article 19, but further bestows the power to stay individual actions against the debtor.

The power to stay individual actions is stated in Article 21(1) and it is a discretionary power afforded to the enacting State. The discretionary power afforded by Article 21 allows an enacting State to safely protect the assets of the debtor or the interests of creditors under the laws of the enacting State and as needed in the circumstances of the case.

It is precisely this power to stay individual actions which has been the focal point in considering the boundaries of this relief.

Although not defined, there have been several cases which have laid down principles relevant to the exercise of that discretion such as *Armada Shipping SA* [2011] EWHC 216 (Ch) and *Re Pan Ocean Co Ltd; Seawolf Tankers Inc and another v Pan Ocean Co Ltd and another* [2015] EWHC 1500 (Ch).

Limitations and restrictions: Through the case law adumbrated below, post-recognition relief relating to the staying of individual actions has been curtailed in many respects. These cases lay down principles which serve as appropriate guidelines when considering an application for post-recognition relief:

In *Rubin v Eurofinance SA* the court refused to grant recognition and enforcement of an insolvency-related default judgment *in personam*, holding that for a foreign judgment to be enforceable in the UK, the judgment debtor

- must have been present in the foreign jurisdiction when the proceedings commenced;
- had made a claim or counter-claim in the proceedings;
- has voluntarily appeared in the proceedings thereby tacitly submitting to the jurisdiction of the court;
- has agreed to submit to the jurisdiction.

In *Firbria Cellulose S/A v Pan Ocean Co Ltd* ("Pan Ocean") an English law shipping contract containing an *ipso facto* clause formed the pivotal issue in the following two grounds of relief:

- a stay on individual legal actions or execution of assets against the debtor and his estate under Article 21(1)(a), and
- appropriate relief under Article 21(1)(g), in essence, to grant relief in terms of Korean laws.

Rejecting the ground in Article 21(1)(a), the court found that the service of a notice to terminate a contract does not amount to the continuation of an individual legal proceeding and therefore cannot amount to the relief sought.

In further rejecting the application, under Article 21(1)(g) the court applied the decision of *Belmond Park v BNY Corporate Trustee Services* which held that *ipso facto* clauses are in principle valid and enforceable but found in this case that relief granted could not go beyond what was catered for in a domestic insolvency. Further, accepting or rejecting *ipso facto* clauses is a policy decision, and; in the facts of the matter the English court could not be reasonably expected to have applied Korean law.

In *In the Matter of the OJSC International Bank of Azerbaijan and the CBIR 2006 – Bakshiyeva v Sberbank of Russia, et al* (the “IBA case”), the Azeri foreign representative sought an indefinite continuation of the automatic moratorium under Article 21, which was challenged by two creditors who held debt instruments against IBA under English Law and who had not submitted to the Azerbaijan proceedings. The foreign representative sought to manipulate the Gibbs Rule which states that a debt governed by English Law cannot be discharged or compromised by a foreign insolvency proceeding. The court refused to grant the relief requested, finding that the ultimate aim of the application was to stifle the claims of the creditors under English Law, while at the same time forcing the court to recognize the existence of the claims from an English Law perspective. This permanent stay the court found, was not the answer to the Gibbs Rule.

It can be noted from the above that the restrictions to appropriate relief have been moulded and shaped by the case law. However the court stops of allowing insolvency proceedings to act as an automatic gateway to the application of foreign insolvency laws in certain defined instances.

For full mark on this question, the following should also be included in the answer:

1. **Adequate protection:** Pursuant to Article 22 of the Model Law any interim relief under Article 19 of the Model Law or any post-recognition relief under Article 21 of the Model Law require the court in State A to be satisfied that the interests of the creditors and the other interested persons, including the debtor, are adequately protected and any relief may be subject to conditions as the court considers appropriate.
2. **Existing international obligations of State A:** Based on Article 3 of the Model Law, the court in State A should again verify that there are no existing international obligations of State A (under a treaty or otherwise) that may conflict with granting the requested relief under the implemented Model Law in State A.
3. **Public policy exception:** The court in State A should, based on Article 6 of the Model Law, also again verify that the relief application is not manifestly contrary to public policy of State A.

Question 3.4 [maximum 1 mark] 0 marks

Briefly explain 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?

It will be superseded by post-recognition relief.

For marks on this question it should be discussed that art 21 provides another form for protection leaving the freezing order un-warranted.

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

Read the following facts very carefully before answering the questions that follow.

(1) Background

The Commercial Bank for Business Corporation (the Bank) has operated since 1991. The Bank's registered office is situated in Country A, which **has not** adopted the MLCBI. As of 13 August 2015, the Bank's majority ultimate beneficial owner was Mr Z, who held approximately 95% of the Bank's shares through various corporate entities (including some registered in England).

The Bank entered provisional administration on 17 September 2015 and liquidation on 17 December 2015. Investigations into the Bank have revealed that it appears to have been potentially involved in a multi-million dollar fraud resulting in monies being sent to many overseas companies, including entities incorporated and registered in England.

Proceedings were issued 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 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**]; **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**]. **5 marks**

While not all facts provided in the fact pattern for this question (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.

Question 4.1.1

Issue:

The legal issue under consideration is whether the law of Country A makes it possible to recognize a foreign proceeding which is expressly brought in a foreign court in respect of a group of companies, even though recognition in the foreign court is only sought in relation to one specific company which is identified in the application?

This question entails an analysis into the elements of a foreign proceeding, which will be discussed hereunder.

Law:

Definition of foreign proceeding

A “foreign proceeding” is defined by the following elements:

1. It must be a proceeding of some or other type, including an interim proceeding.
2. The proceeding must be either administrative or judicial in nature.
3. It must be collective in nature: In this regard the question is whether substantially all of the assets and liabilities of the debtor are dealt with in one proceeding subject to the usual local priorities, exceptions and exclusions.
4. It must occur in a foreign State.
5. It must be authorized or conducted under a law relating to insolvency.
6. The proceeding relates to assets and affairs of the debtor which are subject to control or supervision by a foreign court.
7. The proceeding is for the purpose of reorganization or liquidation.

The matter of Agrokor

The case of *Agrokor DD* [2017] EWHC 2791 (Ch) (“*Agrokor*”) involved a consideration of what qualifies as a foreign proceeding.

By way of background, Agrokor is the holding company of a group of companies and a key economic producer in Croatia. Agrokor fell into financial difficulties necessitating the (hastily drafted) enactment of the “Law on Extraordinary Administration Proceeding in Companies of Systemic Importance in Croatia” which later came to be known as the *Lex Agrokor*.

As indicated above, the *Lex Agrokor* was enacted in reaction to the severe financial difficulties faced by the Agrokor group and its enactment therefore sought to safeguard Croatia’s economic, social and financial stability through a single procedure.

Agrokor through its foreign representative, sought and was successful in an application for recognition in England under the Cross-Border Insolvency Regulations (“CBIR”). These proceedings were listed as an insolvency proceeding under Annex A of the EU Insolvency Regulation (2015/848/EU).¹² (Note: the matter is subject to appeal but bears no further reference for purposes of this question).

The issues presented to court regarding whether the matter indeed qualified as a foreign proceeding, turned on four elements above:

¹² <https://legalisglobal.com/croatia-lex-agrokor-government-intervention-at-the-eleventh-hour>.

- Whether the Croatia Law of *Lex Agrokor* was a law relating to insolvency? (point 5 above).
- Whether the *Lex Agrokor* was passed for the purpose of reorganization or liquidation? (point 7 above).
 - Whether the proceedings are collective in nature? (point 3 above)
 - Whether the proceeding relates to assets and affairs of the debtor which are subject to the control or supervision by a foreign court? (point 6 above)

Law relating to insolvency:

In its assessment of whether the *Lex Agrokor* was a law relating to insolvency, the court paid due consideration to the Model Law on Cross Border Insolvency: Guide to Enactment and Interpretation (1997) (“Enactment Guide”) and held:

Liquidation and reorganization might be conducted under the law that is not labelled as insolvency law (e.g. company law) but which nevertheless deals with or addresses insolvency or severe financial distress.

The Court in *Agrokor* found authority for this proposition by further referring to the case of *In Re Stanford International Bank Ltd* [2011] Ch 33 (confirmed on appeal) in which the Court in that case held that the liquidator in the Antiguan proceedings were appointed pursuant to a law relating to insolvency. Consequently, the Court held, the liquidators could be recognized as foreign representatives of a foreign proceeding.

Passed for the purpose of reorganization:

Agrokor found that the *Lex Agrokor* was a Croatia Law which would have to be factually proved to have been passed for the purpose of reorganization or liquidation.

In its reasoning, *Agrokor* made reference to the UNCITRAL Legislative Guide on Insolvency Law (2004), Part 1, Chapter 2 at para 23 where it is stated:

...the term reorganization is used in the guide in a broad sense to refer to the type of proceedings whose ultimate purpose is to allow the debtor to overcome its financial difficulties and resume or continue normal commercial operations.

Agrokor applied the principles set out in an Australian decision wherein the requirement that the proceedings be related to insolvency for purposes of recognition was found to exist even where there were no court proceedings taking place, but the matter was dealt with administratively when the company passed a resolution commencing voluntary winding-up.¹³

Collective procedure:

A collective insolvency proceeding is described as a hypothetical collective contract amongst the debtor’s creditors binding them to cooperate (in the common interest) which, because of the strategic incentives of creditors and prohibitively high transaction costs, the creditors cannot and do not conclude ad hoc.¹⁴

¹³ *In Re Betcorp Ltd* 400 BR 266 (2009).

¹⁴ Eidenmüller, E. “What is an insolvency proceeding?” *ECGI Working Paper Series in Law*. Oxford University (2017) available online at http://ssrn.com/abstract_id=2712628. Accessed 6th October 2021.

In assessing whether the company is a group of companies for purposes of a collective procedure, the Court in *Agrokor* considered the UNCITRAL Model on Cross-Border Insolvency: The Judicial Perspective, Chapter 3 (2011) Interpretation and application of the Model Law which considered a number of cases which turned on the interpretation of “foreign proceedings” which have involved enterprise groups.

The Judicial Perspective stated, “For the purposes of the Model Law the focus is on each and every member of an enterprise group as a distinct legal entity....*there is no scope for determining the centre of main interests of the Enterprise group as such under the Model Law.*” (my emphasis).

This is reiterated in the UNCITRAL Legislative Guide on Insolvency Law, Part 3 Chapter 3 Addressing the insolvency of Enterprise groups.

In the matter of *Re Betcorp Ltd* 400 BR 266 (*Betcorp*) cited in *Agrokor* the Court held:

A collective proceeding is one that considers the rights and obligations of all creditors.

Applying the UNCITRAL guidelines as well as *Betcorp*, the court in *Agrokor* found that there was nothing in the CBIR to prevent a foreign proceeding which involves a group of companies from being recognized.¹⁵

Assets and affairs subject to the control of the foreign court:

Agrokor referring to the Enactment Guide found that control or supervision consisted of the monitoring of compliance which should be formal.

Such control could be by an insolvency representative or the court and extended to a debtor in possession.

Agrokor applied the decision of *Re Ashapura Minechem Ltd* 480 BR 129 (2012) which found day to day supervision was not required, but a monitoring to ensure compliance remained a minimum standard.

Application of the law to the facts:

The decision as to whether the application qualifies as a foreign proceeding, rests upon the satisfaction of proof of the elements of a foreign proceeding as enumerated in the Model Law.

Against the background of the legal consequences that are triggered by the characterization of a proceeding as an insolvency proceeding, the LBBA and DGF Laws contains specific Articles dealing with reorganization or liquidation. This takes place in a separate country, being Country A, fulfilling the element of a foreign proceeding.

Article 75 allows the LLBA to 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 in its regulations.

Article 76 makes it obligatory for the NB to classify the Commercial Bank as insolvent if it meets the criteria set out in article 76 of the LBBA, specifically, the Commercial Bank’s inability

¹⁵ *Agrokor* para 54.

to meet its financial obligations,¹⁶ or *prima facie* balance-sheet insolvency¹⁷ and for which, after being declared “troubled” as under Article 75, the Commercial Bank 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 the Commercial Bank can be declared insolvent by the NB directly and without necessarily needing to invoke Article 75.

Article 77 authorizes National Bank (NB) to declare the Commercial Bank Insolvent.

The abovementioned Articles demonstrate the power conferred by the LBBA to take administrative action under a law relating to insolvency.

The decision by the NB declaring the Commercial Bank insolvent triggers the appointment of the Departmental Government Fund (“DGF”) as the formal liquidator – through an authorized representative – to commence the winding-up of the Commercial Bank.

Again, this is an insolvency procedure designed for the purposes of liquidation.

As the DGF contains powers as stipulated in Article 34, to remove the Commercial Bank from the market; exclusive powers under Articles 35(5) and Articles 36(1); and, the ability to impose a moratorium on all actions by creditors or execution against the assets of the Commercial Bank, these powers are specific powers under the laws of insolvency.

Insofar as the assessment as to whether the procedure is a collective one, the Commercial Bank has various corporate entities, some of which are in England. The guidelines set out in the Judicial Perspective, Model Law on Enterprise Groups, and the Enactment Guide, and in application of *Betcorn* as cited in *Agrokor*, as well as *Agrokor* itself, the Commercial Bank can be said to have crossed this threshold.

For all the reasons above, including the fact that for the purposes of this question, the Commercial Bank qualifies as an entity under which the Model Law as enacted in the CBIR allows for administration, the proceeding ought to be recognized as a foreign proceeding.

This would further give colour to Article 8 of the Model Law by having regard to “its international origin and the need to promote uniformity in its application.”

Question 4.1.2: Foreign Representative

Issue: The issue herein is whether the Deposit Guarantee Fund (DGF) qualifies as a foreign representative.

Law: A foreign representative is a person or body, including one appointed on an interim basis, authorized in a foreign proceeding to administer the reorganization or liquidation of the debtor’s assets or affairs or to act as a representative in a foreign proceeding.¹⁸

¹⁶ Article 76: The bank’s regulatory capital amount or standard capital ratios have reduced to one third of the minimum level specified by law.

¹⁷ Within five consecutive working days, the bank has failed to meet 2% or more of its obligations to depositors or creditors.

¹⁸ Schedule 1 of CBIR.

In the case of *Re 19 Entertainment Limited* [2016] EWHC 1545 (Ch) the English Court had to consider the meaning of foreign representatives within the meaning of the CBIR (2006) in the case of Chapter 11 Bankruptcy Proceedings in terms of US Law.

Chapter 11 proceedings are 'debtor in possession' proceedings which meant that the company's directors retain control over the management of the company.

The applicants in this case were directors of *19 Entertainment Limited*, a holding company specializing in entertainment content.

The applicants applied for recognition of the Chapter 11 proceedings by the English court and for discretionary relief in the UK.

The court had to decide whether the applicants (i.e. the directors of the company) were 'foreign representatives.' The Court held, at para 16, "Under s.1107 of the US Bankruptcy Code, a debtor in possession shall have all the rights and powers and shall perform all the functions and duties of a trustee serving in a case under that Chapter."

Therefore the Court accepted that in US proceedings, the continuation of a debtor in possession to operate and manage the business during the bankruptcy proceeding under Chapter 11 is the norm and flowing therefrom, that the directors were indeed foreign representatives.

Application: It would appear that the Deposit Guarantee Fund (DGF) is a governmental institution. There is no reason to conclude that a governmental institution does not qualify as a "body" for purposes of the definition above.

It would appear further that the DGF has powers in terms of Article 34 as well as Articles 35(5) and 36(1) of the DGF Law which powers may be considered to be insolvency related.

In terms of Article 34, and once the bank has been declared insolvent, it is the DGF that provisionally administers the Bank, including establishing a *moratorium* staying legal actions and execution of the bank's assets.

Further to this, in terms of Article 77 of the Law of Banks and Banking Activity ("LBBA") the DGF automatically becomes the liquidator of the Commercial Bank once it receives confirmation of the National Bank's decision to revoke the Commercial Bank's licence.

The power to appoint an interim administrator with powers to liquidate fall within the sole purview of the DGF. However it should be noted that although the DGF appoints its own officer, it retains prime functions associated with the winding-up of the debtor, notably the power to sell off assets.

In conclusion, on a reading of the above-mentioned Articles as well as the application of *Re 19 Limited*, the DGF, and its authorized representative Ms G can be said to qualify as a body, or a person to "administer the reorganization or liquidation of the debtor's assets."

*** End of Assessment ***