INSOL INTERNATIONAL

FOUNDATION CERTIFICATE

IN INTERNATIONAL INSOLVENCY LAW

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 marks: 30 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] 7 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]

Question 2.1 [maximum 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 determining the COMI of a debtor, or whether an establishment exists, is the date of commencement of the foreign proceeding.

Two key factors in determining a debtor's COMI under the Model Law are (i) the location where the central administration of the debtor takes place, and (ii) the location which is readily ascertainable by the debtor's creditors.

Where in some instances the debtor's COMI can move, if this occurs near the time of the commencement of the foreign proceeding, it will be hard to establish this through evidence.

For full marks on this question, the following should be included:

1. The MLCBI does not expressly indicate the relevant date for determining the COMI of the debtor. The same is true with respect to determining the existence of an establishment. However, the UNCITRAL Guide to Enactment suggests that the date of commencement of the foreign proceedings is the appropriate date for determining the existence of the COMI or an establishment of the debtor (see paragraph 143 of The Judicial Perspective).
2. The UNCITRAL Guide to Enactment explains (see paragraphs 159 and 160) that the date of commencement of the foreign proceeding is the appropriate date for determining the existence of the COMI of the debtor as well as an establishment of the debtor. Where the business activity of the debtor ceases after the commencement of the foreign proceeding, all that may exist at the time of the application for recognition to indicate the debtor's COMI or establishment is that foreign proceeding and the activity of the foreign representative in administering the insolvency estate. In such a case, determination of the COMI or an establishment by reference to the date of the commencement of those proceedings would produce a clear result. The same reasoning may also apply in the case of reorganisation where, under some laws, it is not the debtor that continues to have a COMI, but rather the reorganised entity. In such a case, the requirement for a foreign proceeding that is taking place in accordance with article 17(2)(a) is clearly satisfied and the foreign proceeding should be entitled to recognition. Moreover, taking the date of commencement to determine COMI provides a test that can be applied with certainty to all insolvency proceedings. [see also pages 28/29 of the Guidance Text]
3. However, US courts may take a slightly different approach based on the *Morning Mist Holdings Ltd v. Krys (Matter of Fairfield Sentry Ltd)* (2nd Cir Appeals April 16, 2013) (which was recently followed in the UK in *Re Toisa Limited* – see footnote 94 on page 28 of the Guidance Text). The US court will most likely consider the date of the recognition application pursuant to the US Chapter 15 as the appropriate date for determining the COMI or the existence of an establishment.

Question 2.2 [maximum 3 marks] 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: The concept refers to concurrent proceedings which is addressed by Article 29 of the Model Law. The correct answer is art. 30 (c)

Statement 2: This relates to the Hotchpot Rule which is addressed by Article 32 of the Model Law and states that it is without prejudice to secured claims.

Statement 3: The concept in question refers to a debtor's COMI and this is addressed by Article 16 of the Model Law.

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**.

In the *IBA* case, OJSC International Bank of Azerbaijan ("**IBA**") proposed a restructuring plan in Azerbaijan. Gunel Bakhshiyeva (an Azeri foreign representative for IBA) made application for relief in the form of an indefinite continuation of the automatic moratorium under Article 21 of the Model Law. This moratorium application was made because IBA had two creditors for which liabilities were owed pursuant to debt instruments governed by English law. The indefinite moratorium was applied for with the intention to allow the Azerbaijan-based restructuring to take place without the English law creditors enforcing the debts in the UK based on the 'Gibbs Rule'. Mr. Justice Hildyard ruled that the relief being sought be denied on the basis that a permanent stay cannot be deployed as a way around the Gibbs Rule.

In the *IBA* case appeal, the decision of Mr. Justice Hildyard was upheld that the relief should not be granted. The Court of Appeal ruled in favour of the English law creditors and held *inter alia* that the relief would only be required where to do so would be to protect the interests of IBA's creditors, but the Court of Appeal ruled that IBA's creditors needed no further protection for the Azeri restructuring to take place.

For full marks issue "2" of the following should also be addressed:

- According to the English Court of Appeal, the real issue was whether as a matter of settled practice the UK court should not exercise its power to grant the indefinite moratorium where to do so would (i) in substance prevent the English creditors (that is the Challenging Creditors) from enforcing their English law rights in accordance with the Gibbs Rule ("Issue 1") and / or (ii) prolong the stay after the Azeri reconstruction has come to an end ("Issue 2").
- In respect of each issue, the English Court of Appeal held that:
  1. Issue 1: The UK court would need to be convinced that (a) the indefinite stay is necessary to protect the interests of IBA's creditors and (b) an indefinite stay is the appropriate way of achieving such protection. The factual evidence that can be brought before the court will ultimately decide Issue 1.
  2. Issue 2: Based on Article 18 of the MLCBI, the English Court of Appeal in the IBA case appeal held that had the MLCBI ever contemplated the continuance of relief after the end of the relevant foreign proceeding, it would have addressed the question explicitly and provided appropriate machinery for that purpose.

Question 2.4 [2 marks] 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**.

Article 20 of the Model Law sets out the details of automatic relief granted upon the recognition of foreign proceedings, being:

- Stay of the commencement or continuation of actions concerning the debtor's assets, rights obligations or liabilities;
- Stay of execution against the debtor's assets; and

- Suspension of the right to transfer, encumber or dispose of any assets of the debtor.

In addition to the discretionary power to grant relief referred to above, under Article 21(1) of the Model Law, the court in the enacting state is provided with the discretionary power to grant relief where necessary to protect either the assets of the debtor or the interests of the creditors at the request of the foreign representative. There are various other forms of relief, which can include *inter alia* providing for the examination of witnesses concerning the debtor's affairs.

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

Article 18 of the Model Law requires that the foreign representative, from the time of filing the recognition application for the foreign proceeding, promptly inform the court in the enacting state of the following:

- Any substantial change in the status of the recognised foreign proceeding or the status of the foreign representative's appointment; and
- Any other foreign proceeding regarding the same debtor that becomes known to the foreign representative.

QUESTION 3 (essay-type questions) [15 marks in total] 8 marks

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

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

Question 3.1 [maximum 4 marks] **2 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?

Under Articles 9 to 14 of the Model Law, State B's foreign representative is provided with standing in the Courts of State A (Articles 9 and 11). This would enable the foreign representative to make any representations as may be required on behalf of the Debtor within State A. Whilst this is a speculative point based on the limited information of the Debtor's proceedings, the foreign representative may need to bring or defend claims in State A as a result of actions instigated by creditors based in State A. The bringing/defending of such claims may be vital to the Debtor's restructuring plan.

Recognition of the foreign proceedings in State A should demonstrate to any State A creditors that coordination is being conducted in the interests of the State A creditors and should provide them with reassurance that their interests are being considered as part of the Debtor's wider restructuring.

Any State A creditors should be reassured that parity is maintained for all creditors under non-discriminatory principles (both domestic and foreign, or in State A and State B); this is because, as stated under Article 13 of the Model Law, it is noted that a creditor in a foreign jurisdiction will not rank below another creditor in the same creditor class purely on the basis of the claim holder being based in a foreign jurisdiction. Therefore, both State A creditors and State B creditors, so long as their claims rank in the same category, will not have priority ranking over the other. This should help the foreign representative with management and

throughout the Debtor's restructuring and should help to ensure a restructuring process takes place in a smoother manner. This in turn should serve to marginalise the work required by the foreign representative and should minimise costs of the Debtor's estate, which in turn helps to maximise the value of the Debtor's estate available to creditors.

Further, under Article 10 of the Model Law, the 'safe conduct rule' ensures that the court in State A does not assume any jurisdiction over all assets of the Debtor and maintains the principle of comity. This should serve to assist the foreign representative as a necessary step in preserving the assets of the Debtor and the value of such.

With an order for recognition of foreign proceedings, as well as preserving the Debtor's assets, the foreign representative would be better placed to source any information or records from parties located in State A on the basis of the comity principles that State A operates under the adoption of the Model Law. Sourcing of information from State A may serve to assist in the administration of the Debtor's proceedings and the guidance under Article 21 of the Model Law can further assist the foreign representative in this way if relief is granted in relation to examination of certain parties.

For full marks on this point, the following should also be addressed:

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

Question 3.2 [maximum 5 marks] 2 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.

Matters concerning foreign recognition are addressed by Articles 15-18 of the Model Law.

When making application for recognition of foreign proceedings, it is important to consider where the debtor's COMI is as this will determine whether the proceedings will be foreign main proceedings or foreign non-main proceedings (Article 17 of the Model Law), which in turn shall affect the consequences of the relief granted.

In this instance, we might assume that the Debtor's COMI is in State B, the Debtor's recognition application being made in State A would be for recognition as foreign main proceedings. If we can establish, for example, that the Debtor's registered office is in State B, then under the rebuttable presumption in Article 16(3), we can presume that the Debtor's COMI is in State B.

When making the recognition application in State A, pursuant to Article 15(2) of the Model Law, the Debtor's foreign representative must submit such application to the court with the following evidence:

- A certified copy of the decision commencing the [State B] foreign proceeding and appointing the foreign representative; or
- A certificate from the foreign court [in State B] affirming the existence of the [State B] foreign proceeding and of the appointment of the foreign representative; or
- In absence of the above, any other evidence acceptable to the court of the [State B] foreign proceedings and the foreign representative's appointment.

In addition to the evidence above, pursuant to Article 15(3) of the Model Law, the recognition application should be accompanied by a statement identifying all of the Debtor's foreign proceedings that are known to the Debtor's foreign representative.

Under Article 16 of the Model Law, State B's foreign representative must also ensure that sufficient evidence is presented with the recognition application confirming where the Debtor's COMI is. In the absence of such, then as referred to above, it will be presumed by the court that the Debtor's COMI is in the jurisdiction where its registered office is located.

Article 17 of the Model Law sets out that State A should grant recognition of the Debtor's foreign main proceedings so long as the evidence requirements under Article 15 are met.

The Debtor's foreign representative should note, however, that it has a duty under Article 18 of the Model Law to keep the court up to date on the following:

- Any substantial change in the status of the Debtor's recognised foreign proceeding or the status of the foreign representative's appointment; and
- Any other foreign proceeding regarding the Debtor that becomes known to the foreign representative.

The above is important to consider as the recognition granted by State A may be modified or terminated if it is shown to the court that the grounds for granting the application were fully or partially lacking, or have ceased to exist (Article 17(4) of the Model Law).

For full marks 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. Public policy exception: Finally, the court in State A should also ensure based on Article 6 of the Model Law that the recognition application is not manifestly contrary to public policy of State A.

Question 3.3 [maximum 5 marks] 3 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.

Matters concerning foreign recognition are addressed by Articles 19-24 of the Model Law.

Pre-recognition relief

Pursuant to Article 19 of the Model Law, pre-recognition relief may be granted by the court on a provisional basis if it is urgently required to protect either the Debtor's assets or the interests of the creditors. The Debtor's foreign representative must request such provisional relief from the court, then it is at the court's discretion to grant the appropriate relief. Under Article 19, such relief may include the following:

- Staying execution against the Debtor's assets;
- Entrusting the administration or realisation of all or part of the Debtor's assets located in State A to the Debtor's foreign representative;
- Any relief mentioned in paragraph 1 (c, d and g) of Article 21.

The foreign representative should be mindful that, unless extended by the court, any pre-recognition provisional relief granted under Article 19 of the Model Law will terminate when the recognition application is decided on.

Although pre-recognition relief may be granted by the court, the Debtor and its foreign representative should be aware that the court may refuse to grant such relief where it considers that such relief would interfere with the administration of the foreign main proceedings in State B (Article 19(4)).

Post-recognition relief

Under Article 20 of the Model Law, the following relief is automatically granted to the Debtor:

- A stay on commencement of continuation of individual actions/proceedings concerning the Debtor's actions, rights, obligations or liabilities;
- A stay on execution against the Debtor's assets; and
- Suspension of the right to transfer, encumber or otherwise dispose of any of the Debtor's assets.

The above does not, however, prevent individual actions/proceedings being brought against the Debtor to the extent required to do so for preserving a claim against the Debtor, nor does it affect a party or individual's right to request the commencement of proceedings under State A's insolvency legislation or the right to file claims in the Debtor's proceedings.

In addition to the automatic relief granted under Article 20 of the Model Law above, the Debtor's foreign representative may apply to the court for further relief. Such further relief that the court has discretion to grant is set out in Article 21(1) of the Model Law. This further relief that the court may grant regardless of whether the proceedings' recognition relates to main or non-main proceedings.

If we assume the Debtor's proceedings are seeking to be recognised in State A as foreign non-main proceedings, the foreign representative should note that relief under Article 21 will only be granted so long as the court is satisfied that in doing so relates to assets that, under State A's laws, should be administered in the foreign non-main proceedings or concerns information required in those proceedings.

Where relief is granted to under Articles 19 or 21 of the Model Law, the court must be satisfied that the interests of creditors and other interested parties (including the Debtor) are protected. Under Article 22, such relief is not necessarily unlimited and may be modified or terminated

by the court where to do so protects the interests of the aforementioned interested parties. For the court to modify or terminate such relief, this may be done at the request of the Debtor's foreign representative, a person affected by the relief or at the court's own motion.

Further consequences of foreign recognition being granted can be summarised as:

- The Debtor's foreign representative has standing to initiate actions under State A's laws to avoid, or render ineffective, any legal acts that are detrimental to the Debtor's creditors; and
- The Debtor's foreign representative has the right to intervene in local proceedings that the Debtor is a party to in State A, subject to satisfying the relevant criteria for such under State A's laws.

For full marks the following should also be mentioned:

1. Existing international obligations of State A: Based on Article 3 of the Model Law, the court in State A should again verify that there are no existing international obligations of State A (under a treaty or otherwise) that may conflict with granting the requested relief under the implemented Model Law in State A.
2. Public policy exception: The court in State A should, based on Article 6 of the Model Law, also again verify that the relief application is not manifestly contrary to public policy of State A.

Question 3.4 [maximum 1 mark] 1mark

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?

Pre-recognition interim relief is designed to provide temporary protection in the interests of the creditors at the risk of where *inter alia* the Debtor's assets may dissipate or devalue.

Whilst there would be reasonable grounds that a worldwide freezing order is a pragmatic order to make in the interim period up until the time the Debtor's foreign recognition order is made, the appropriate relief that may be granted by the court in State A is not unlimited. The making of a continued worldwide freezing order post-recognition may raise an argument as to whether the court in State A has the jurisdiction to make such an order, as was encountered in the *IBA* case.

Further, if the interim relief of a worldwide freezing order were continued post-recognition, this may interfere with the overall administration of the Debtor's proceedings in State B, which is referred to in Article 19(4), albeit Article 19 is in relation to the granting of pre-recognition relief.

QUESTION 4 (fact-based application-type question) [15 marks in total] 10 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]**; 5 marks and

4.1.2 whether the Applicants fall within the description of "foreign representatives" as defined by article 2(d) of the MLCBI **[maximum 5 marks]**.

While not all facts provided in the fact pattern 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.

4.1.1

We are assuming that the Bank is not excluded under Article 1(2) of the Model Law, therefore, the English Court can be satisfied that the Bank does not meet the criteria under that article to have its recognition application rejected.

Under Article 2(a) of the Model Law, we define the term "foreign proceeding" as "a collective judicial or administrative proceeding in a Foreign State, including an interim proceeding, pursuant to a law relating to insolvency in which proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganization or

liquidation". Under this definition, a number of qualifying criteria must be met which can be extracted by breaking down this definition into the following:

i. Proceedings are judicial or administrative and collective in nature

We must consider whether the Bank's proceedings are judicial or administrative, and collective in nature, whereby the proceedings relate to the Bank and its creditors.

We are aware that the Bank's proceedings are subject to Country A's legislation, specifically in this insolvency matter being the LBBA and DGF Law. The Affidavit that has been submitted to the English court sets out the detailed insolvency process and so should clarify the administrative procedure that the Bank's reorganization and liquidation will be subject to. This procedure is sophisticated and comprised of various structured stages which include a period in which the Bank may bring its dealings in line within the NB's regulations, the Bank is then classified as insolvent under the terms of certain criteria which incorporate the interests of the Bank's creditors, then formal insolvency proceedings commence which bestow powers upon the appointed administrator and liquidator to administer the Bank's estate in a manner that gives parity and protection to the interests of the Bank's creditors. For these reasons, we can determine that the insolvency procedure in Country A is an administrative procedure and considers the interests of the Bank and its creditors and would meet the requirement of being collective in nature.

ii. Proceedings are conducted pursuant to insolvency-related law

We must also consider whether the proceedings in Country A are being conducted pursuant to insolvency-related law. Under the details of the legislation set out under the LBBA and DGF Law, there is set out the procedure for appointing an administrator/liquidator over the Bank and further, there are number of powers set out in Country A's LBBA legislation which are granted to the duly appointed administrator/liquidator, as is set out similarly in the insolvency legislation of other jurisdictions, including that of the UK. To that end, we can be satisfied that the Bank's proceedings in Country A are being conducted pursuant to insolvency legislation.

iii. The assets and affairs subject to control or supervision of the foreign court

A further matter of consideration is whether the assets and affairs of the Bank are subject to control or supervision by a foreign court. It is difficult to confirm the extent of the involvement of Country A's courts during the Bank proceedings in Country A based on the limited information provided. Article 37 of the DGF Law establishes that "*the DGF … has extensive powers, including powers … to file property and non-property claims with a court*". This would imply some element of supervision by Country A's courts and we can assume that, although given that some of the major events appear to take place by passing of resolutions by the NB, or by automatic appointment (e.g. Article 77 of the LBBA provides that the DGF automatically becomes liquidator), this would imply that the insolvency process in Country A is largely an out of court procedure.

Under Article 4 of the Model Law, the court in the enacting state (in this instance, the UK court) may clarify if any functions relating to the Bank's recognition is being performed by a competent court or an authority other than the court. In this case, the DGF would be the appropriate authority. Based on the sophistication of Country A's insolvency legislation and procedure, which we can assume will have been ratified by the appropriate court or authorising body in Country A, we can consider that the Bank's proceedings in Country A would be under sufficient guidance and supervision of Country A's court or the DGF being the appropriate authority.

iv. For the purpose of reorganization or liquidation

We should also consider whether the Bank's proceedings in Country A are for the purpose of the Bank's reorganization or liquidation. The Affidavit submitted to the English court sets out the steps taken as part of the Bank's insolvency proceedings, which explains that if the Bank failed to remedy its breaches under the NB's regulation, it would have its banking license revoked and that in turn would result in it becoming subject to liquidation procedure. The Affidavit expressly states that "*the DGF is also responsible for the process of withdrawing insolvent banks from the market and winding down their operations via liquidation*".

Further, Article 31 of the Model Law provides for a rebuttable presumption that recognition of a foreign main proceeding is proof that the debtor is insolvent.

Determining the Bank's COMI and type of proceedings

Further to the consideration of the Bank's liquidation in accordance with the Article 2(a) definition, and in assessing the applicability of Article 31 of the Model Law, we must consider whether the proceedings shall be recognised as foreign main or foreign non-main proceedings. In order to determine such, we must consider where the Bank's Centre of Main Interests (COMI) are. Furthermore, as part of this consideration, if the Bank's liquidation is not opened in the jurisdiction of the Bank's COMI, and if the Bank does not have an establishment in that jurisdiction, the Bank's liquidation cannot be recognised as a foreign proceeding under the Model Law.

Whilst we determine where the Bank's COMI is located, under Article 16(3) of the Model Law, unless proven otherwise by sufficient evidence, the Bank's COMI shall be presumed to be where the Bank's registered office is located, which is in Country A.

I do not see any evidence in the information provided, or understood to be in the Affidavit to suggest that the Bank's COMI lies in any jurisdiction other than Country A. As such, pursuant to the rebuttable presumption stated within Article 16 of the Model Law, we can presume that the Bank's COMI is in Country A and the recognition being sought is as foreign main proceedings.

referring back to the earlier point concerning Article 31 of the Model Law, and on the basis of the information set out in the Affidavit, the English court may presume that there is sufficient evidence of the Bank being insolvent and has entered into proceedings in Country A for the purpose of reorganization, then ultimately, liquidation.

In summary of considering the criteria and in terms of the definition stated in Article 2(a), I believe that the Bank's liquidation comprises a foreign proceeding within that meaning.

For full mark there should be a more thoroughly description of the requirements of art. 2 (a) and how this must be interpreted. Along the following lines:
Recognition of the Bank's liquidation under the CBIR

1. In order to be recognised, the Bank's liquidation must meet the definition of "*foreign proceeding*" set out in article 2(a) of the MCBI.
2. Here reference can also Be made to paragraphs 6.4.1 and 6.4.2 of the Guidance Text and in particular the *Agrokor* case discussed there.

"*Collective proceeding*"

3. UNCITRAL's guide for judiciary, "The Model Law on Insolvency: The Judicial Perspective" (2013) explains the requirement for proceedings to be "*collective*":

> "The UNCITRAL Model Law was intended to apply only to particular types of insolvency proceedings. The Guide to Enactment and Interpretation indicates that the notion of a "collective" insolvency proceeding is based on the desirability of achieving a coordinated, global solution for all stakeholders of an insolvency proceeding. It is not intended that the Model Law be used merely as a collection device for a particular creditor or group of creditors who might have initiated a collection proceeding in another State, or as a tool for gathering up assets in a winding up or conservation proceeding that does not also include provision for addressing the claims of creditors. The Model Law may be an appropriate tool for certain kinds of actions that serve a regulatory purpose, such as receiverships for such publicly regulated entities as insurance companies or brokerage firms, provided the proceeding is collective as that term is used in the Model Law."

4. The Guide to Enactment and Interpretation of the UNCITRAL Model Law (2014) explains that when:

> "evaluating whether a given proceeding is *collective* for the purpose of the Model Law, a key consideration is whether substantially all of the assets and liabilities of the debtor are dealt with in the proceeding, subject to local priorities and statutory exceptions, and to local exclusions relating to the rights of secured creditors. A proceeding should not be considered to fail the test of collectivity purely because a class of creditors' rights is unaffected by it."

5. Based on the facts provided the understanding is that *all* of the Bank's creditors are entitled to claim in the liquidation and that their claims are met from available assets, according to the statutory order of priorities. Consequently, the conclusion can be reached that the Bank's liquidation is a "*collective proceeding*".

"Judicial or administrative"* and *"subject to the control or supervision by a foreign court"

6. The collective proceeding, must be "*judicial or administrative*" where "*the assets and affairs or the debtor are subject to control or supervision by a foreign court*".
7. The term "*foreign court*" is defined at article 2(e) of the MLCBI and means: *"a judicial or other authority competent to control or supervise a foreign proceeding"*.
8. The Guide to Enactment notes: *"87) A foreign proceeding that meets the requisites of article 2, subparagraph (a), should receive the same treatment irrespective of whether it has been commenced and supervised by a judicial body or an administrative body. Therefore, in order to obviate the need to refer to a foreign non-judicial authority whenever reference is made to a foreign court, the definition of "foreign court" in subparagraph (e) includes also non-judicial authorities."*
9. In ***Re Sanko Steamship Co Ltd*** [2015] EWHC 1031 (Ch) Simon Barker QC, noted that a foreign proceeding may be recognised where the control or supervision of the proceeding is undertaken by a non-judicial administrative body.
10. The Guide to Enactment states: *"74) The Model Law specifies neither the level of control or supervision required to satisfy this aspect of the definition nor the time at which that control or supervision should arise. Although it is intended that the control or supervision required under subparagraph (a) should be formal in nature, it may be potential rather than actual. As noted in paragraph 71, a proceeding in which the debtor retains some measure of control over its assets, albeit under court supervision, such as a debtor-in-possession would satisfy this requirement. Control or supervision may be exercised not only directly by the court but also by an insolvency representative where, for example, the insolvency representative is subject to control or supervision by the court. Mere*

supervision of an insolvency representative by a licensing authority would not be sufficient."

11. In this case the DGF has control of all of the Bank's assets and overall control of the liquidation.
12. 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.
13. 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.
14. Taking these factors into account, the Bank's liquidation is *administrative.* The assets and affairs of the Bank are subject to the control of the DGF, an official body which exercises its powers in the liquidation free from intervention by government or the NB and which should be considered, for the purposes of the definition set out in article 2(e) of the MLCBI, as a "*foreign court*".

"Pursuant to a law relating to insolvency"

15. The Guide to Enactment provides at paragraph 48:

> "Acknowledging that different jurisdictions might have different notions of what falls within the term "insolvency proceedings", the Model Law does not define the term "insolvency". However, as used in the Model Law, the word "insolvency" refers to various types of collective proceedings commenced with respect to debtors that are in severe financial distress or insolvent."

Further explanation is provided at paragraph 73:

> "This formulation is used in the Model Law to acknowledge the fact that liquidation and reorganization might be conducted under 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 purpose was to find a description that was sufficiently broad to encompass a range of insolvency rules irrespective of the type of statute or law in which they might be contained and irrespective of whether the law that contained the rules related exclusively to insolvency."

16. Article 76 of the LBBA clearly set out Country A's specific insolvency procedures for insolvent banks. The Bank's liquidation was commenced pursuant to those provisions and in my judgment should be considered by this Court as being "*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"

17. Having determined that the DGF falls within the definition of "*foreign court*", I am satisfied, that by virtue of the legislative provisions set out above, it has control of all of the Bank's assets and affairs for the purposes of administering the Bank's liquidation.

In this instance, we can highlight that the Applicants comprise of:

i. The DGF; and
ii. Ms G, in her capacity as authorised officer of the DGF of Country A in respect of the liquidation of the Bank.

Under Article 2(d) of the Model Law, we define the term "foreign representative" as "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 to act as a representative of the foreign proceeding". Therefore, in order to qualify as a foreign representative within the meaning of the Model Law, the applicants must meet two key elements.

Firstly, the Applicants must be an appointed person or body authorised in the foreign proceeding.

The first of the Applicants, being the DGF, is a governmental body of Country A. Following determination of the Bank's insolvency, under Country A's legislation, the DGF is responsible for withdrawing the Bank from the market, which is often achieve initially through a provisional administration process, and certain powers are bestowed on the DGF to administer this process, which is explained in the Affidavit.

It can then be identified that, following the conversion of the Bank's insolvency procedure from provisional administration to liquidation, under Article 77 of the LBBA, the DGF automatically becomes liquidator of the Bank.

We can, therefore, be satisfied that the DGF meets the criteria of being an authorised body.

The second of the Applicants, being Ms G, was appointed to replace Ms C as authorised officer with effect from 17 August 2020. Ms G's appointment was made by the DGF, the appropriate authorising body, and was documented under Resolution 1513.

Further, 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.*" Resolution 1513 notes that Ms G is a "leading bank liquidation professional", therefore, this can be construed as satisfying Country A's requirements under Article 35(1).

Country A's laws also explain that an authorised person may not be a creditor of the Bank, have a criminal record, have any obligations to the Bank, or have any conflict of interest with the Bank. These points are not specifically addressed in the available information concerning Ms G and any potential connection to the Bank. However, if we can assume that these points are addressed within the Affidavit and that Ms G does not have any of the above stated connection/conflict with the Bank, then under Article 16(2) of the Model Law, the English Court is entitled to presume that the Affidavit and accompanying documents/information is authentic.

We can, therefore, be satisfied that Ms G meets the criteria of being an appointed person.

The second matter to consider is that the Applicants' authorisation is either to administer the liquidation of the Bank's assets and affairs or to act as representative of the Bank's proceedings in Country A.

As set out under Article 77 of the LBBA, the DGF automatically becomes liquidator of a bank on the date it receives confirmation of the NB's decision to revoke the bank's licence. So long

as the English court is satisfied that NB has revoked the Bank's license, we can be satisfied that the DGF meets this criteria.

With regards to Ms G, the DGF's Resolution 1513 confirms Ms G's replacement of Ms C as authorised person and sets out all the liquidation powers (and exclusions/limitations) delegated to Ms G. We can, therefore, be satisfied that Ms G meets this criteria.

In summary of the above, I am of the opinion that the Applicants, comprising of both the DGF and Ms G, fall within the description of "foreign representatives".

It should also be noted that it is not a requirement for the Applicants to be authorised by the foreign court (as defined in Article 2(e) of the Model Law), being the court in Country A, to act as the Bank's foreign representatives.

*** End of Assessment ***