



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 points: 44 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] 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 **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] 9 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.

As a starting point, the appropriate date for determining the COMI of a debtor or whether an establishment exists is the date of the commencement of the foreign proceeding. However, in circumstances where the COMI of a debtor has moved, if such move is proximate in time to the commencement of the foreign proceedings, evidence for establishing COMI will be harder to establish, particularly the requirement that it must be readily ascertainable by third parties, such as creditors. This has led the courts in the US¹, and more recently in the UK², to take a more nuanced approach to the question of establishing COMI. The filing of the Chapter 15 (recognition) proceedings in *Morning Mist* (in the US) and the date of the recognition

¹ *Morning Mist Holdings Ltd v Kryz (Matter of Fairfield Sentry Ltd)* (2nd Cir Appeals Apr. 16, 2013)

² *Re Toisa Limited* (unpublished judgment of ICC Judge Catherine Burton of 29 March 2019), discussed in Lexis Nexis Update "Clarity on cross-border conundrum (*Re Toisa Limited*)", Charlotte Moller and Harry Rudkin of Reed Smith LLP and Adam Goodison of South Square Chambers.

application in *Re Toisa* (in the UK) was considered to be the appropriate date for establishing COMI. In *Morning Mist* the 2nd Circuit considered any relevant events occurring in that period such as liquidation activities can be considered in the COMI analysis. This approach has seemingly been taken in order to avoid COMI shifting for forum shopping purposes.

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 relates to Article 30(c) of the Model Law dealing with concurrency of two foreign non main proceedings, and provides that no foreign non-main proceeding is *a priori* treated preferentially and that the court must grant, modify or terminate relief for the purpose of facilitating coordination of the two proceedings.

Statement 2 relates to the 'hotchpot rule' in Article 32 of the Model Law. This rule serves to prevent a creditor obtaining more favourable treatment than the other creditors in the same class by obtaining payment of the same claim in insolvency proceedings in other jurisdictions.

Statement 3 relates to Article 31 of the Model Law which provides that for the purposes of opening a domestic insolvency proceeding, where recognition of a foreign main proceeding has been obtained, there is a rebuttable presumption of insolvency in relation to the debtor.
The correct answer is 16(3)

Question 2.3 [2 marks] 2 marks

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

The English Court of Appeal held that the indefinite Moratorium Continuation sought did not satisfy the test of necessity in Article 21(1) of the Model Law because although theoretically it could be argued that the IBA creditors who participated in the restructuring plan could be prejudiced if the ability of IBA to repay the corporate bonds (issued as part of the plan) if the English / challenging creditors successfully enforced their stayed claims, this was a "*far too indirect and imponderable a consideration*"³.

Secondly, it was held that if the power to grant a stay under Article 21 was intended to override the substantive rights of creditors under the proper law governing their debts, one would expect this to have been made explicit in the language of the Article⁴. Similarly, it was held that if the Model Law had intended to provide for the continuation of relief once a foreign proceeding has come to an end and the foreign representative no longer holds office, this would also have been expressly stated and appropriate machinery to achieve this provided

³ *In the Matter of the OJSC International Bank of Azerbaijan* [2018] EWCA Civ 2802 (the *IBA case appeal*) at 87

⁴ *Idem*, at 88-89

for. As the restructuring plan as an insolvency proceeding had served its purpose and IBA was trading normally, there was no scope for further orders providing / extending previously granted relief in aid of the insolvency proceedings⁵.

Question 2.4 [2 marks] 2 marks

In terms of relief, what should the court in an enacting State, where a domestic proceeding has already been opened in respect of the debtor, do after recognition of a foreign main proceeding? In your answer you should **mention the most relevant article of the MLCBI**. What (ongoing) duty of information does the foreign representative in the foreign main proceeding have towards the court in the enacting State? Here too you are required to **mention the most relevant article of the MLCBI**.

When a foreign main proceeding is recognised, the automatic relief as provided for in Article 20 of the Model Law can apply. However, this is not so where domestic proceedings are already afoot (Article 29(a)). In these circumstances, the court can, at the request of the foreign representative, exercise its discretionary power in Article 21(1) to grant appropriate relief where necessary to protect the debtor's assets and / or the interests of creditors. The court in the enacting state will only grant appropriate relief which is necessary if it is not inconsistent with the domestic insolvency proceedings. From the time of filing the recognition application, the foreign representative has an ongoing duty to inform the court in the enacting State of (i) any substantial change in the status of the recognised foreign proceeding or the status of the foreign representative's appointment and (ii) any other foreign proceedings regarding the same date about which the foreign representative becomes aware (Article 18 of the Model Law).

QUESTION 3 (essay-type questions) [15 marks in total] 11 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]

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

The foreign representative can benefit from the *locus standi* rights afforded by Articles 9 to 12 of the Model Law, as implemented in State A. Article 9 provides for direct access to the Court in State A but does not automatically vest the foreign representative with any other rights or powers. Article 11 provides for direct access to the Court in State A for the purposes of opening domestic proceedings. No prior recognition is required for access for this purpose⁶ or for the purpose of access under Article 9. Upon recognition of the foreign proceedings, being granted, Article 12 provides standing for the foreign representative to make petitions, requests or submissions in any domestic proceedings already afoot in State A. However, no other specific powers or rights vest with the foreign representative⁷. Appropriate relief will need to

⁵ *Idem*, at 97-98 and 100-101

⁶ UNICITRAL Guide to Enactment, p57, paras 112-114

⁷ *Idem*, p 58 115-117

be applied for and granted in accordance with Article 21 of the Model Law. These rights of access save the foreign representative the need to meet formal requirements such as obtaining licenses or consular action in order to have standing before the Court of State A for the purposes described above.

The foreign representative can also avail themselves of certain provisions which facilitate effective coordination, such as the 'Safe Conduct Rule' provided for in Article 10 which ensures that the Court in State A will not assume jurisdiction over all of the assets of the Debtor on the ground that recognition of the foreign proceeding has been applied for. This alleviates any concerns that the foreign representative may have the recognition application will trigger an all-embracing jurisdiction which State A might otherwise attempt to invoke. Similarly, foreign representatives can be assured that creditors of the Debtor whose claims have been submitted in the foreign proceedings will not be discriminated against for the purposes of commencing and participating in local proceedings (Article 13 of the Model Law), nor will their claims be ranked lower than that of generally unsecured claims. Pursuant to Article 14 of the Model Law, foreign creditors are also entitled to individual notification of, amongst other things, commencement of local proceedings and time limits to file claims. These principles aim to save time and expense, avoid value destruction and a grab for assets. They also provide comfort and transparency.

For full marks on this question, reference should also be made to coordination rights in art. 25-27.

Question 3.2 [maximum 5 marks] 4,5 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.

In order for a recognition application to be granted pursuant to Article 17 of the Model Law, assuming that the foreign proceeding qualifies as such under Article 2(a) and that the foreign representative qualifies as such under Article 2(d), the foreign representative will also need to satisfy and have regard to the following:

(i) The evidential requirements prescribed by Article 15 of the Model Law require the application to be accompanied by a certified copy of the decision commencing the foreign proceeding and appointing the foreign representative or a certificate from the foreign court affirming the existence of the foreign proceeding and of the appointment of the foreign representative or in the absence of the former evidential options, any other evidence acceptable to the court of the said existence and appointment. In addition, the application must be accompanied by a statement identifying all foreign proceedings relating the Debtor about which the foreign representative is aware. Translations of the above mentioned documents into the official language of State A may also be required.

(ii) The Model Law may be restricted or prevented from applying in the event of a conflict between the Model Law and any international treaties or other form of multi-State agreement. In such circumstances, the treaty or multi-State agreement would prevail⁸.

⁸ Re Standard International Bank Limited [2009] EWHC 1441 (Ch) and [2010] EWCA 137 (CA) pp 48-49, paras 91-93; and Judicial Perspective, pp 48-49, paras 91-93.

(iii) Exclusions may apply to certain types of proceedings (if excluded by State A in its implementation of the Model Law), such as if the Debtor is required to be administered under a special regulatory regime⁹, as may be the case for banks and insurance companies¹⁰. Although the Model Law cautions against inadvertently or undesirably limiting to the right to seek assistance or recognition on public policy reasons¹¹, theoretically, State A could invoke Article 6¹² to exclude on public policy grounds. For example, proceedings concerning public utility companies or consumers / non-traders may require special considerations and the foreign representative should take steps to ascertain if any such exclusions are expressly stated in State A's national insolvency laws. However, as a general rule and where no such specific exclusions apply by virtue of a domestic law, the public policy exception (Article 6 of the Model Law) should rarely be the basis for refusing an application for recognition, although it may be a basis for limiting the nature of the relief sought.

(iv) Limitations will be placed on the foreign proceedings in the event that a domestic proceeding is already or afoot or commenced after the foreign proceedings are afoot and / or recognised. As Article 29 makes clear, primacy will be given to domestic proceedings and the recognition of foreign proceedings does not prevent domestic proceedings from being commenced. If the foreign proceeding of the Debtor is not the main foreign proceeding, but a non-main foreign proceeding, primacy will be given to any main foreign proceeding (Article 30(a) and (b)).

(v) There will be judicial scrutiny of a recognition application and therefore full and frank disclosure is required. The application must be made at the earliest possible time and recognition can be modified or terminated if it is established that the grounds for granting it were fully or partially lacking or have ceased to exist¹³. The foreign representative must also be aware of the continuous obligation after recognition to update the Court on developments and any change in circumstances¹⁴.

Very good answer. For full marks on this question, there should just be a brief explanation on the judicial scrutiny on establishing COMI in art. 16/17.

Question 3.3 [maximum 5 marks] 2,5 marks

As far as relief is concerned, briefly explain (with reference to the relevant MLCBI articles) what pre- and post-recognition relief can be considered in the context of the MLCBI, 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.

In these circumstances, pre-recognition relief as provided for by Article 19 of the Model Law can be applied for by the foreign representative. An application of this sort may be granted by the Court in State A prior to the determination in relation to the recognition application if the relief requested is urgently needed to protect the assets of the debtor or the interests of creditors. It matters not whether the foreign proceedings are main or non-main foreign proceedings, however, if the proceedings in aid of which relief is sought is a non-main proceeding, then the Court in State A may refuse to grant the application if the interim relief

⁹ UNCITRAL Guide to Enactment, pp 35-36 at paras 55 and 56

¹⁰ Article 1(2) of the Model Law

¹¹ *Idem*, pp 36-37 at paras 67-61

¹² However, public policy exceptions should be interpreted restrictively and only applied in exceptional circumstances concerning matters of fundamental importance for the enacting State, see UNCITRAL Guide to Enactment, p52, para 104

¹³ Article 17 of the Model Law, paragraphs 3 and 4.

¹⁴ Article 18 of the Model Law.

sought would interfere with the administration of a foreign main proceeding¹⁵. Interim relief can include a stay of execution against the Debtor's assets located in State A; entrusting the administration or realisation of all or part of the Debtor's assets located in State A to the foreign representative or another person designated by the Court in order to protect and preserve the value of the assets that, by their very nature or because of other circumstances, are perishable, susceptible to devaluation or otherwise in jeopardy; and any of the following post-recognition relief provided for in Article 21 of the Model Law:

- (a) suspending the right to transfer, encumber or otherwise dispose of any assets of the debtor;
- (b) providing for examination of witnesses, the taking of evidence or delivery of information regarding the Debtor's assets, affairs, rights, obligations or liabilities; and
- (c) granting any additional relief that may be available to a domestic liquidator / office holder under the laws of State A.

If interim relief is granted, Article 19(2) provides that the Court in State A can include an appropriate notice.

On condition that the foreign proceedings are main proceedings, Article 20 provides for automatic post-recognition relief which has the following three effects:

- (a) staying the commencement or continuation of individual actions or individual proceedings (including arbitrations where possible on jurisdictional grounds) concerning the Debtor's assets, rights, obligations or liabilities;
- (b) staying the execution against the Debtor's assets; and
- (c) suspending the right to transfer, encumber or otherwise dispose of any assets of the debtor.

A potential caveat to (a) and (b) above is that the Court in State A may modify or terminate these effects if it would be contrary to the legitimate interests of a party of interest (including the Debtor)¹⁶, such as if the continuation of an arbitration would be in the interests of the parties. Further exceptions to the stays provided for under Article 20(1) may be founded upon the law of State A, where for example, open market transactions need to complete, actions need to be initiated in respect of claims which have arisen after the recognition of the foreign main proceedings or the enforcement of claims by secured parties. It must be further noted that Article 20(3) carves out a further exception in the context of rights to commence individual actions or proceedings to the extent necessary to preserve a claim against the Debtor. Additionally, Article 20(4) clarifies that domestic insolvency proceedings or the right to file claims in such proceedings are not affected by the automatic stay and suspension in Article 20(1).

If the foreign proceedings are non-main proceedings, the Court in State A has the discretionary power¹⁷ to grant appropriate relief pursuant to Article 21 of the Model Law. On an application by the foreign representative the Court will grant appropriate relief "*as necessary to protect the assets of the debtor or the interests of creditors*"¹⁸. Such relief includes the three effects attached to the automatic relief under Article 20 and various other relief, such as the extension

¹⁵ Article 19(4) of the Model Law.

¹⁶ Article 20(2) of the Model Law

¹⁷ The principles relevant to the exercise of discretion in relation to applications for, or to discharge a stay under Article 21 of the Model Law were considered by the English Court in *In the matter of Armada Shipping SA* [2011] EWHC 216 (Ch) and *Re Pan Ocean Co Ltd* [2015] EWHC 1500 (Ch)

¹⁸ Article 21(1) of the Model Law; see also UNCITRAL Guide to Enactment, pp 87-89 at paras 189-195 and *The Judicial Perspective*, pp 57-84, paras 168-186.

of any interim relief granted pursuant to Article 19(1) of the Model Law and any additional relief that may be available to a domestic liquidator / office holder under the law of State A¹⁹.

In addition to the test of necessity under Article 21(1), a condition for the granting of the relief requested by the foreign representative is that the Court must be satisfied that the relief relates to assets that, under the law of State A, should be administered in the foreign proceeding, or concerns information required in those proceedings. Therefore, the relief should not interfere with the administration of another insolvency proceeding (albeit it is noted there are no concurrent proceedings in this scenario), nor must it be inconsistent with or go beyond that which the law of State A provides for. An example of this might be seen in the exercise of the limitation provided for under the Article 6 'public policy' exception, whereby if the relief sought would run contrary to a right enshrined or protection afforded by the domestic law of State A, it is unlikely to be granted.

In relation to limitations and or restrictions, the foreign representative would not be able to enforce an insolvency-related *in personam* judgment, which were based, for example, on insolvency avoidance powers in the foreign representatives. This was the result of the decision of the English Supreme Court in *Rubin v Eurofinance SA*²⁰. It remains to be seen whether following the implementation of the Model Law on recognition and enforcement of insolvency related judgments (**MLREIJ**), the decision of the Supreme Court will be reconsidered and / or would have been decided differently. However, until the **MLREIJ** any recognition of an insolvency-related judgment could not form part of the relief sought by the foreign representative.

Another case which serves to limit the relief the foreign representative may seek is the *IBA Case*²¹ in which a Moratorium Continuation application was refused. Following the English Court of Appeal decision in *IBA*, it is likely that the Court in State A would only grant an indefinite Moratorium Continuation if satisfied that (i) the stay would be necessary to protect the interests of the debtor's creditors and (ii) the stay would have to be an appropriate way of achieving such protection. Were a Moratorium Continuation sought by the foreign representative in order to prevent certain creditors from enforcing their claims in State A, such relief is likely to be refused.

Thirdly, the foreign representative should not expect the law of the forum of the foreign proceedings to override the law of State A, so as to give effect to insolvency law in the foreign representatives jurisdiction for the provision of relief which goes beyond what would be granted in a domestic insolvency under the law of State A²².

Good answer, however reference should also be made to art. 3, art. 6 and art. 22 on adequate protection.

Question 3.4 [maximum 1 mark] 1 mark

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?

¹⁹ See UNICITRAL Guide to Enactment, pp 87-88, para 189 which clarifies that "(...) *The types of relief listed in Article 21(1) are typical of the relief most frequently granted in insolvency proceedings; however, the list is not exhaustive and the court is not restricted unnecessarily in its ability to grant any type of relief that is available under the law of the enacting State and needed in the circumstances of the case*".

²⁰ [2010] UKSC 46

²¹ *In the Matter of the OJSC International Bank of Azerbaijan and the CBIR 2006 – Bakshiyeva v Shernank of Russia, et al.* [2018] EWHC 59 (Ch) (the **IBA Case**); and [2018] EWCA Civ 2802 (the **IBA Case Appeal**).

²² *Fibria Celulose A/S v Pan Ocean Co Ltd* [2014] EWHC 2124 (Ch).

Where a worldwide freezing order granted as pre-condition interim pre-recognition relief has been ordered in order to preserve the assets of the Debtor and avoid dissipation, although possible, it is unlikely to continue post-recognition by virtue of Article 21 of the Model Law, because the foreign representative will be necessarily seek relief enabling the administration or realisation of the Debtor's assets in State A in order to preserve their value for the benefit of the liquidation estate. Moreover whereas the freezing order would serve to preserve the Debtor or any third party on instructions of the Debtor to appropriate assets, the foreign representative, upon recognition, will have the requisite responsibility to administer those assets which will incidentally relinquish the ability for any other party to take any steps which would be adverse to the interested stakeholders in the estate.

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] 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.

The Bank's liquidation was invoked by, and as part of, a special insolvency regime, which it is said does not exclude the Bank from the scope of the Model Law, for the purposes of answering this question. However, whether the liquidation of the Bank comprises a "foreign proceeding" within the meaning of Article 2(a) of the Model Law and whether the Applicants fall within the description of "foreign representatives" as defined by Article 2(d) of the Model Law are necessary preconditions for the granting of recognition.

4.1.1

In addressing the first precondition, Article 2(a) defines "foreign proceeding" to mean "*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 reorganisation or liquidation*".

This definition comprises a number of elements which have been interpreted by courts in States such as England (where the Model Law has been implemented by way of the UK Cross-Border Insolvency Regulations 2006 (CBIR) and meaning ascribed by relevant guidance texts²³. As the CBIR is the English adoption of the Model Law, reference to the Model Law should be taken to apply by extension to the CBIR.

The application of Ms G and the DGF for recognition is being pursued before the English court and accordingly the *Agroker*²⁴ judgment as well as other English cases are particularly instructive when applied to the facts of this case. Somewhat similar to the circumstances giving rise to the proceedings in *Agroker*, the Bank's liquidation was instigated by an administrative process in Country A (a foreign state) which empowers the governmental body, the DGF, to act in the Bank's provisional administration and liquidation.

The said administrative process first commenced with the NB's classification of the Bank as "troubled"²⁵ on 19 January 2015. On 17 September 2015 the NB classified the Bank as "insolvent" pursuant to article 76 of the LBBA²⁶. On the same day, the DFG passed a resolution

²³ Such as The Judicial Perspective, pp 25-31 at paras 70-92 and the UNCITRAL Guide to Enactment.

²⁴ *In the matter of Agroker* DD [2017] EWHC 2791 (Ch). It is to be noted that an appeal of this judgment has been lodged which has not yet resulted in a decision. This judgment therefore remains good law as at the time of this assessment.

²⁵ Pursuant to Article 75 of the Law of Country A on Banks and Banking Activity (LBBA)

²⁶ Relevant criteria for classification of insolvent under Article 76 includes the that (a) the bank's regulatory capital amount or standard capital ratios have reduced to one third of the minimum level specified by law; (ii) within 5 consecutive working days, the bank has failed to meet 2% or more of its obligations to depositors or

commencing the process of withdrawing the Bank from the market and appointed Ms C as interim administrator. On 17 December 2015 the NB formally revoked the Bank's liquidation, following which and in accordance with article 34 of the DGF Law and article 77 of the LBBA, the DGF was automatically appointed as liquidator of the Bank and initiated the liquidation procedure. The DGF appointed Ms C as the authorised person to whom powers of the liquidator were delegated²⁷. Ms C was subsequently replaced for Ms G (one of the applicants) with effect from 17 August 2020. The stages of the administrative process described above, followed in accordance with the relevant provisions of the LBBA and the DGF Law are likely to be considered a constitute "a proceeding" and in particular, are likely to be categorised as "administrative". The administrative proceeding of the Bank is being conducted in Country A, which (not being England), is a "foreign State".

We are told that on 7 September 2020, the DGF resolved to approve an amended list of creditors' claims totalling approximately USD 1.113 billion. This step and the initially comprised list was an exercise of one of the many powers that the DGF has, upon being automatically appointed as liquidator under Article 77 of the LBBA, as conferred on it by Article 37 of the DGF. In addition to compiling a register of creditor claims, the DGF has extensive powers conferred on it by Article 37 of the DGF. Such powers include the ability to exercise management powers over the Bank, the power to take steps to find, identify and recover property belonging to the Bank, the power to dismiss employees and withdraw from / terminate contracts and to dispose of the Bank's assets, and powers of sale, distribution and the power to bring claims for compensation against persons who inflicted harm on the Bank. A key consideration is whether substantially all of the assets and liabilities of the debtor are dealt with in the proceeding²⁸. As the DGF has settled a list of creditors' claims presumably for the purpose of ensuring that all creditors of the Bank²⁹ benefit from the execution of all of the other extensive powers that the DGF can exercise over the assets and liabilities of the Bank, this strongly indicates that the "collective in nature" element of the definition of "foreign proceeding" for the purpose of Article 2(a) of the Model Law, would be satisfied.

We are not told in specific terms the extent to which the assets and affairs of the Bank are subject to control or supervision (if any) by the courts of Country A. Given the provisional administration and liquidation in Country A arise from regulatory functions of governmental bodies, it is possible that the courts do not have any control. However, this does not mean proceedings would not qualify as "foreign proceedings" for the purposes of Article 2(a) of the Model Law as the Model Law specifies neither the control or supervision required to satisfy this element of the definition, not the time at which that control or supervision should arise. In Moreover, this may be potential rather than actual as stated in The Judicial Perspective³⁰ and as noted in *Lex Agroker*. Most noteworthy is that control and supervision can be that exercised by an insolvency representative which itself is subject to control or supervision by a court or regulatory authority³¹, as is the case here with Ms G and the DGF.

As to whether the administrative proceeding is authorised or conducted under a law relating to insolvency. The relevant legislation in Country A comprises the LBBA and the DGF Law which prescribe a specific insolvency procedure for banks in Country A. It matters not that

creditors; and (iii) the bank, having been declared as troubled, then fails to comply with an order or decision of the NB and / or request by the NB to remedy violations of the banking law.

²⁷ Pursuant to Article 48(3) of the DGF Law.

²⁸ UNCITRAL Guide to Enactment, pp 39-40 at paras 69 to 70.

²⁹ Collective relating to the Bank and its own creditors, not creditors of others as noted by Sberbank in *Agroker*

³⁰ P30 at para 85

³¹ Betcorp Limited 400 B.R. 266, 283 -284

neither of these laws specifically includes the word "insolvency"³². Paragraph 73 on page 41 of the UNCITRAL Guide to Enactment clarifies that the language "*authorised or conducted under a law relating to insolvency*" is intended to provide a description sufficiently broad to encompass a range of insolvency rules, irrespective of the type of statute or law in which they might be contained and does not require that the relevant law or rules deal exclusively with insolvency. It is not known from the facts whether the LBBA addresses other issues in addition to insolvency of banks in Country A, but from its title and the word "Activity", it is likely that it does. Although the facts inform that the principal task of the DGF (being a governmental body of Country A) is to provide deposit insurance to bank depositors, this does not detract from the DFG Law being a law relating to insolvency as we know the DGF is also responsible for withdrawing insolvent banks from operation and winding down their operations via liquidation.

The words "is for the purpose of reorganisation or liquidation" accords with the stated purposes of addressing insolvency or severe financial distress as per the guidance given by the English court in *Sturgeon Central*³³. In *Agroker* it was held that the purpose of the *Lex Agroker* was to protect the stability of the economic system against systemic shocks by enabling the restructuring of companies of systemic importance that get into financial difficulty and, if restructuring failed, by transforming it into a bankruptcy proceeding. This was held to be a law for the purpose of reorganisation or liquidation within the meaning of the CBIR. Applying this to this set of facts, it is readily apparent that the Bank was in financial distress³⁴. The NG identified several breaches or deficiencies including falling below NB's minimum capital requirements, there being 10 months of loss making-activities and reduction in the Bank's holding of highly liquidation assets (amongst others) rendered the provisional administration and later, the liquidation, to be necessary for the purposes of limiting the loss suffered by depositors and creditors of the Bank. The powers given to the DGF and the process which has been followed subsequent to the findings of the NG to withdraw the Bank from the market and entering it into an administrative followed by an insolvency procedure satisfy this criteria for the purposes of qualifying as a "foreign proceeding".

Considering all of the above, it is highly likely that when considering whether to recognise the proceedings, the English Court would deem these proceedings to be "foreign proceedings" for the purposes of satisfying the criteria in Article 2(a) of the Model Law.

An impressive answer!

4.1.2

In relation to the second precondition, Article 2(d) defines "foreign representative" 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*".

Interpretative guidance in relation to these elements can be found in the UNCITRAL Guide to Enactment (**GE**) and the Guide to Enactment and Interpretation of the UNCITRAL Model Law on Cross Border Insolvency (**GEI**)

³² This was clarified in *Agroker* by the English Court which held that the Model Law does not require "insolvency law" as a label; it being sufficient if the law deals with or addresses insolvency or severe financial distress.

³³ *Ibid* at p6 applying "a purpose approach" and reading 'for the purpose' in context.

³⁴ The Bank is clearly not solvent and proceedings involving a solvent debtor would not, as the English court held in *In the matter of Sturgeon Central Asia Balanced Fund Ltd* [2020] EWHC 1215 (Ch), qualify as a "foreign proceeding" for the purpose of considering section 2(a) of the Model Law in the context of a recognition application as it would run contrary to the stated purpose and object of the Model Law.

In relation to the first element: "a person or body, including one appointed on an interim basis" we are told that the DGF together with Ms G in her capacity as authorised officer of the DGF in respect of the Bank's liquidation are the applicants. The DGF is a governmental body of Country A and its powers include the power to act in a bank's interim or provisional administration and its ultimate liquidation. The Model Law does not define the words "person" or "body", However, paragraph 86 of the GEI notes this criterion is sufficiently broad to include appointments that might be made by a special agency other than the court. "Body" is interpreted as meaning "*an artificial person created by a legal authority*"³⁵ and given the DGF is a governmental body, it is likely that the DGF would be considered a "body" for the purposes of Article 2(d).

Article 48(3) of the DGF Law empowers the DGF to delegate its powers to an "authorised officer" such as Ms G. With reference to Article 35(1) Ms G appears to be suitably qualified. It is noted that once appointed, Ms G becomes accountable to the DGF for her actions and may exercise the powers delegated to them by the DGF in pursuance of the bank's liquidation. Ms G's appointment was made pursuant to Resolution 1513 of the Executive Board of Directors of DGF and notes that Ms G is a "leading bank liquidation professional".

The second element "*authorised in a foreign proceeding*" is satisfied noting that the DGF is authorised to act in the Bank's liquidation pursuant to the LBBA and the DGF Law discussed above under 4.1.1. Ms G is authorised to act by Resolution 1513. It is noted that the Model Law does not specify that the foreign representative must be authorised by the foreign court.

In relation to the third element "*to administer the reorganisation or the liquidation of the debtor's assets or affairs or to act as a representative of the foreign proceeding*", Resolution 1513 delegates to Ms G all liquidation powers in respect of the Bank set out in the DGF Law, including articles 37, 38, 47-52, 521 and 53. However, excluded from Ms G's suite of powers is 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 (although it is noted that Ms G has the authority to sign all agreements related to the sale of the bank's assets). Each of the excluded powers remains vested in the DGF as the Bank's formally appointed liquidator.

It is said that the DGF automatically became the Bank's liquidator on the date the NB gave its decision to revoke the Bank's licence and at that point it acquired the full powers of a liquidator under the law of Country A. However, even prior to the liquidation, pursuant to Articles 35(5) and 36(1) the DGF had full and exclusive rights to manage the Bank and all powers of the Bank's management. The DGF and Ms G together, have an unlimited mandate for the administration of the Bank's affairs in respect of its liquidation. As this element of the definition is disjunctive, either arm can be relied upon. Therefore, it is unlikely to matter that Ms G's powers have been curtailed in certain ways. The DGF is authorised to administer the liquidation of the debtor's assets or affairs which would include the ability to bring claims and arrange for the sale of the Bank's assets. The DGF is the appointed liquidator and Ms G an authorised officer of DGF, and duly authorised to act as a foreign representative in the proceedings. It perhaps matters not which arm of the definition is relied upon on the basis that paragraph 86 of the GEI indicates that the fact of appointment of foreign representative in the proceeding to act in either or both capacities is sufficient for purposes of Model Law.

Accordingly, the applicants are likely to satisfy the definition of "foreign representative" and meet this precondition for the purposes of the recognition application.

³⁵ Black's Legal Dictionary

*** End of Assessment ***