



**SUMMATIVE (FORMAL) ASSESSMENT: MODULE 2A**  
**THE UNCITRAL MODEL LAWS RELATING TO INSOLVENCY**

Commented [SL1]: TOTAL = 41

82%

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**

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

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**

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]

##### Question 2.1 [maximum 3 marks]

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

##### Answer:

Under the MLCBI, when an application for recognition of foreign proceedings is made, generally, the date of commencement of foreign proceeding is used as the benchmark date for determining COMI as this can be applied with certainty to all insolvency proceedings<sup>1</sup>. However, some cases have also relied on the time when the foreign court was first required to decide whether to open the insolvency proceeding or the date on which application for recognition of foreign proceeding was made.<sup>2</sup>

##### Question 2.2 [maximum 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'".

<sup>1</sup> Para 159, UNCITRAL Guide to Enactment; Report of the 11th Multinational Judicial Colloquium, UNCITRAL-INSOL-World Bank (21-22 March 2015, San Francisco) para 10, available at <<https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/eleventhjc.pdf>>, last accessed on 10 February 2023

<sup>2</sup> Paras 130-133, UNCITRAL Judicial Perspective; See also, Look Chan Ho, 'A Commentary on the UNCITRAL Model Law', (2017), vol.

Commented [SL4]: SUBTOTAL = 9 MARKS

Commented [SL5]: 2 marks

Also, US courts: *Morning Mist Holdings Ltd v. Krys (Matter of Fairfield Sentry Ltd)*.

Commented [SL6]: 3 marks

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

Answer:

Sl. No	Statement	Article of the MLCBI <sup>3</sup>	Name of the provision/Concept
1.	“This Article lays down the requirements of notification of creditors.”	Article 14	<b>Notification to foreign creditors of a proceeding</b> - The purpose of notifying foreign creditors is to inform them of the commencement of the insolvency proceeding and of the time limit to file their claims.
2.	“This Article is referred to as the ‘Safe Conduct Rule’”.	Article 10	<b>Limited jurisdiction</b> - The aim of this provision is to ensure that the court in the enacting State would not assume jurisdiction over all the assets of the debtor on the sole ground of the foreign representative having made an application for recognition of a foreign proceeding.
3.	“This Article contains a rebuttable presumption in respect of an undefined key concept in the MLCBI.”	Article 16	<b>Presumptions concerning recognition</b> - The Model Law does not define COMI but provides a rebuttable presumption in Article 16(3) which states that a corporate debtor’s registered office is its COMI in the absence of proof to the contrary while it is habitual residence in the case of an individual. This presumption ensures speed and convenience of proof in vanilla cases where no controversy on COMI is involved. <sup>4</sup>

**Question 2.3 [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.**

Answer:

In the matter of the OJSC International Bank of Azerbaijan and the CBIR 2006 – Bakshiyeva v Sberbank of Russia, et al. [2018] EWHC 59 (Ch) IBA case), a OJSC International Bank of Azerbaijan (IBA/debtor) sought to restructure English law-governed debts pursuant to an Azerbaijani restructuring proceeding. Accordingly, in order to prevent certain dissenting creditors from commencing enforcement proceedings against the debtor in the UK, the debtor asked the English court to provide an indefinite stay. However, the Court of Appeal reinforced the old English common law principle known as “the rule in Gibbs, “which

<sup>3</sup> UNCITRAL, ‘UNCITRAL Model Law on Cross-Border Insolvency with Guide to Enactment and Interpretation’ (“UNCITRAL Guide to Enactment”), available at < <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/1997-model-law-insol-2013-guide-enactment-e.pdf> >.

<sup>4</sup> Para 15, Report of the 11th Multinational Judicial Colloquium, UNCITRAL-INSOL-World Bank (21-22 March 2015, San Francisco), available at <<https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/eleventhjc.pdf>>, last accessed on 10 February 2023

prevents debt obligations governed by English law being discharged by foreign insolvency proceedings without consent. The Court of Appeal dismissed the application, holding that:<sup>5</sup>

(i) The permanent stay was not necessary to protect the interests of IBA's creditors (the requirement under the CBIR 2006 for the grant of appropriate relief) - IBA was trading again and the restructuring was at an end;

(ii) The scope of the Model Law was limited to procedural aspects of cross-border insolvency cases – there was nothing in the CBIR 2006 to suggest that the procedural power to grant a stay could be used to extinguish the substantive rights guaranteed by Gibbs. Further, as the Supreme Court had held in *Rubin v Eurofinance SA* [2012] UKSC 46, the principle of universalism could not be used to justify the disregard of English law to assist a foreign insolvency process; and

(iii) It would be inconsistent with the Model Law's procedural and supporting role for a stay granted under the CBIR 2006 to outlast the foreign proceedings to which the stay related.

**Question 2.4 [2 marks]**

Commented [SL8]: 2 marks

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

**Answer:**

Issue raised	Relevant article of the MLCBI <sup>6</sup>	Observation
"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".	<b>Article 29</b> - Coordination of a proceeding under [identify laws of the enacting State relating to insolvency] and a foreign proceeding	When the domestic proceeding is already opened in respect of debtor and subsequently foreign proceeding is recognised as a main proceeding, the courts in the enacting State ensures that: (i) Any relief granted under article 19 or 21 must be consistent with the domestic proceeding; and (ii) Article 20 does not apply in case of foreign main proceeding.
"What (ongoing) duty of information does the foreign representative in the foreign main proceeding have towards the court in the enacting	<b>Article 18</b> - Subsequent information	After the application for recognition or after recognition, it is possible that changes have occur in the foreign proceeding that would have affected the

<sup>5</sup> Khan, S., & Thorn, M. (2019, April). *Re OJSC International Bank of Azerbaijan* [2018]. Retrieved from Norton Rose Fulbright: <https://www.nortonrosefulbright.com/en/knowledge/publications/b933d9a7/re-ojsc-international-bank-of-azerbaijan>

<sup>6</sup> UNCITRAL Guide to Enactment.



State”.		decision on recognition or the relief granted on the basis of recognition, such as termination of the foreign proceeding or conversion from one type of proceeding to another. Accordingly, Article 18 cast duty upon the foreign representative to continuously inform the court about any changes in status of recognised proceeding.
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**QUESTION 3 (essay-type questions) [15 marks in total]**

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). In addition, the foreign representative is also considering what (if any) relief may be appropriate to request from the court in State A.

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

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

**Commented [SL9]:** SUBTOTAL = 12 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.

**Answer:**

In the instant case, if a foreign representative seek recognition under Model law in State A, he will have the following rights with reference to access and co-operation under the provisions of the Model law:

**(i) Access:** The Model Law allows foreign representative and foreign creditors direct access to domestic courts and confers on them the ability to participate in and commence domestic insolvency proceedings against a debtor. Chapter II (Article 9-14) [1] of the Model law deals with access to foreign representatives and creditors in domestic courts. The provisions relating to "Access" which is one of the four key concepts under the model law will benefit the foreign representative in following ways:

- **Direct access to courts:** Foreign representative shall have the right to have direct access to a court in the enacting country. This allows the foreign representative to approach courts to seek remedies directly and aims to simplify the process of availing remedies from the court in relation to the foreign proceeding. Formal requirements such as registration, license or consular action which may be applicable domestically are intended to be dispensed with for foreign representatives. Accordingly, it will reduce the procedural requirements for the foreign representative to approach courts in the enacting state. [1]

- **Participation in domestic proceeding:** The foreign representative on the behalf of the foreign creditors will seek the right to commence an insolvency proceeding in the State A or file claims in such a proceeding.
- **Equal treatment of creditors:** Recognition of proceeding in state A ensure that foreign creditors are also treated on similar footing as local creditor in respect of assets of the debtor in state A. Hence, this will ensure that foreign creditors should not be treated worse than local creditors.
- **Notification about proceeding in state A:** Normally, States have different provisions or practices regarding the methods for notifying creditors regarding commencement of domestic insolvency proceeding. Recognition of foreign proceeding ensure that foreign creditors will be notified about the domestic proceeding and they should not be in a less advantageous situation than local creditors. This ensure timely filing of claims and active participation of creditors in reorganisation/liquidation proceeding in the state A.

**(ii) Cooperation:** Chapter IV (Articles 25-27) of the Model Law contains provisions regarding cooperation and communication with foreign courts and foreign representatives. [1] This chapter is a key element of the Model law as it seeks to fill the gap found in many national laws by expressly empowering courts to extend cooperation in the areas covered by the Model Law. This will have the following benefits for the foreign representative seeking recognition in state A.

- **Prevent dissipation of assets and maximise the value of assets:** The UNCITRAL Guide to Enactment states that cooperation is often the only realistic way to prevent dissipation of assets, to maximize the value of assets, to find the best solutions for the reorganization of the enterprise and so on<sup>7</sup>. Thus, foreign representative seeking recognition will be able to maximise the value of the assets of the debtor. [1]
- **More transparency and predictability in cross-border insolvency:** Better cooperation and communication between courts and insolvency representative ensures more transparency and predictability in cross border cases. It is well-known fact that cross border cases involves additional complexity and same can be resolved cooperation mechanism between courts and insolvency representatives.
- **Time bound mechanism:** Recognition of foreign proceeding ensures that Model law provisions come into force which will help in avoiding traditional time-consuming and cost-inefficient procedures, such as letters rogatory and requests for consular assistance.
- **Provide flexibility:** The concept of cooperation provides flexibility and discretion to the foreign courts and foreign representatives while communication in both formal and informal manner. This ensures preparation of group strategy and better realisation to the creditors.

<sup>7</sup> Para 211, UNCITRAL Guide to Enactment.

**Question 3.2 [maximum 5 marks] [3 out of 5 marks]**

For a recognition application in State A to be successful, the foreign proceeding opened in State B must qualify as a “foreign proceeding” within the meaning of article 2(a) of the MLCBI and the “foreign representative” must qualify as a foreign representative within the meaning of article 2(d) of the MLCBI. Assuming 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.

**Answer:**

In addition to the requirements mentioned in the article 2(a) and 2(d) of the Model Law, in order to ensure that recognition application is successful, the recognition application in State A can be considered from the following aspects and the details of the same is as under:

**(i) Public Policy Exception:** Article 6 of the Model Law provides that receiving countries have the right to refuse to take any action covered under the Model Law, including denial of recognition or relief, if such action would be manifestly contrary to the public policy of the country that receives the application for recognition. [1]

**(ii) Legislative Reciprocity:** In the instant case it is assumed that State A does not contain any reciprocity provision in their law. However, in other cases it is possible that a particular state have adopted the Model law based on legislative reciprocity. Accordingly, the “*legislative reciprocity*” indicates that a domestic court will recognize and enforce a foreign court’s judgments or orders only if the country in which the foreign court is located has adopted the same or similar legislation to that governing the domestic court.

**(iii) Supremacy of other international obligations:** Article 3 expresses the principle of supremacy of international obligations of the enacting State over internal law. If the enacted Model Law conflicts with a treaty or other form of multi-State agreement of the enacting State, then that treaty or international agreement prevails. In a restructuring of an airline, for example, the treaty obligations under the Convention on International Interest in Mobile Equipment (also known as the Cape Town Convention) may take priority over the Model Law if the enacting State is a party to the Cape Town Convention. [1]

**(iv) Judicial scrutiny:** The recognition application must overcome judicial scrutiny, which means that the court in State A must review the application to ensure that it complies with all the requirements of the MLCBI and that recognition of the foreign proceeding is appropriate under the circumstances

**(v) Excluded entities:** Article 1 of the Model Law allows enacting countries to exempt certain entities from the application of the Model Law. It is noted that banks and insurance companies are mentioned as examples of entities that the enacting country may decide to exclude from the scope of the Model Law. The reason for the exclusion would typically be that the insolvency of such entities gives rise to a particular need to protect vital interests of a large number of individuals or that the insolvency of those entities usually requires particularly prompt and circumspect action and may be subject to a special insolvency regime. Accordingly, if the debtor falls within the excluded category recognition may be refused by the courts. [1]

**(vi) Abuse of process:** The Model Law itself does not contain a provision on abuse of process, but leaves it to domestic law and the procedural rules of the enacting State to

determine what constitutes an abuse of process. However, the Model Law also does not explicitly prevent a court in the enacting State from responding to a perceived abuse of process.

**Your answer should have included a discussion on the following:**

- 1. Sufficient evidence: Article 15 of the Model Law sets forth in paragraph 2 what evidence in respect of the commencement of the foreign proceedings and the appointment of the foreign representative must accompany the recognition application. A statement identifying all foreign proceedings in respect of the debtor that are known to the foreign representative must also accompany the recognition application (Article 15(3) of the Model Law).**
- 2. Judicial scrutiny: While the court in State A is able to rely on the rebuttable presumptions set forth in Article 16 of the Model Law, in the context of Article 17 of the Model Law the court will have to assess whether either the COMI or at least an establishment of the debtor is located in State B where the foreign proceedings were opened. If the COMI of the debtor is in State B the foreign proceedings should be recognised as foreign main proceedings and if only an establishment of the debtor is in State B the foreign proceedings should be recognised as foreign non-main proceedings. Without a COMI or at least an establishment of the debtor in State B, recognition cannot be granted by the court in State A.**

**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.

**Answer:**

The Model Law basically provides for two kinds of relief - **interim relief** and **relief on recognition**. While the former may be provided by the court until an application for recognition of foreign proceedings is decided upon, the latter is to be granted if a foreign proceeding is recognised. The details of the same is as under:

**Interim relief:**

Article 19 of the Model Law provides urgent relief which may be granted, at the discretion of the court, after an application for recognition is filed.<sup>8</sup> The relief mentioned in Article 19 is narrower than the relief which may be provided after recognition of foreign proceedings under the Model Law. Unless extended by the court, the relief in Article 19 shall terminate when the decision with respect to recognition of the foreign proceedings is taken by the court. This relief is not exhaustively provided and may include: (a) staying of the execution of debtor's assets; (b) staying transfer and disposal of debtor's assets; (c) entrusting of administration of debtor's assets to the foreign representative or other designated person; (d) providing for the examination of witnesses and taking of evidence related to the debtor's

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<sup>8</sup> Para 150, UNCITRAL Judicial Perspective

property; (e) any additional relief available to an insolvency professional in the enacting country.<sup>9</sup> [1]

### **Relief on recognition**

The relief available on recognition of a foreign proceeding may be of two kinds: (i) mandatory relief on recognition as a foreign main proceeding, and (ii) discretionary relief on recognition as either foreign main proceeding or foreign non-main proceeding. The former applies automatically when a foreign main proceeding is recognised while the latter may be provided by the court on recognition of either foreign main or foreign non-main proceeding.

- **Mandatory relief**

Article 20 of the Model Law provides that an automatic moratorium shall apply on recognition of foreign main proceedings. This moratorium is to be similar in scope as the moratorium available under the domestic insolvency law of the enacting country.<sup>10</sup> This moratorium in the Model Law does not interfere with the right to commence any domestic insolvency proceedings or with the right to file claims in such a domestic proceeding.<sup>11</sup> This is in line with the general approach of the Model Law which gives prominence to the domestic insolvency proceedings of the enacting country over foreign proceedings. [½]

Further, Article 20(3) of the Model Law provides that the moratorium discussed above does not affect the right to commence individual actions or proceedings to the extent necessary to preserve claims against the debtor. This is because the Model Law does not cover the question of the effect of the moratorium on the limitation period for filing of claims. Similarly, Article 20(4) of the Model Law provides that the moratorium in Article 20(1) does not affect the right to commence domestic insolvency proceedings or the right to file claims in such proceeding.

- **Discretionary relief**

Article 21 of the Model Law provides relief that may be granted in respect of foreign main or non-main proceedings and provision of such relief is left to the discretion of the court. The list of relief provided in Article 21(1) is broad and encompasses various kinds of relief provided in various jurisdictions in insolvency processes. However, this list is meant to be inclusive and is not exhaustive.<sup>12</sup> [½]

The relief provided in Article 21(1) of the Model Law is not limited in scope as it is assumed that courts will utilise their discretion to define the scope of the relief while providing it<sup>13</sup>. In relation to relief available under Article 21(1)(a)-(c) of the Model Law, the intent of the Model Law is that the courts while granting relief shall consider the scope of the moratorium under domestic law of the enacting country. Article 21(1)(d) provides relief relating to examination of witnesses and collecting information and evidence regarding the debtor and her affairs

Article 21(2) provides a broad power to the court to enable the foreign representative or any other designated person to distribute all or part of the debtor's assets located in the enacting

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<sup>9</sup> Article 19 of the Model Law

<sup>10</sup> Para 183, UNCITRAL Guide to Enactment.

<sup>11</sup> Para 4, Article 20 of the Model Law.

<sup>12</sup> Para 189, UNCITRAL Guide to Enactment.

<sup>13</sup> UNCITRAL, 'Report of the Working Group on Insolvency Law on the Work of its Twenty-First Session', A/CN.9/435, paragraph 52, <<https://documents-dds-ny.un.org/doc/UNDOC/GEN/V97/209/05/PDF/V9720905.pdf?OpenElement>>, last accessed 10 February 2023.

country. This provision also envisages a safeguard for domestic creditors by subjecting entrustment of distribution of assets of the corporate debtor to the foreign representative on satisfaction of the court that interests of domestic creditors are adequately protected. Additionally, safeguards have been provided in the Model Law to clarify that interests of creditors and other interested persons be adequately protected.

Further, the relief provided as interim relief (Article 19) or as discretionary relief on recognition (Article 21) in the Model Law is subject to satisfaction of the court that the interests of parties, such as the creditors and the debtor, are protected. [1] 14 This may help in achieving a balance between the relief provided by the court and the interests of various stakeholders. Additionally, Article 22 of the Model Law provides courts with the flexibility to impose conditions on the relief given under Articles 19 and 21 or to modify or terminate such relief. [1]

**Your answer must include a brief discussion on the following elements:**

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

Question 3.4 [maximum 1 mark] [1 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?

**Answer:**

In a recent English case between *Igor Vitalievich Protasov and Khadzhi-Murat Derev*, the question before court was whether under article 21 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. The Court considered whether foreign bankruptcy proceedings were “*substantive proceedings*” and concluded that they were not. Further, the Cross-Border Insolvency Regulations 2006 under which the Russian bankruptcy proceedings had been recognised, put the applicant in the same position as an officeholder appointed under domestic law and therefore brought domestic insolvency legislation into play which suspended the respondent’s rights to deal with his assets, and there was therefore no need for a freezing injunction.<sup>15</sup>

**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**

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<sup>14</sup> Article 22 of the Model Law.

<sup>15</sup> Napley, K. (2021, April 16). Civil Fraud Quarterly Round-Up: Q1 2021. Retrieved from lexology: <https://www.lexology.com/library/detail.aspx?g=159ea944-d62c-4eae-8916-f211d3ba39f2>

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] [11 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:

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

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

4.1.1 whether the Bank's liquidation comprises a "foreign proceeding" within the meaning of article 2(a) of the MLCBI [maximum 10 marks]; and [7.5 out of 10]

**Answer:**

It is understood from the fact of the case, that Bank is not excluded from the scope of the MLCBI by article 1(2) of the MLCBI. Accordingly, being a judge in English court it is understood that condition of Article 1 of MLCBI is satisfied, and as recognition is sought by the foreign representative of country A in connection with a foreign liquidation proceedings of the Bank.

Being a judge in English court the next important question which I have to consider is whether liquidation proceeding of the Bank comprises a "foreign proceeding" within the meaning of article 2(a) of the MLCBI. It is important to note that article 2(a) of the MLCBI define foreign proceeding and it has following key elements:

- a proceeding (including an interim proceeding);
- that is either judicial or administrative;
- that is collective in nature;
- that is in a foreign State;
- that is authorised or conducted under a law relating to insolvency;
- in which the assets and affairs of the debtor are subject to control or supervision by a foreign court; and
- which proceeding is for the purpose of reorganisation or liquidation.<sup>49</sup>

Accordingly, in this case, the liquidation of the Commercial Bank for Business Corporation (the Bank) by the Deposit Guarantee Fund (DGF) of Country A constitutes a "foreign proceeding" due to the following reasons:

**Proceeding under foreign law:** 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. In the instant case, on 17<sup>th</sup> December, 2015 the NB formally revoked the Bank's banking licence and resolved that it be liquidated. Accordingly, liquidation proceeding was commenced against the Bank in country A as per the foreign law i.e. Law of Country A on Banks and Banking Activity (LBBA). Hence, same falls within the definition of foreign proceeding as defined in article 2(a) of the MLCBI.

**Law relating to insolvency:** It is pertinent to mention that the Model Law does not require "insolvency law" as a label; it is sufficient if the law deals with or addresses insolvency or severe financial distress, which the LBBA does in the country A and same is relating to the banks and the banking activity and has the provisions to classify bank as insolvent and commence liquidation proceeding in respect of that. Accordingly, in the instant case the requirement of the "law relating to insolvency" is satisfied if insolvency is one of the grounds on which the proceeding could be commenced.

**Court supervision:** The Model Law only calls for a minimal amount of court oversight. Under the LBBA it can be potential and indirect, rather than direct and actual. The fact that LBBA give control to the DGF did not negate the supervision of the court.

For full marks, your response should address each element with sufficient detail, provide guidance and source references, as appropriate and apply the facts. For this element we are looking for something 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 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.
8. 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".

**Collective nature of the proceedings:** The liquidation proceeding against the Bank in the instant case is a collective proceeding related to the assets of the Bank, and its creditors. Hence, same falls within the definition of foreign proceeding as per article 2(a) of the MLCBI. See general comment made above regarding how each element should be addressed for full marks.

**For the purpose of reorganisation or liquidation:** The purpose of the LBBA was to deal with the issues of Banks and Banking Activity in the country A. Under Article 76 the NB is obliged to classify a bank as insolvent if it meets the criteria as set out further 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. Accordingly, LBBA could be described as a law for the purposes of reorganisation or liquidation of the Banks in country A.

Considering the above points, it can be concluded that the Bank's liquidation constitutes a "foreign proceeding" within the meaning of article 2(a) of the MLCBI.

Further being a judge in English court I will rely on the judgment in the matter of *Agrokor*, wherein the English court granted recognition pursuant to the Cross Border Insolvency Regulations 2006 ("CBIR") to *Agrokor's* extraordinary administration proceedings, which had been commenced under "Lex *Agrokor*", a new Croatian law enacted for the sole purpose of resolving the financial difficulties of enterprise groups of systemic importance to Croatia's

economy. The application fell within the scope of the CBIR, notwithstanding that in Croatia the proceedings encompassed not just Agrokor but 50 of its affiliates in a single group proceeding.

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]. [3.5 out of 5]**

**Answer:**

Article 2(d) of the MLCBI, defined the term “foreign representative” and it has the following key elements:

• **a person or body, including one appointed on an interim basis:** In the instant matter, Ms G’s is a person appointed as authorised officer of the Deposit Guarantee Fund (or DGF) of Country A as per the provision of article 48(3) of the DGF Law.

• **authorised in a foreign proceeding:** 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. Further Ms G is authorised in foreign proceeding as per the provision of article 48(3) and article 2(1)(17) of the DGF Law.

• **to administer the reorganisation or liquidation of the debtor’s assets or affairs or to act as representative of the foreign proceeding:** As defined in question 4.1 above, liquidation proceeding against the Bank comes within the definition of foreign proceeding as per article 2(a) of the MLCBI and Mr. G is authorised by DGF in respect of liquidation of Bank.

It may be further noted that the Model Law does not specify that the foreign representative must be authorised by the foreign court.<sup>16</sup> Therefore, it can be concluded that the Applicants fall within the description of “foreign representatives” as defined by article 2(d) of the MLCBI.

For full marks, we are looking for a response 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

<sup>16</sup> The term “foreign court” is defined in Article 2(e) of the Model Law as “a judicial or other authority competent to control or supervise a foreign proceeding”. See also the UNCITRAL Guide to Enactment, p 46 at para 86. The English Court of Appeal in *Candey Ltd v Crumpler an another (as joint liquidators of Peak Hotels and Resorts Ltd (in liquidation))* [2020] EWHC Civ 26, held in its judgment of 23 January 2020 that a recognition order under the MLCBI does not have the effect that the foreign representatives are thereafter treated acting as or acting in the capacity of an English liquidator. If, so reasoned the English Court of Appeal, the effect of a recognition order was generally to deem a foreign representative to have the same abilities, capacities and powers as a British insolvency practitioner, article 21 of the MLCBI would be redundant because the foreign representative would automatically have the powers that the MLCBI expressly confers on them. A similar conclusion was reached in the decision of 28 November 2017 in *Brian Glasgow (the Bankruptcy Trustee of Harlequin Property (SVG) Ltd) v ELS Law Ltd and others* [2017] EWHC 3004 (Ch) where at 83 the English court held that, in the UK, the foreign representative is not an officer of the [English] court, having been appointed bankruptcy trustee by the High Court in St Vincent and the Grenadines.

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 our judgment they both had the necessary standing to apply in that capacity, for recognition of the Bank's liquidation.

**\* End of Assessment \***