



SUMMATIVE (FORMAL) ASSESSMENT: MODULE 2A

THE UNCITRAL MODEL LAWS RELATING TO INSOLVENCY

Commented [SL1]: TOTAL = 38.5

77%

This is the summative (formal) assessment for Module 2A of this course and is compulsory for all candidates who selected this module as one of their compulsory modules from Module 2. Please read instruction 6.1 on the next page very carefully.

If you selected this module as one of your elective modules, please read instruction 6.2 on the next page very carefully.

The mark awarded for this assessment will determine your final mark for Module 2A. *In order to pass this module, you need to obtain a mark of 50% or more for this assessment.*

INSTRUCTIONS FOR COMPLETION AND SUBMISSION OF ASSESSMENT

Please read the following instructions very carefully before submitting / uploading your assessment on the Foundation Certificate web pages.

1. **You must use this document for the answering of the assessment for this module. The answers to each question must be completed using this document with the answers populated under each question.**
2. **All assessments must be submitted electronically in MS Word format, using a standard A4 size page and a 11-point Arial font. This document has been set up with these parameters - please do not change the document settings in any way. DO NOT submit your assessment in PDF format as it will be returned to you unmarked.**
3. **No limit has been set for the length of your answers to the questions. However, please be guided by the mark allocation for each question. More often than not, one fact / statement will earn one mark (unless it is obvious from the question that this is not the case).**
4. **You must save this document using the following format: [student ID.assessment2A]. An example would be something along the following lines: 202223-336.assessment2A. Please also include the filename as a footer to each page of the assessment (this has been pre-populated for you, merely replace the words "studentID" with the student number allocated to you). Do not include your name or any other identifying words in your file name. Assessments that do not comply with this instruction will be returned to candidates unmarked.**
5. **Before you will be allowed to upload / submit your assessment via the portal on the Foundation Certificate web pages, you will be required to confirm / certify that you are the person who completed the assessment and that the work submitted is your own, original work. Please see the part of the Course Handbook that deals with plagiarism and dishonesty in the submission of assessments. Please note that copying and pasting from the Guidance Text into your answer is prohibited and constitutes plagiarism. You must write the answers to the questions in your own words.**
- 6.1 **If you selected Module 2A as one of your compulsory modules (see the e-mail that was sent to you when your place on the course was confirmed), the final time and date for the submission of this assessment is 23:00 (11 pm) GMT on 1 March 2023. The assessment submission portal will close at 23:00 (11 pm) GMT on 1 March 2023. No submissions can be made after the portal has closed and no further uploading of documents will be allowed, no matter the circumstances.**
- 6.2 **If you selected Module 2A as one of your elective modules (see the e-mail that was sent to you when your place on the course was confirmed), you have a choice as to when you may submit this assessment. You may either submit the assessment by 23:00 (11 pm) GMT on 1 March 2023 or by 23:00 (11 pm) BST (GMT +1) on 31 July 2023. If you elect to submit by 1 March 2023, you may not**

submit the assessment again by 31 July 2023 (for example, in order to achieve a higher mark).

- 7. Prior to being populated with your answers, this assessment consists of 14 pages.*

ANSWER ALL THE QUESTIONS

Please note that all references to the "MLCBI" or "Model Law" in this assessment are references to the Model Law on Cross-Border Insolvency.

QUESTION 1 (multiple-choice questions) [10 marks in total]

Commented [SL2]: SUBTOTAL = 9 MARKS

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

Question 1.1

Which of the following statements does not reflect the purpose of the Model Law?

- (a) The purpose of the Model Law is to provide greater legal certainty for trade and investment.
- (b) The purpose of the Model Law is to provide protection and maximization of the value of the debtor's assets.
- (c) The purpose of the Model Law is to facilitate the rescue of a financially troubled business, by providing a substantive unification of insolvency law.**
- (d) The purpose of the Model Law is to provide a fair and efficient administration of cross-border insolvencies that protects all creditors and the debtor

Question 1.2

Which of the following statements are reasons for the development of the Model Law?

- (a) The increased risk of fraud due to the interconnected world.
- (b) The difficulty of agreeing multilateral treaties dealing with insolvency law.
- (c) The practical problems caused by the disharmony among national laws governing cross-border insolvencies, despite the success of protocols in practice.

(d) All of the above.

Question 1.3

Which of the following challenges to a recognition application under the Model Law is most likely to be successful?

(a) The registered office of the debtor is not in the jurisdiction where the foreign proceedings were opened, but the debtor has an establishment in the jurisdiction of the enacting State.

(b) The registered office of the debtor is in the jurisdiction of the enacting State, but the debtor has an establishment in the jurisdiction where the foreign proceedings were opened.

(c) The debtor has neither its COMI nor an establishment in the jurisdiction where the foreign proceedings were opened.

(d) The debtor has neither its COMI nor an establishment in the jurisdiction of the enacting State.

Question 1.4

Which of the following rules or concepts set forth in the Model Law ensures that fundamental principles of law are upheld?

(a) The *locus standi*/access rules.

(b) The public policy exception.

(c) The safe conduct rule.

(d) The "hotchpot" rule.

Question 1.5

For a debtor with its COMI in South Africa and an establishment in Argentina, foreign main proceedings are opened in South Africa and foreign non-main proceedings are opened in Argentina. Both the South African foreign representative and the Argentinian foreign representative have applied for recognition before the relevant court in the UK. Please note that South Africa has implemented the Model Law subject to the so-called principle of reciprocity (based on country designation), Argentina has not implemented the Model Law and the UK has implemented the Model Law without any so-called principle of reciprocity. In this scenario, which of the following statements is the most correct one?

(a) The foreign main proceedings in South Africa will not be recognised in the UK because the UK is not a designated country under South Africa's principle of reciprocity, but the foreign non-main proceedings in Argentina will be recognised in the UK despite Argentina not having implemented the Model Law.

(b) Both the foreign main proceedings in South Africa and the foreign non-main proceedings in Argentina will not be recognised in the UK because the UK has no principle of reciprocity and Argentina has not implemented the Model Law.

(c) Both the foreign main proceedings in South Africa and the foreign non-main proceedings in Argentina will be recognised in the UK.

(d) None of the statements in (a), (b) or (c) are correct.

Question 1.6

Which of the following statements regarding concurrent proceedings under the Model Law is true?

(a) No interim relief based on Article 19 of the Model Law is available if concurrent domestic insolvency proceedings and foreign proceedings exist at the time of the application of the foreign proceedings in the enacting State.

(b) In the case of a foreign main proceeding, automatic relief under Article 20 of the Model Law applies if concurrent domestic insolvency proceedings and foreign proceedings exist at the time of the application of the foreign proceedings in the enacting State.

(c) The commencement of domestic insolvency proceedings prevents or terminates the recognition of a foreign proceeding.

(d) If only after recognition of the foreign proceedings concurrent domestic insolvency proceedings are opened, then any post-recognition relief granted based on Article 21 of the Model Law will not be either adjusted or terminated if consistent with the domestic insolvency proceedings.

Question 1.7

When using its discretionary power to grant post-recognition relief pursuant to Article 21 of the Model Law, what should the court in the enacting State primarily consider?

(a) The court must be satisfied that the interests of the creditors and other interested parties, excluding the debtor, are adequately protected.

(b) The court should consider whether the relief requested is necessary for the protection of the assets of the debtor or the interests of the creditors and strike an appropriate balance between the relief that may be granted and the persons that may be affected.

(c) The court should be satisfied that the foreign proceeding is a main proceeding.

(d) All of the above.

Question 1.8

Commented [SL3]: Correct answer is (d).

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

(a) COMI is not a defined term in the Model Law.

(b) For a corporate debtor, the Model Law does contain a rebuttable presumption that the debtor's registered office is its COMI.

(c) For an individual debtor, the Model Law does contain a rebuttable presumption that the debtor's habitual residence is its COMI.

(d) All of the above.

Question 1.9

An automatic stay of execution according to article 20 in the Model Law covers:

(a) Court proceedings.

(b) Arbitral Tribunals.

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

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

Question 1.10

Article 13 grants access to the creditors in a foreign proceeding. Which of the following statements correctly describes the protection granted in Article 13?

(a) A foreign creditor has the same rights regarding the commencement of, and participation in, a proceeding as creditors in this State.

(b) A foreign creditor has the same rights as it has in its home state.

(c) All foreign creditors' claims are, as a minimum, considered to be unsecured claims.

(d) Article 13 contains a uniform ranking system to avoid discrimination.

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

Commented [SL4]: SUBTOTAL = 7 MARKS

Question 2.1 [maximum 3 marks]

Commented [SL5]: 1 mark

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

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. Also a discussion of US courts and *Morning Mist Holdings Ltd v. Krys (Matter of Fairfield Sentry Ltd)*.

[[“Center of Main Interest” COMI is defined under the MLCBI like what is captured under the EIR as the debtor’s establishment or the location of the debtor in a recognised state. Under Article 2(f) “Establishment” means any place of operations where the debtor carries out a non-transitory economic activity with human means and goods or services. Under the GEI (para 90)” under the MLCBI, the inquiry whether the debtor has an establishment is a purely factual one and will thus turn on the specific evidence adduced; unlike “foreign main proceeding” there is no presumption to assist with that inquiry.”

In the case Interdil, Srl v Fallimento Interdil, Srl [2011], “the court emphasized that the definition of “establishment” must be read as a whole, not broken down into discrete elements as each element coloured the others.”¹ Interestingly, no case law shows a specific date or appropriate date for determining the COMI of the debtor. In 2012, Tokyo High Court in an appeal held that “noting that diversity of outcomes with respect to the date at which COMI is determined does not promote uniformity of interpretation”.² It affirms why appropriate date for determining COMI is not explicitly stated in the MBCL due to the complexity and diversity of modern business operations among other factors. At best, the establishment of the debtor must be the COMI]

¹ See Digest Case Law UNCITRAL Law , pp 9 EIR: Interdil, Srl v Fallimento Interdil, Srl [2011] EUECJ C-396/09 [2012] Bus LR 1582.

² See Digest Case Law UNCITRAL Law , pp 26 , Japan: Think3, case No. (ra) 1757 of 2012 (appeal), Tokyo High Court, ch. 3, 2 (1), CLOUT 1335 noting that diversity of outcomes with respect to the date at which COMI is determined does not promote uniformity of interpretation (see discussion on timing under art. 17, para. 2)

Question 2.2 [maximum 3 marks]

Commented [SL6]: 3 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 lays down the requirements of notification of creditors."*

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

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

[Situation 1 - Deals timely notices which as be found in Article 14 (a) of the Model law which relates to notification to a foreign creditor of a proceeding.

Situation 2 - The "Safe Conduct Rule" is provided for in Article 10 which "aims at ensuring the court in the enacting state does not assume jurisdiction over all the assets of the debtor on the sole ground that the foreign representative has made an application for recognition of a foreign proceedings"³

Situation 3 - The rebuttable presumption for an undefined key concept (Center of Main Interest "COMI" a concept whose interpretation is presume under article 16 paragraph 3 of MLCBI]

Question 2.3 [2 marks]

Commented [SL7]: 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 upheld the decision that the court should first instance by Mr Justice Hildyard and focused on the jurisdictional question raised. The Court of Appeal held that the English court lacked jurisdiction to grant the indefinite Moratorium Continuation requested by the foreign representative, as it would prevent the English creditors (that is, the Challenging Creditors) from enforcing their English Law rights in accordance with the Gibbs Rule. It concluded that the IBA creditors needed no further protection in order for the foreign proceeding to achieve its purpose and that IBA could in principle have promoted a parallel scheme of arrangement in the UK, but chose not to do so.]

³ "Safe conduct" Digest of Case Law on UNCITRAL Model Law on Cross-Border Insolvency pp 30

Question 2.4 [2 marks]

Commented [SL8]: 1 mark

Art 18

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.

[The court in an enacting State, where a domestic proceeding has already been opened in respect of the debtor and recognition of a foreign main proceeding elected should give primacy to the domestic proceedings under Article 29 of the MLCBI, and the appropriate relief set forth under Article 19 should there be the need for urgent interim relief or the court can use its discretionary powers set forth under Article 21 to protect the debtors assets as well as protect the interest of creditors.

In case of Pan Ocean Co Ltd [2014] EWHC 2124 (Ch), CLOUT 1482 - "the court distinguished the interpretation given in Fogerty v Petroquest Resources, Inc. (In re Condor Ins. Ltd.), 601 F.3d 319 (5th Cir. 2010) [paras. 106, 114], CLOUT 1006, which appeared to support an interpretation of those words that would allow the recognizing court to give effect to an order of the foreign court, even if the recognizing court could not itself have made such an order in its own domestic proceedings. While noting that art. 8 of the MLCBI directed the court to have regard to the need to promote uniformity in its application, the court gave several reasons for not following the United States case. These included that although the legislative history of Ch. 15, and in particular the words "any appropriate relief", appeared to enable United States' courts to apply the law of the foreign proceedings, there was no comparable legislative history in Great Britain and it was open to the court to conclude that implementation of the MLCBI in the United States and Great Britain was not identical."⁴

The duty of information the foreign representative in the foreign main proceeding has towards the court is captured under Article 15 which provides that, the foreign representative on an application must provide a certified copy of the decision commencing the foreign proceeding and appointing him or her or a certificate from the foreign court conferring the existence of the representative or his or her appointment or a piece of evidence acceptable to the court clearly affirm representative. Also such application will accompany a statement listing the debtors foreign proceedings and where translation of the

⁴ See Digest Case Law UNCITRAL Law , pp 71 England: Pan Ocean Co Ltd [2014] EWHC 2124 (Ch), CLOUT 1482 – the court distinguished the interpretation given in Fogerty v Petroquest Resources, Inc. (In re Condor Ins. Ltd.), 601 F.3d 319 (5th Cir. 2010) [paras. 106, 114], CLOUT 1006

documents so required by the court, such must be given to the court in the language agreeable by the Court.]

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

Commented [SL9]: SUBTOTAL = 13 MARKS

Question 3.1 [maximum 4 marks] [3 out of 4 marks]

The foreign representative is considering his options to secure the value of the debtor's assets located in State A. With reference to the Model Law's provisions on access and co-operation, explain how these rights in State A can benefit the foreign representative.

[First of all, the foreign representative must satisfy the elements as a foreign representative under Article 2(d). To have access to and corporation in the Foreign Courts, Article 9 of the MBCL that access to a foreign representative to State A withstanding in the Courts [1] but does not automatically vest the powers. Article 11 also provides the standing of the enacting court having the conditions under Article 15 which specifies the recognition requirement are met. Access can be grand, where (a) a certified copy of the decision commencing the foreign proceeding and appointing the foreign representative or under Article 15(b)(c) must be met.

*Also, Article 25 provides for mandatory corporation and direct communication with the foreign court or foreign representative, where Article 25(1) provides that the courts must co-operate to the maximum extent possible with foreign representatives or foreign court. In addition, Article 26 and 27 grants the opportunity to co-operative and communicate directly with a foreign representative and foreign Courts. [1] The foreign representative must ensure that the recognition and relief to sort after does not affect the public policy under article 6 of the Model Law. In view of these, should the foreign representative explore these provisions, it will facilitate timely access to the Courts in state A, and reduce any further costs which are likely to be incurred in starting the entire case from State A [1] **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.***

Your discussion should have included the following:

- **Legal standing (Article 9 MLCBI): The key access for the foreign representative is set forth in Article 9 MLCBI. In the capacity of foreign representative, the foreign representative has automatically standing before the courts in State A without having to meet any formal requirements such as a license or any consular action. In other words, the "status" in State B of the foreign representative is automatically recognised in State A for the purpose of granting the foreign representative standing before the courts in State A. This allows the foreign representative to safeguard and pursue assets of the debtor estate in State A before its courts.**

- ***Opening domestic insolvency proceedings (Article 11 MLCBI):*** The foreign representative is further specifically entitled to apply for the opening of domestic insolvency proceedings in State A, as reflected in Article 11 of the MLCBI. Whether or not the foreign representative would wish to do this will depend on what the requirements are for opening such domestic proceedings. Can these requirements be met? On the other hand, it will depend on what the foreign representative believes he/she can get in terms of (interim) relief for the foreign proceedings in State B. In other words, are domestic insolvency proceedings really needed, or just additional time and costs that should be avoided?
- ***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.

In addition, Article 16 also encourages the Court to presume that the documents presented for the application for the recognition are very authentic, and test for the legality of such. Also, the debtor's registered office or habitual residence is presumed to be the centre of the debtor's main interest. Article 17 lays the ground for the decision on recognition whether or not the proceeding should be recognised as foreign main proceedings or foreign non-main which comes with its peculiar reliefs. If the foreign proceedings take place at the Centre of Main interest(COMI) of the debtor, the proceedings will be classified as foreign main and if the debtor has established office in the said foreign state when the proceedings is open, then its foreign non-main proceedings where reliefs can be granted either under Article 19 or Article 21 or Article 22. [1]

Restrictions

Consideration must be given to Article 3 of the MBCL which gives supremacy of the international Obligations of the enacting State. This state that "to the extent that this Law conflicts with an obligation of this State arising out of any treaty or other form of agreement to which it is a party with one or more other States, the requirements of the treaty or agreement prevail. "In the case the Model Law conflicts with a treaty or other form of multi-State agreement of the State B, then that treaty or international agreement prevails.

Under Article 6 of the MLCBI on public policy, exceptions must be considered in the enacting state. This is expressed in "Nothing in this Law prevents the court from refusing to take an action governed by this Law if the action would be manifestly contrary to the public policy of this State". Toft 453 B.R. 186, 195-196 (Bankr. S.D.N.Y 2011), CLOUT 1209, the Court "indicated that it was not an issue of fashioning relief in a manner that sufficiently protected all

interested parties, but rather one where the relief sought (a mail interception order) would directly contravene United States law and public policies”⁵

Article 9 gives foreign representatives to apply directly to a court of the enacting state but does not automatically will the power or right of the foreign representative. The limitation to the communication set out under Article 9 and 11 of the MLCBI. “ Another court has noted that the principle of direct access in article 9 did not dictate that relief must be given to the foreign representative, as relief was specifically addressed under other articles.”⁶.]

Question 3.2 [maximum 5 marks] [5 marks out of 5]

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

[Having satisfied with the preconditions of under Article 2(a) and 2(d) as “foreign proceeding” and “foreign representative”, first of Article 1(2) excludes proceedings which are subject to certain entities with special legislations such as banking, credit, insurance, clearing houses among others.

Evidence

Article 15 sets out the recognition requirements where proof of the foreign representative must show as evidence under the MLCBI. The foreign representative having been appointed must accompany such request with an application with either a certified copy of the decision commencing the foreign proceeding and appointment documents [1]

Restrictions

Consideration must be given to Article 3 of the MBCL which gives supremacy of the international Obligations of the enacting State. [1] In the case the Model Law conflicts with a treaty or other form of multi-State agreement of the State B, then that treaty or international agreement prevails. “to the extent that this

⁵ See Digest Case Law UNCITRAL Law , pp 22 United States: Toft 453 B.R. 186, 195–196 (Bankr. S.D.N.Y 2011), CLOUT 1209 – court indicated that it was not an issue of fashioning relief in a manner that sufficiently protected all interested parties, but rather one where the relief sought (a mail interception order) would directly contravene United States law and public policies

⁶ See Digest Case Law “ Case Law on Article 9” pp 29

Law conflicts with an obligation of this State arising out of any treaty or other form of agreement to which it is a party with one or more other States, the requirements of the treaty or agreement prevail."

Exclusions and Limitation

For recognition application should be granted, such exclusions under the model law must be identified. Under Article 1(2) entities that are excluded from the from the Model Law which requires special legislation such as banks, public utility companies, insurance companies among others.. [1]

In addition , Article 6 must be inhibits the foreign proceedings in the enacting state. "Nothing in this Law prevents the court from refusing to take an action governed by this Law if the action would be manifestly contrary to the public policy of this State".] [1]

Note: I am not quite sure why your answer is out of sequence, I have however given you the benefit of the doubt and included the answers above the heading "Question 3.2" as part of the answers to this question.

Question 3.3 [maximum 5 marks] [4 out of 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. Also address which restrictions, limitations or conditions should be considered in this context. For the purposes of this question, it can be assumed that there is no concurrence of proceedings.

[Pre and Post Recognition relief can be identified under Articles 19, 20, 21. Under Article 19, Relief may be granted upon application for recognition of a foreign proceeding

- 1. From the time of filing an application for recognition until the application is decided upon, the court may, at the request of the foreign representative, where relief is urgently needed to protect the assets of the debtor or the interests of the creditors, grant relief of a provisional nature, including: [1]*
 - (a) Staying execution against the debtor's assets;*
 - (b) Entrusting the administration or realization of all or part of the debtor's assets located in this State to the foreign representative or another person designated by the court, in order to protect and preserve the value of assets that, by their nature or because of other circumstances, are perishable, susceptible to devaluation or otherwise in jeopardy.*

These are aimed to ensure the proper steps are taken in a timely and orderly manner to avoid any delays and extrar costs.

Article 20 of the Model law provides for automatic mandatory relief in case the foreign representative qualifies as main proceeding. [1] Article 21 where the

Courts can use its discretionary post recognition relief, the Court in the enacting state must be satisfied that the interest of the creditors and other stakeholders are adequately protected.

Restriction and Limitation

The Courts in granting this relief must be satisfied that the reliefs relates to assets under the law of the enacting state and must not interfere with any other peculiar insolvency law or any other government policy.

Article 3 which states that, "to the extent that this Law conflicts with an obligation of this State arising out of any treaty or other form of agreement to which it is a party with one or more other States, the requirements of the treaty or agreement prevail." [1] Here, any recognition, whether pre or post will be inhibited should the relief have any conflicting provisions in the enacting state. Another limitation worth considering is whether or not foreign representative's reliefs affects any government policy. The Court will not grant any such reliefs in line with Article 6 [1] or the MLCBI which states that, "Nothing in this Law prevents the court from refusing to take an action governed by this Law if the action would be manifestly contrary to the public policy of this State."

In the case of *Toft 453 B.R. 186, 196 (Bankr. S.D.N.Y 2011)*, *CLOUT 1209* - "the court held that such powers would exceed the traditional limits on the powers of a trustee under United States law, constitute relief that was banned by statute in the United States and might subject anyone who carried it out to criminal prosecution. The mail interception order issued in the insolvency proceedings in Germany had been recognized and enforced in England on the basis that (a) the relief granted in Germany did not violate public policy of the United Kingdom because, under local law, the court could enter a mail redirection order similar to the one entered in Germany, and (b) there should be no concern about lack of procedural fairness in granting ex parte relief, because the debtor had been able to oppose the mail interception order in the proceeding in Germany, and his challenge had been rejected by the court in Germany [Order by the High Court of England and Wales, 16 February 2011]."⁷

]

For full marks your answer could have included a brief discussion on Article 22 of the Model Law as follows:

- 1. Adequate protection: Pursuant to Article 22 of the Model Law any interim relief under Article 19 of the Model Law or any post-recognition relief under Article 21 of the Model Law require the court in State A to be satisfied that the interests of the creditors and the other interested persons, including the debtor, are**

⁷ Foundation Certificate in UNCITRAL MODEL LAW, "Igor Vitalievich Protasov and Khadzhi-Murat Derev [2021] EWHC 392 (CH) (the Protasov v Derev Case) INSOL pp 34

adequately protected and any relief may be subject to conditions as the court considers appropriate.

Question 3.4 [maximum 1 mark] [1 mark]

Briefly explain - with reference to case law - why a worldwide freezing order granted as pre-recognition interim relief *ex* article 19 MLCBI, is unlikely to continue post-recognition *ex* article 21 MLCBI?

[The English Case between Igor Vitalievich Protasov and Khadzhi-Murat Derev sets forth fundamental questions whether under article 21 of MLCBI a worldwide freezing order that was granted as provisional relief under article 19 MLCBI could continue following recognition in the UK of a Russian bankruptcy as a foreign main proceeding. English Court held to have jurisdiction in the strict sense to grant such post-recognition discretionary relief, it later found that relevant restrictions and limitations existed which inhibited the proper exercise of that jurisdiction. The English court found that the English bankruptcy regime offers other forms of protection which mean that relief in the form of a freezing order or similar injunction is simply not warranted.

The court in its wisdom stated that, "the scheme of the Model Law is intended to put the foreign trustee or bankruptcy manager in the same position, as far as practicable, as an officeholder appointed under domestic law and consistent with that, the effect of recognition of a foreign main proceeding is to bring into play the same wide infrastructure of the insolvency legislation. Absent some exceptional reason, a freezing order or other similar order will not in my view be required or justified. In this case, I am not persuaded that any special or exceptional reason exists"¹⁶]

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

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

(1) Background

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

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

Proceedings were commenced in the High Court of England and Wales (Chancery Division) against various defendants on 11 February 2021 (the English Proceedings).

An affidavit (the Affidavit) sets out a detailed summary of the legislation of Country A's specific insolvency procedure for Banks. The procedure involves initial input from the National Bank (the NB) and at the time that the Bank entered liquidation, followed by a number of stages:

Classification of the bank as troubled

The NB may classify a bank as "troubled" if it meets at least one of the criteria set down by article 75 of the Law of Country A on Banks and Banking Activity (LBBA) or for any of the reasons specified in its regulations.

Once declared "troubled", the relevant bank has 180 days within which to bring its activities in line with the NB's requirements. At the end of that period, the NB must either recognise the Bank as compliant, or must classify it as insolvent.

Classification of the bank as insolvent

The NB is obliged to classify a bank as insolvent if it meets the criteria set out in article 76 of the LBBA, which includes:

- (i) the bank's regulatory capital amount or standard capital ratios have reduced to one-third of the minimum level specified by law;**
- (ii) within five consecutive working days, the bank has failed to meet 2% or more of its obligations to depositors or creditors; and**
- (iii) the bank, having been declared as troubled, then fails to comply with an order or decision of the NB and / or a request by the NB to remedy violations of the banking law.**

The NB has the ability to classify a bank as insolvent without necessarily needing to first go through the troubled stage. Article 77 of the LBBA accordingly provides that a bank can be liquidated by the NB directly, revoking its licence.

Provisional administration

The Deposit Guarantee Fund (DGF) is a governmental body of Country A tasked principally with providing deposit insurance to bank depositors in Country A. However, the Affidavit explained that the DGF is also responsible for the process of withdrawing insolvent banks from the market and winding down their operations via liquidation. Its powers include those related to early detection and intervention, and the power to act in a bank's interim or provisional administration and its ultimate liquidation.

Pursuant to article 34 of the DGF Law, once a bank has been classified as insolvent, the DGF will begin the process of removing it from the market. This is often achieved with an initial period of provisional administration. During this period:

- (i) the DGF (acting via an authorised officer) begins the process of directly administering the bank's affairs. Articles 35(5) and 36(1) of the DGF Law provide that during provisional administration, the DGF shall have full and exclusive rights to manage the bank and all powers of the bank's management.**
- (ii) Article 36(5) establishes a moratorium which prevents, *inter alia*: the claims of depositors or creditors being satisfied; execution or enforcement against the bank's assets; encumbrances and restrictions being created over the bank's property; and interest being charged.**

Liquidation

Liquidation follows provisional administration. The DGF is obliged to commence liquidation proceedings against a bank on or before the next working day after the NB's decision to revoke the bank's licence.

Article 77 of the LBBA provides that the DGF automatically becomes liquidator of a bank on the date it receives confirmation of the NB's decision to revoke the bank's licence. At that point, the DGF acquires the full powers of a liquidator under the law of Country A.

When the bank enters liquidation, all powers of the bank's management and control bodies are terminated (as are the provisional administrators' powers if the bank is first in provisional administration); all banking activities are terminated; all money liabilities due to the bank are deemed to become due; and, among other things, the DGF alienates the bank's property and funds. Public encumbrances and restrictions on disposal of bank property are terminated and offsetting of counter-claims is prohibited.

As liquidator, the DGF has extensive powers, including the power to investigate the bank's history and bring claims against parties believed to have caused its downfall. Those powers include:

- (i) the power to exercise management powers and take over management of the property (including the money) of the bank;**
- (ii) the power to compile a register of creditor claims and to seek to satisfy those claims;**
- (iii) the power to take steps to find, identify and recover property belonging to the bank;**
- (iv) the power to dismiss employees and withdraw from/terminate contracts;**
- (v) the power to dispose of the bank's assets; and**
- (vi) the power to exercise "such other powers as are necessary to complete the liquidation of a bank".**

The DGF also has powers of sale, distribution and the power to bring claims for compensation against persons for harm inflicted on the insolvent bank.

However, article 48(3) of the DGF Law empowers the DGF to delegate its powers to an "authorised officer" or "authorised person". The "Fund's authorised person" is defined by article 2(1)(17) of the DGF Law as: "an employee of the Fund, who on behalf of the Fund and within the powers provided for by this Law and / or delegated by the Fund, performs actions to ensure the bank's withdrawal from the market during provisional administration of the insolvent bank and/or bank liquidation".

Article 35(1) of the DGF Law specifies that an authorised person, must have: "...high professional and moral qualities, impeccable business reputation, complete higher education in the field of economics, finance or law...and professional experience necessary." An authorised person may not be a creditor of the relevant bank, have a criminal record, have any obligations to the relevant bank, or have any conflict of interest with the bank. Once appointed, the authorised officer is accountable to the DGF for their actions and may exercise the powers delegated to them by the DGF in pursuance of the bank's liquidation.

The DGF's independence is addressed at articles 3(3) and 3(7) of the DGF Law which confirm that it is an economically independent institution with separate balance sheet and accounts from the NB and that neither public authorities nor the NB have any right to interfere in the exercise of its functions and powers.

Article 37 establishes that the DGF (or its authorised person, insofar as such powers are delegated) has extensive powers, including powers to exercise managerial and supervisory powers, to enter into contracts, to restrict or terminate the bank's transactions, and to file property and non-property claims with a court.

(2) The Bank's liquidation

The Bank was formally classified by the NB as "troubled" on 19 January 2015. The translated NB resolution records:

"The statistical reports-based analysis of the Bank's compliance with the banking law requirements has found that the Bank has been engaged in risky operations."

Those operations included:

- (i) a breach, for eight consecutive reporting periods, of the NB's minimum capital requirements;**
- (ii) 10 months of loss-making activities;**
- (iii) a reduction in its holding of highly liquid assets;**
- (iv) a critically low balance of funds held with the NB; and**
- (v) 48% of the Bank's liabilities being dependent on individuals and a significant increase in "adversely classified assets" which are understood to be loans, whose full repayment has become questionable.**

Despite initially appearing to improve, by September 2015 the Bank's financial position had deteriorated further with increased losses, a further reduction in regulatory capital and numerous complaints to the NB. On 17 September 2015, the NB classified the Bank as insolvent pursuant to article 76 of the LBBA. On the same day, the DGF passed a resolution commencing the process of withdrawing the Bank from the market and appointing Ms C as interim administrator.

Three months later, on 17 December 2015, the NB formally revoked the Bank's banking licence and resolved that it be liquidated. The following day, the DGF initiated the liquidation procedure and appointed Ms C as the first of the DGF's authorised persons to whom powers of the liquidator were delegated. Ms C was replaced as authorised officer with effect from 17 August 2020 by Ms G.

Ms G's appointment was pursuant to a Decision of the Executive Board of the Directors of the DGF, No 1513 (Resolution 1513). Resolution 1513 notes that Ms G is a "leading bank liquidation professional". It delegates to her all liquidation powers in respect of the Bank set out in the DGF Law and in particular articles 37, 38, 47-52,

521 and 53 of the DGF Law, including the authority to sign all agreements related to the sale of the bank's assets in the manner prescribed by the DGF Law. Resolution 1513 expressly excludes from Ms G's authority the power to claim damages from a related party of the Bank, the power to make a claim against a non-banking financial institution that raised money as loans or deposits from individuals, and the power to arrange for the sale of the Bank's assets. Each of the excluded powers remains vested in the DGF as the Bank's formally appointed liquidator.

On 14 December 2020, the Bank's liquidation was extended to an indefinite date, described as arising when circumstances rendered the sale of the Bank's assets and satisfaction of creditor's claims, no longer possible.

On 7 September 2020, the DGF resolved to approve an amended list of creditors' claims totalling approximately USD 1.113 billion. The Affidavit states that the Bank's current, estimated deficiency exceeds USD 823 million.

QUESTION 4.1 [maximum 15 marks] **[9.5 out of 15]**

Prior to any determination made in the English Proceedings, Ms G, in her capacity as authorised officer of the Deposit Guarantee Fund (or DGF) of Country A in respect of the liquidation of the Commercial Bank for Business Corporation (the Bank), together with the DGF (the Applicants), applied for recognition of the liquidation of the Bank before the English court based on the Cross-Border Insolvency Regulations 2006 (CBIR), the English adopted version of the MLCBI.

Assuming you are the judge in the English court considering this recognition application, you are required to discuss:

4.1.1 whether the Bank's liquidation comprises a "foreign proceeding" within the meaning of article 2(a) of the MLCBI [maximum 10 marks]; and **[7 out of 10]**

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]. **[2.5 out of 5]**

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

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

* End of Assessment *

[4.1.1 First of all, under Article 2 (a) of the Model Law, defines 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;”

In the case of Bear Stearns, referencing Daniel M. Glosband, “SPhinX Chapter 15 “foreign proceedings are eligible for recognition only if they meet the definitional requirements of either a foreign main proceeding or a non-main proceeding” and at 85 “If the foreign proceeding is not pending in a country where the debtor has its [centre of main interests] or where it has an establishment, then the foreign proceeding is simply not eligible for recognition under Chapter 15” - the court in Bear Stearns said recognition must be coded as either main or non-main.”⁹

It must be noted that financial institutions, and insurance companies among others which require special regulations to deal with the peculiarity of their nature are often excluded from the application of MLCBI. To this illustration above we assume that “the Bank” is not excluded from the scope of the MLCBI by article 1(2) of the MLCBI.

Besides, for a foreign proceeding to be eligible for recognition under the MLCBI, it must satisfy all of the elements whether or not the proceedings are:

- 1. Collective Judicial or administrative proceeding: it must be a judicial or administrative proceeding for a collective nature*

- 2. Collective proceeding: It must provide for creditor collective involvement in the proceeding*

- 3. Related to insolvency Law : the proceeding must be conducted under a law related to insolvency of the originating state*

- 4. Supervision and control by a foreign Court as defined under article 2(e) as “a judicial or other authority competent to control or supervise a foreign proceeding;” : here the assets and affairs of the debtor must be vested under the supervision of a court or authorised body. It must be noted that MLCBI is not strict on the appointment made only by a Court but sufficiently broad in its definition to cover appointments made by a special agency, such as Banking Commission, or administrative agencies.*

- 5. Must be for the purpose of reorganization or liquidation.*

To test the Bank with the following elements, these questions arises similar to the Lex Agrokor case;

Is Commercial Bank for Business Corporation (the Bank) administered under an insolvency provision and is it Collective Judicial or administrative proceeding?

⁹ United States: Bear Stearns, referencing Daniel M. Glosband, “SPhinX Chapter 15 Opinion Misses the Mark”, 25 AM. BANKR. INST. J. 44 (Dec./Jan.2007) at 45

Yes, DGF of Country A has its special rules which has the power to handle the Liquidation with its powers expressed pursuant to article 34 of the DGF Law. In addition, Article 77 of the LBBA provides that the DGF automatically becomes the liquidator of a bank. It is an administrative proceeding under DGF, an independent body in Country A.

Is the Bank proceedings related to Insolvency?

Yes, NB classified it as "troubled" on 19 January 2015 as its resolution record stated as follows;

"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."

Also, Investigations into the Bank revealed that "it appears to have been potentially involved in a multi-million dollar fraud resulting in monies" transferred to overseas companies, including entities incorporated and registered in England.

Was the Bank passed for the purpose of reorganization and liquidation?

Yes, the Bank had breached its prudential requirements had its licensed revoked by NB On 17 September 2015, classified the Bank as insolvent pursuant to article 76 of the LBBA. DGF same day passed a resolution to commence liquidation and appointed Ms G as the authorised representative.

Does the bank qualify as a collective proceeding?

Yes, On 7 September 2020, the DGF 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. This makes the proceeding collective in nature.

Does the bank subject to control or supervision by a foreign Court or authorised institution?

Yes, The Bank was under the DGF supervision, an independent institution mandated by the LBBA law of in Country A which has the power to administer all reorganisation and liquidation proceedings.

In the Irish Bank Resolution Corporation (IBRC) Limited case - "court found a winding up directed by the IBRC was a proceeding, the majority of tasks undertaken by the special liquidator and the Minister of Finance were administrative in nature, any creditor could seek a ruling of the High Court with respect to any question

*arising in the proceeding, and it was collective in nature because it adopted the same distribution scheme the Companies Act applied to any other corporation”;*¹⁰

Does the Bank’s request affect English Public Policy? [This part of the answer does not address Q 4.1.1]

No. This will be dependent on whether or not it may affect any English Public Policy under Article 6 of the MCBL, however, under Article 19 or 21 of the MBLC, the English Courts has its discretionary powers to grant any reliefs should DGF through its representative Ms G meet the requirement set out above. Ms G can apply for recognition and relief and claw back the monies which were sent to the bank establishment in England.

*In the OAS S.A. case, the Court held that “differences in insolvency schemes do not themselves justify a finding that enforcing one State’s laws would violate the public policy of another State.”*¹¹

In view of the above, the Bank and DGF meets the criteria as a foreign proceeding specifically as a foreign non-main which the latter is defined under Article 2(c) as “ a foreign proceeding, other than a foreign main proceeding, taking place in a State where the debtor has an establishment “. In this case, the Bank has an establishment in England, therefore, Ms G can seek for recognition, relief and corporation accordingly.

In the English Case in Ms Svitlana Vasylyvna Groshova and Deposit Guarantee Fund Ukraine [2021] EWHC 1100(Ch)(the PJSC Bank Case, the English Courts held that the various elements of the definition of “foreign proceedings” and “foreign representative” have satisfied the conditions and met the requirement also set forth under Article 6, 15 and 17 of the MLCBI. ¹²

While your answer references the elements of the definition that must be met, for full marks each element should be addressed in more detail providing also explanatory guidance. For example. The “subject to the control or supervision by a foreign court” element should be addressed along the following lines:

- 1. 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”.**
- 2. 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**

¹⁰ See Digest of Case Law UNCITRAL pp12 : In the United States: Irish Bank Resolution Corporation (IBRC) Limited, 538 B.R. 692, 697 (D. Del 2015), CLOUT 1628 citing Betcorp Limited 400 B.R. 266, 278 (Bankr. D. Nev. 2009), CLOUT 927

¹¹ Ibid , United States: OAS S.A. 533 BR 83, 104–105 (Bankr. S.D.N.Y. 2015), CLOUT 1629 – court considered the issues in some detail in the light of the actual facts of the case and what had transpired in the foreign proceedings, as well as the provisions of United States law and applicable exceptions. It was satisfied that due process was met because the ex parte proceedings and orders (including the consolidation order) were subject to ex post review. The court quoted United States case law and the GEI [30] to the effect that “differences in insolvency schemes do not themselves justify a finding that enforcing one State’s laws would violate the public policy of another State.” pp

¹² Foundation Certificate in UNCITRAL MODEL LAW, “In English Case Ms Svitlana Vasylyvna Groshova (in her capacity as authorized officer of the Deposit Guarantee Fund of Ukraine [2021] in respect of the Liquidation of PJSC Bank Finance and Credit) and Deposit Guarantee Fund of Ukraine [2021] EWHC 1100(Ch)(the “PJSC Bank Case”)", INSOL pp 15

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."

- 3. 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.**
- 4. 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."**
- 5. In this case the DGF has control of all of the Bank's assets and overall control of the liquidation.**
- 6. 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.**
- 7. 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.**

4.1.2 Under Article 2(d), a "Foreign representative" "means a person or body, including one appointed on an interim basis, authorized in a foreign proceeding to administer the reorganization or the liquidation of the debtor's assets or affairs or to act as a representative of the foreign proceeding;"

There must be a precondition established under the MLCB as a foreign representative.

First, a foreign representative must be a person or body appointed to conduct the foreign proceedings (including appointed on an interim basis), authorization granted to administer the reorganization or liquidation as a representative over the debtor's assets or affairs.

Appointment of the Body and granted to administer Liquidation:

DGF Directors by a resolution on 17th August 2020 appointed Ms. G.

Ms G is a "leading bank liquidation professional". It delegated to Ms G 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 to act on its behalf as it were its appointor where all the assets or affair of the bank is vested. This was purely to pursue a liquidation of the Bank, hence, Ms G meets the element of foreign representative.]

For full marks your answer should be along the following lines:

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

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

2. This application is brought jointly by the DGF and Ms G. The DGF's role as liquidator arises under statute and article 77 of the LBBA provides that the DGF is automatically appointed as liquidator on the day it receives the NB's decision pursuant to article 77 revoking a bank's licence and commencing its liquidation.

3. 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".

4. 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.

5. 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.

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