



SUMMATIVE (FORMAL) ASSESSMENT: MODULE 2A

THE UNCITRAL MODEL LAWS RELATING TO INSOLVENCY

Commented [SL1]: TOTAL = 36

72%

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.**
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- 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 = 6 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

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

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 [SL4]: 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

Commented [SL5]: Correct answer is (c).

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 [SL6]: 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]

Question 2.1 [maximum 3 marks]

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

[The appropriate date for determining the COMI of a debtor is the date of the commencement of the foreign proceeding. It is possible that a COMI of a debtor to move, if such move is in proximity i.e., timing to the commencement of the foreign proceeding, the appropriate evidence for such will be harder to establish, that requirement that the COMI must be readily ascertainable by third parties such as creditors of the debtor.

The US Court held in judgment of Morning Mist Holding Ltd vs. Krys (Matter of Fairfield Sentry Ltd) that "a debtor's COMI should be determined based on its activities at or around the time the Chapter 15 petition (i.e., the US implementation of the Model Law) is filed, as the statutory text suggests. But given the EIR and other international interpretation, which focus on the regularity and ascertainability of the debtors' COMI, a court may consider the period between the commencement of the foreign insolvency proceeding and the filing of the Chapter 15 petition to ensure that a debtor has not manipulated its COMI in bad faith".

Also, US court further held that any relevant activities including liquidation activities and administrative function may be considered in the COMI analysis.

Type your answer here

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'".

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

[Statement 1: "This article lays down the requirements of notification of creditor".

Provision: Access for foreign Representative and creditor

Concept: Timely Notice

Article: Article 14

T Statement 2:

"This Article is referred to as the 'safe conduct Rule'

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Commented [SL7]: SUBTOTAL = 8 MARKS

Commented [SL8]: 2.5 marks

Morning Mist Holdings Ltd v. Krys (Matter of Fairfield Sentry Ltd) (2nd Cir Appeals April 16, 2013) (which was recently followed in the UK in Re Toisa Limited – see footnote 94 on page 28 of the Guidance Text).

Commented [SL9]: 2 marks

3 = Art 16(3)

Provision: Access for foreign Representative and Creditor
Concept: Safe conduct Rule
Article – Article 10

Statement 3

“This Article contains a rebuttable presumption in respect of an undefined key concept in the MLCB1”
Provision: Concurrent Proceedings Chapter V
Concept: Presumptions of Insolvency
Article: Article 31

type your answer here]

Question 2.3 [2 marks]

Commented [SL10]: 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 Article 21 of the Model Law refers to the issue of Limits to appropriate relief. The Article 21(1) of the Model Law Stated that the appropriate relief the court of the enacting state can grant is not unlimited.

In the IBA case appeal, the Court upheld the decision that the Court should not exercise its power to grant the indefinite Moratorium Continuation.

The Court in upholding the appeal, it focused on the jurisdictional question raised. The question raised was in what sense it may be said that the English Court lacked jurisdiction to grant the Indefinite Moratorium requested by the foreign representative? The Court of Appeal stated that the case did not involve an issue of jurisdiction, but the real issue was whether as a matter of settled practice the court should not exercise its power to grant indefinite moratorium continuation where to do so would:

- (a) In substance prevent the English Creditors from enforcing their English Law rights in accordance with the Gibbs Rule; and/or
- (b) Prolong the stay after the Azeri reconstruction has come to an end.

The Court of Appeal answered both (a) and (b) in favour of the respondents (the challenging creditors)

In respect of (a) above is concerned, the Court of Appeal held that an English Court could only properly grant the Indefinite Moratorium Continuation if it were satisfied to two things: first the stay would have to be necessary to protect the intent of IBA's creditors and secondly, the stay would have to be an appropriate way of achieving such protection. The Court held that neither of these conditions are satisfied.

In respect of (b) above, the Court of Appeal considered that the information obligation on the foreign representative contained in article 18 of the Model Law, regarding a substantial change in the status of the foreign proceeding and the status of the foreign representative's own appointment, requires the foreign proceeding to still be in existence and the foreign representative to still be in office. From this, the strong implication is, according to the Court of Appeal, that once the foreign proceeding has come to an end and the foreign representative no longer holds office, there is no scope for further orders in

support of the foreign proceeding to be made and any relief previously granted under the Model Law should terminate. The court further held that had the Model Law ever contemplated the continuance of relief after the end of the relevant foreign proceeding, it would surely have addressed the question explicitly and provided appropriate machinery for that purpose.

Type your answer here]

Question 2.4 [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.

[The Court in the enacting state shall review or modify or terminate any automatic relief that had been granted to the foreign main proceeding under Article 20. The relevant Article is **Article 29(b)**.

Article 18 requires the foreign representative in the foreign proceeding to inform the Court of the enacting state the following

- (i) any substantial change in the status of the recognised foreign proceeding or the status of the recognised foreign representative's appointment and
- (ii) any other foreign proceeding regarding the same debtor that becomes known to the foreign representative.

Type your answer here]

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 State A (which does not contain any reciprocity provision). In addition, the foreign representative is also considering what (if any) relief may be appropriate to request from the court in State A.

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

Question 3.1 [maximum 4 marks] **[3.5 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.

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Commented [SL11]: 1.5 marks

Art 29(a)

Commented [SL12]: SUBTOTAL = 13.5 MARKS

It is assumed that the foreign proceeding is qualified within the meaning of Article 2(a) of the MLCBI, and the foreign representative also qualified within the meaning of **Article 2(b)** of the MLCBI.

The access rights provided to the foreign representative in Article 9 gives the foreign representative standing before the Courts in the state B, this without the need for the recognition of the foreign proceeding opening in the foreign state to be recognised in the enacting state. [1]

Article 11 of the MLCBI also gives the foreign representative standing to open domestic insolvency proceedings in the enacting state provided that all requirements for such an opening are otherwise met. [1]

These access rights together with the 'safe conduct' rule as provided in **Article 10** of MLCBI gives comfort because these rights ensure that local tools are available to the foreign representative without the need for any separate proceedings in the enacting state to obtain such standing. This saves time and cost. [1]

The access rights in the model law that provide foreign representatives standing before courts in the enacting state (without the need for separate proceedings to achieve such standing) clearly facilitate cooperation as they allow foreign representatives to communicate with the court. That cooperation is further facilitated by recognition of the foreign proceeding which allow the court to provide the foreign representative with appropriate and tailor-made relief, as and when required. [½] *For full marks you must refer to Articles 25 – 27 of the MLCBI which make these provisions.*

The model law provides a procedural framework to allow cooperation to take place. **Article 27** provided by way of guidance a non-exhaustive list of appropriate means of communication.

Question 3.2 [maximum 5 marks] [5 out 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.

[Evidence

The evidential requirements for recognition of a foreign proceedings are set forth in **Article 15** of the Model [1]

The Article 15 provides as follows:

A foreign representative may apply to the court for recognition of the foreign proceeding to which the foreign representative has been appointed.

An application for recognition shall be accompanied by:

(a) a certified copy of the decision commencing the foreign proceeding and appointing the foreign representative; or
(b) a certificate from the foreign court affirming the existence of the foreign proceeding and of the appointment of the foreign representative; or
(c) in the absence of evidence referred to in sub-paragraphs a) and b), any other evidence acceptable to the court of the existence of the foreign proceeding and the appointment of the foreign representative.

- Any application for recognition shall also be accompanied by a statement identifying all foreign proceedings in respect of the debtor that are known to the foreign representative.
- The court may require a translation of documents supplied in support of the application for recognition into an official language of the enacting State.

These requirements are met recognition will be granted pursuant **Article 17** of the Model Law.

Article 16 sets forth the following presumptions concerning recognition:

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

- The court is entitled to presume that documents submitted in support of the application for recognition are authentic, whether they have been legalised.
- In the absence of proof to the contrary, the debtor's registered office, or habitual residence in the case of an individual, is presumed to be the Centre of the debtor's main interests. [1]

Restrictions

The Public Policy exception contained in **Article 6** of the Model Law gives the courts in the enacting state the necessary discretion to deny application that are manifesting contrary to the public policy of the enacting state. [1]

Article 12 is another article that provides the foreign representative with standing, but this time recognition of the foreign proceeding is required for this standing to be available. When a domestic insolvency proceeding in the enacting State is opened in respect of the debtor and following recognition of the foreign proceeding in the enacting State, the foreign representative will have standing to make petitions, requests or submissions concerning issues such as the protection, realisation or distribution of assets or co-operation with the foreign proceeding. However, article 12 does not vest the foreign representative with any specific powers or rights.

Exclusions

Paragraph 2 of Article 1 allows the enacting State to exclude certain proceedings from the application of the implemented Model Law. In principle, the Model Law should apply to any proceeding that qualifies as a "foreign proceeding" within the meaning of Article 2(a) of the Model Law. However, banks and insurance companies are mentioned as examples of entities that the enacting State might decide to exclude from the Model Law,[1] as they may require to be administered under a special regulatory regime. Public utility companies or consumers/non-traders could - for policy reasons - also require special solutions in cross-border situations, but an enacting State should be careful not to inadvertently and undesirably limit the right of the insolvency representative or court to seek assistance or recognition abroad of an insolvency proceeding conducted in the territory of the enacting State, merely because that insolvency is subject to a special regulatory regime. It is advisable to

exclusions from the scope of the Model Law be expressly mentioned by the enacting State to make the national insolvency law more transparent (especially for the benefit of foreign users)

Limitations

Assuming that (i) both the foreign proceeding and the foreign representative meet all required characteristics (ii) there are no grounds to invoke public policy exception of Article 6 of the Model Law and (iii) also the requirements set forth in **Article 17(1)(a) and (d)** of the Model Law are met, the Court in the enacting State will need to determine in accordance with **Article 17(2)** of the Model Law – whether the Debtors' COMI is in the foreign state in which the foreign proceeding are opened, in which case the foreign proceeding can be recognised as foreign main proceeding, or whether the debtor has an establishment in the foreign state where the foreign proceedings were opened, in which case the foreign proceedings can be recognised as foreign non-main proceeding.

If the debtor only has 'certain assets' in the foreign State and nothing else, it is unlike that the Court in the enacting State will conclude that the COMI of the debtor is in the foreign State. An "establishment" is defined in article 2(f) of the Model Law as "any place of operations where the debtor carries out a non-transitory economic activity with human mean and goods or services." The existence of certain assets of the debtor in the foreign State seems – on its without anything else – also unlikely to convince the court in the enacting State that there is an establishment.

If neither the COMI nor an establishment of the debtor exists in the foreign State whether the foreign proceedings were opened, then the court in the enacting State will have to deny the recognition application.

For the transparency and ease of use of the insolvency legislation to benefit both foreign representatives and foreign courts, the **Article 4** allows the enacting state to clarify if any functions relating to recognition and cooperation under the model law are performed by an authority other than a court.

Article 5 makes it clear that the scope and power exercised by the insolvency representative would depend upon the foreign law and courts.

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. In this context it should be noted that a foreign representative has an obligation to full and frank disclosure to the court in the enacting State. If a foreign representative breaches this obligation by, for example, falsely claiming that the COMI of the debtor is in a particular State, or where the foreign representative has inappropriate alternative motives for the recognition application which are not disclosed to the court, then the court could consider this to be abuse of process based on domestic law and procedural rules which could affect the recognition application

Judicial Scrutiny

The Court in the enacting State is further limited to the jurisdictional pre-conditionals as set out in the definition of foreign proceeding as set forth in **Article 2(a)** of the Model Law. The Court of the enacting state is not to embark on a consideration of whether

the foreign proceeding for which recognition is requested was correctly commenced under the applicable law of the foreign state.

Article 17 makes it clear that an application for recognition of a foreign proceeding must be decided upon at the earliest possible time.

The recognition can be modified or terminated if it is shown that the grounds for granting it were fully or partially lacking or have ceased to exist. (**Art. 17 para 4**).

The court may need to give greater or less weight to a given but in all cases the determination of the COMI is a holistic endeavour designed to determine that the location of the foreign proceeding in fact corresponds to the actual locations of the debtor's COMI as readily ascertained by its creditors. [1]

In this context it should further be noted that, as a rule the public policy exception (of article 6 of the Model Law) should rarely be the basis for refusing an application for recognition, even though it might be a basis for limiting the nature of relief accorded.

Article 18 requires the foreign representative, from the time of filing the recognition application for the foreign proceeding, to promptly inform the court in the enacting State of (i) any substantial change in the status of the recognised foreign proceeding or the status of the foreign representative's appointment and (ii) any other foreign proceeding regarding the same debtor that becomes known to the foreign representative **Type your answer here]**

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.

[Where relief is urgently needed to protect the assets of the debtor or the interests of the creditors, the court of the enacting State may, at the request of the foreign representative, grant relief of a provisional nature from the time of filing the recognition application until the application is decided upon. This interim relief- which applies to both foreign main and foreign non-main proceedings - can include:

- a stay of execution against the debtor's assets.
- entrusting the administration or realisation of all or part of the debtor's assets located in the enacting 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.
- any of the following post-recognition relief provided for in **Article 21** of the Model Law:
 - (a) suspending the right to transfer, encumber or otherwise dispose of any assets of the debtor.
 - (b) providing for the examination of witnesses, the taking of evidence or the delivery of information concerning the debtor's assets, affairs, rights, obligations or liabilities; and
 - (c) granting any additional relief that may be available to a domestic liquidator/ office holder under the laws of the enacting State.

Paragraph 2 of Article 19 allows the enacting State to include an appropriate notice of the interim relief granted. If the interim relief would interfere with the administration

of a foreign main proceeding, the court may - based on **paragraph 4 of Article 19** - refuse to grant such interim relief.

Article 20 provides for automatic relief in case the recognised foreign proceeding qualified as a foreign main proceeding.

The recognition of a foreign main proceeding (that is, where the COMI of the debtor is in the jurisdiction where the foreign proceeding was opened) has the following three automatic effects:

- (a) a stay of the commencement or continuation of individual actions or individual proceedings concerning the debtor's assets, rights, obligations or liabilities.
- (b) a stay of execution against the debtor's assets; and
- (c) a suspension of the right to transfer, encumber or otherwise dispose of any assets of the debtor.

Limitations or Conditions

Article 21 sets out discretionary power to provide post-recognised relief. Upon recognition of a foreign proceeding (whether main or non-main), Article 21 (1) of the Model Law provides the court in the enacting State with the discretionary power - where necessary to protect the assets of the debtor or the interest of creditors and at the request of the foreign representative - to grant appropriate relief, including:

- staying the commencement or continuation of individual actions or individual proceedings concerning the debtor's assets, rights, obligations or liabilities, to the extent they have not been (automatically) stayed under Article 20(1)(a) of the Model Law;
- staying execution against the debtor's assets to the extent it has not been stayed (automatically) under Article 20(1)(b) of the Model Law;
- suspending the right to transfer, encumber or otherwise dispose of any assets of the debtor to the extent this right has not been (automatically) suspended under Article 20(1)(c) of the Model Law;
- providing for the examination of witnesses, the taking of evidence or the delivery of information concerning the debtor's assets, affairs, rights, obligations, or liabilities;
- entrusting the administration or realisation of all or part of the debtor's assets in the enacting State to the foreign representative or another person designated by the court;
- extending any interim relief granted pursuant to Article 19(1) of the Model Law; and
- granting any additional relief that may be available to a domestic liquidator/ office holder under the laws of the enacting State.

Paragraph 2 of Article 21 provides the court in the enacting State with discretionary power - at the request of the foreign representative - to hand over all or a part of the debtor's assets located in the enacting State to the foreign representative (or another person designated by the court), provided that the court is satisfied that the interests of the local creditors in the enacting State are adequately protected. As far as granting relief to a foreign representative of a foreign nonmain proceeding is concerned, the court must - according to paragraph 4 of Article 21 - be satisfied that the relief relates to assets that - under the law of the enacting State - should be administered in the foreign non-main proceeding, or concerns information required in that proceeding. In short, such relief should not interfere with the administration of another insolvency proceeding, in particular the main proceeding.

Article 22 of the Model Law clarifies in Paragraph 1 that in granting or denying relief based on either Article 19 (interim pre-recognition relief) or Art 21 (discretionary post-recognition relief) the court in the enacting state must be satisfied that the interests of the debtors' creditor and other interested parties are adequately protected.

The court in the enacting State must strike an appropriate balance between the relief that may be granted to the foreign representative and the interests of the persons that may be affected by the relief. Article 22 specifically mentions the interests of creditors, the debtor, and other interested parties. These interests should guide the court in exercising its discretionary powers to grant interim relief in Article 19 and post-recognition relief in Article 21. Relief can be tailored by subjecting it to certain conditions (Article 22(2)) or by modifying or terminating relief that has been granted (Article 22(3)).

Restrictions

The standing afforded to the foreign representative in Article 23 extends only to actions that are available to the local insolvency representative in the context of an insolvency proceeding. It only ensures that a foreign representative is not prevented from initiating any action to avoid antecedent transactions by the sole fact that the foreign representative is not the insolvency representative appointed in the enacting State. By distinguishing between main and non-main proceedings in paragraph 2 of Article 23, the relief in a non-main proceeding is likely to be more restrictive than for a main proceeding.

For full marks you 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?

[In a recent English case between Igor Vitalievich Protasov and Khadzhi-Murat Derev, the question 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. While the English court held to have jurisdiction in the strict sense to grant such post-recognition discretionary relief, it found that relevant restrictions and limitations existed which served to inhibit 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. According to the court, '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 reasons exist' – Paragraph 52 of the Protasov v Derev case judgement.

Type your answer here]

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] [8.5 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 [6 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 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.

4.1.1 I assume that the Bank is not excluded from the scope of the MLCBI by Article 1(2) of the MLCBI.

In attending this issue, the following questions are to be raised:

1. Is the Deposit Guarantee Fund (DGF) Law 'a law relating to Insolvency'?
2. Does it matter whether Country has adopted MLCBI?
3. Does the DGF Law qualify as 'collective proceedings'?
4. Is the DGF Law "subject to control or supervision by a foreign Court"?
5. Does it matter that DGF is a single group proceeding in respect of the commercial Bank for Business Corporation (the Bank and its various corporate entities, while the model law only provides for recognition of a single company proceedings)?
6. Would recognition of DGF in respect of the Bank as foreign proceeding be contrary to English Public Policy.? [This is not an element of the "foreign proceeding" definition, but a separate recognition issue]
7. Is the DGF law passed "for the purpose of reorganization"?
8. Other elements of the "foreign proceeding" definition to address separately are "proceeding" and "judicial or administrative"

As a judge in the English Court considering this recognition application, the above questions would be answered as follows:

1. Law Relating Insolvency: 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 DGF does. The "law relating to insolvency" requirement is satisfied if insolvency is one of the grounds on which the proceedings could be commenced, even if insolvency could not actually be demonstrated and there was another basis for commencing the proceeding.

For full marks your response should also provide some guidance together with source references that explain the element you address. For the "pursuant to a law relating to insolvency" element, we are looking for something along the following lines:

1. The Guide to Enactment provides at paragraph 48:

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

Further explanation is provided at paragraph 73:

"This formulation is used in the Model Law to acknowledge the fact that liquidation and reorganization might be conducted under law that is not labelled as insolvency law (e.g. company law), but which nevertheless deals with or addresses insolvency or severe financial distress. The purpose was to find a description that was sufficiently broad to encompass a range of insolvency rules irrespective of the

type of statute or law in which they might be contained and irrespective of whether the law that contained the rules related exclusively to insolvency.”

2. Article 76 of the LBBA clearly set out Country A’s specific insolvency procedures for insolvent banks. The Bank’s liquidation was commenced pursuant to those provisions and in my judgment should be considered by this Court as being “pursuant to a law relating to insolvency”.

At the commencement of the proceedings, it was unchallenged evidence that the Bank and the wider group was in a state of serious financial distress

2. It does not matter whether the country adopted MLCBI or not [so Country A meets the “foreign State” element of the “foreign proceeding” definition]
3. Collective Native of the Proceeding: All the assets and liabilities of the debtor are dealt with in the proceeding which subject to local priorities and statutory exceptions and to local exclusion relating to the rights of secured creditors. The nature of DGF made it collective

Again, for full marks, your response also needs to provide appropriate guidance and source references for this element as well apply it to the facts.

4. Foreign Law: Characteristics of the DGF Law are a matter of country A Law and question of foreign law and question of fact to be decided by the English Court on the basis of expert evidence.
5. Single Group Proceedings: None of the model law material state that it is impossible to recognise a single group proceeding, such DUF law as a foreign proceeding in respect of a single debtor.
6. Court Supervision: The level of court supervision required by the Model Law is relatively low. The fact that the DGF has some power and control did not negate the supervision of the Court.

Again, for full marks, your response also needs to provide appropriate guidance and source references for this element as well apply it to the facts. For this element, we are looking for a response 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".

7. For reorganization or liquidation

- Article 77 of the LBBA provides that a bank can be liquidated by the NB directly, revolving it likewise.
- DGF Law made it possible for DGF to be responsible of winding down operation of bank via liquidation and 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.

DCIF did tried all efforts to restrict the bank and the failure to its restricting exercise, then the liquidation process commences. This law is for the purpose of reorganization or liquidation.

8. It is not envisaged that a foreign proceeding will be denied recognition solely on the grounds that a court in the state in which the foreign proceeding was commenced would not provide equivalent relief to an insolvency reported from the enacting state.

Based on the above, the Banks' liquidation comprises a foreign proceeding with the meaning of Article 2(a) of the MLCBI.

4.1.2 **For** a representative to qualify as a 'foreign representative' within the meaning of the Model Law the representative needs to meet the following elements:

1. Appointed authorised person or body – it needs to be an appointed person or body (including appointed on an interim basis) authorized in the foreign proceedings and;
2. Administer debtor assets or affect or act as a representative, the authorization of the representative is either to administer the reorganization or liquidation of the debtor assets or affairs or to act as representative of the foreign proceedings.

Article 48(3) of the DGF Law empowers the DGF to delegate its powers to an authorised officer. Article 35(1) of the DGL Law specifies the attributes of the authorised person.

Ms. G was appointed pursuant to a decision of the Executive Board of the Directors of the DGF.

Both the foreign representative fulfils criteria 1 and 2.

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 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 ***