



SUMMATIVE (FORMAL) ASSESSMENT: MODULE 2A

THE UNCITRAL MODEL LAWS RELATING TO INSOLVENCY

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

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

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

INSTRUCTIONS FOR COMPLETION AND SUBMISSION OF ASSESSMENT

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

1. You must use this document for the answering of the assessment for this module. The answers to each question must be completed using this document with the answers populated under each question.
2. All assessments must be submitted electronically in MS Word format, using a standard A4 size page and a 11-point Arial font. This document has been set up with these parameters – **please do not change the document settings in any way. DO NOT** submit your assessment in PDF format as it will be returned to you unmarked.
3. No limit has been set for the length of your answers to the questions. However, please be guided by the mark allocation for each question. More often than not, one fact / statement will earn one mark (unless it is obvious from the question that this is not the case).
4. You must save this document using the following format: **[student ID.assessment2A]**. An example would be something along the following lines: 202122-336.assessment2A. **Please also include the filename as a footer to each page of the assessment** (this has been pre-populated for you, merely replace the words “studentID” with the student number allocated to you). Do not include your name or any other identifying words in your file name. **Assessments that do not comply with this instruction will be returned to candidates unmarked.**
5. Before you will be allowed to upload / submit your assessment via the portal on the Foundation Certificate web pages, you will be required to confirm / certify that you are the person who completed the assessment and that the work submitted is your own, original work. Please see the part of the Course Handbook that deals with plagiarism and dishonesty in the submission of assessments. **Please note that copying and pasting from the Guidance Text into your answer is prohibited and constitutes plagiarism. You must write the answers to the questions in your own words.**
- 6.1 If you selected Module 2A as one of your **compulsory modules** (see the e-mail that was sent to you when your place on the course was confirmed), the final time and date for the submission of this assessment is **23:00 (11 pm) GMT on 1 March 2022**. The assessment submission portal will close at 23:00 (11 pm) GMT on 1 March 2022. No submissions can be made after the portal has closed and no further uploading of documents will be allowed, no matter the circumstances.
- 6.2 If you selected Module 2A as one of your **elective modules** (see the e-mail that was sent to you when your place on the course was confirmed), you have a **choice** as to when you may submit this assessment. You may either submit the assessment by **23:00 (11 pm) GMT on 1 March 2022** or by **23:00 (11 pm) BST (GMT +1) on 31 July 2022**. If you elect to submit by 1 March 2022, you **may not** submit the assessment again by 31 July 2022 (for example, in order to achieve a higher mark).
7. Prior to being populated with your answers, this assessment consists of **12 pages**.

ANSWER ALL THE QUESTIONS

Total: 35,5 out of 50

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

QUESTION 1 (multiple-choice questions) [10 marks in total] 5 marks

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

Question 1.1

Which of the following statements **incorrectly** reflects the main purpose of the Model Law?

- (a) The Model Law provides effective mechanisms for dealing with cases of cross-border insolvency so as to promote a number of objectives, including the protection and maximisation of trade and investment.
- (b) The Model Law provides effective mechanisms for dealing with cases of cross-border insolvency so as to promote a number of objectives, including the fair and efficient administration of cross-border insolvencies that protects the interests of all creditors and other interested persons, not including the debtor.
- (c) The Model Law is a substantive unification of insolvency law so as to promote co-operation between courts of the enacting State and foreign States and facilitation of the rescue of financially troubled businesses.
- (d) All of the above.

Question 1.2

Which of the following statements is **unlikely** to be a reason for the development of the Model Law?

- (a) The existence of a statutory basis in national (insolvency) laws for co-operation and co-ordination of domestic courts with foreign courts or foreign representatives.
- (b) The difficulty of agreeing multilateral treaties dealing with insolvency law.
- (c) The practical problems caused by the disharmony among national laws governing cross-border insolvencies, despite the success of protocols in practice.
- (d) None of the above.

Question 1.3

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

- (a) The registered office of the debtor is not in the jurisdiction where the foreign proceedings were opened, but the debtor has an establishment in the jurisdiction of the enacting State.
- (b) The registered office of the debtor is in the jurisdiction of the enacting State, but the debtor has an establishment in the jurisdiction where the foreign proceedings were opened.
- (c) The debtor has neither its COMI nor an establishment in the jurisdiction where the foreign proceedings were opened.
- (d) The debtor has neither its COMI nor an establishment in the jurisdiction of the enacting State.

Question 1.4

“Cross-border insolvencies are inherently chaotic and value evaporates quickly with the passage of time”. Which of the following rules or concepts set forth in the Model Law **best addresses** this feature of cross-border insolvencies?

- (a) The *locus standi* access rules.
- (b) The public policy exception.
- (c) The safe conduct rule.
- (d) The “hotchpot” rule.

Question 1.5

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

- (a) The foreign main proceedings in South Africa will not be recognised in the UK because the UK is not a designated country under South Africa’s principle of reciprocity, but the foreign non-main proceedings in Brazil will be recognised in the UK despite Brazil not having implemented the Model Law.
- (b) Both the foreign main proceedings in South Africa and the foreign non-main proceedings in Brazil will not be recognised in the UK because the UK has no principle of reciprocity and Brazil has not implemented the Model Law.

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

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

Question 1.6

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

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

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

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

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

Question 1.7

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

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

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

(c) The court should consider both (a) and (b).

(d) Neither (a) nor (b) must be considered by the court.

Question 1.8

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

(a) COMI is a defined term in the Model Law.

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

- (c) While (for purposes of the Model Law) the COMI of a debtor can move, the closer such COMI shift is to the commencement of foreign proceedings, the harder it will be to establish that the move was “ascertainable by third parties”.
- (d) None of the above.

Question 1.9

Which of the following types of relief have, prior to the adoption of the Model Law on Recognition and Enforcement of Insolvency-Related Judgments, been declared beyond the limits of the Model Law?

- (a) Enforcement of insolvency-related judgments.
- (b) An indefinite moratorium continuation.
- (c) Both (a) and (b).
- (d) Neither (a) nor (b).

Question 1.10

When for the interpretation of the Model Law “its original origin” is to be considered in accordance with article 8 of the Model Law, which of the following texts is likely to be of relevance?

- (a) The UNCITRAL Guide of Enactment and the Practice Guide.
- (b) The UNCITRAL Guide of Enactment and the Legislative Guide – Parts One, Two, Three and Four.
- (c) The UNCITRAL Guide of Enactment and the Judicial Perspective.
- (d) All of the above.

QUESTION 2 (direct questions) [10 marks in total] 9 marks

Question 2.1 [maximum 3 marks] 3 marks

Under the MLCBI, explain what the appropriate date is for determining the COMI of a debtor, or whether an establishment exists.

Further to Art.17 (although not referenced expressly) and the GEI (para 159), the appropriate date from determining the Centre of Main Interest (COMI), or whether an establishment exists is the date on which foreign proceedings are commenced. This is the approach broadly applied, with the slight departure taken by the US courts in *Morning Mist Holdings Limited v Krys* – here the court determined that the date of the debtor's COMI was based on its activities around the time the petition for bankruptcy was filed. In this instance there is a potential window between the domestic filing and the commencement of foreign proceedings that may allow a debtor to manipulate its COMI in the intervening period. This approach – presumably

taken to avoid the mischief mentioned above – has also been adopted in the court's reasoning in the UK case of *Re Toisa Limited*.

Question 2.2 [maximum 3 marks] 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 provides guidance in case of concurrence of two foreign non-main proceedings.*”

Art.30(c) – Co-ordination of more than one foreign proceeding.

Statement 2 “*The rule in this Article does not affect secured claims.*”

Art. 32 – “the hotchpot rule”

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

Art 31 – Presumption of insolvency based on recognition of a foreign main proceeding. Insolvency is not defined.

This may equally apply to the rebuttable presumption under Art.16(3) in connection with the presumption that the registered office of the debtor is also its COMI, which is undefined in the MLCBI.

The latter is correct

Question 2.3 [2 marks] 2 marks

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

The preliminary question raised and before the Court of Appeal was whether the court could found jurisdiction to grant the indefinite Moratorium Continuation (IMC). The court held that the case was not one involving issues of jurisdiction (i.e. the court was able to hear and determine the case) but rather a question of discretion as to whether, having the power to do so, the court *should* exercise that power in granting the IMC where doing so would:

- i) prevent English creditors enforcing their rights (under the laws of England & Wales (per the jurisprudence in *Gibbs*) and/or
- ii) prolong the stay after the restructuring in Azerbaijan had concluded.

The court determined both i) and ii) in favour of the respondents, affirming the decision of Mr. Justice Hildyard at first instance. In reaching the decision to uphold the decision at first instance, the court concluded that an English court can only grant an IMC where it would be necessary to protect creditors interests and the stay was an appropriate way to achieve that protection for creditors. It was determined that neither of these criteria had been met and the judge at first instance was correct in law in reaching the conclusion that he did.

The court held that the creditors did not require further protection in order for the foreign proceedings to achieve their purpose.

The court also found relevance in the fact that IBA were in a position to, but elected not to, pursue a parallel scheme of arrangement in the UK.

In connection with ii) the court considered that once the foreign proceedings had concluded (and the foreign representative departed office) there is no scope for further orders to support foreign proceedings – equally any relief made under MLCBI would terminate. Had it been the case that the relief ought to continue after the conclusion of foreign proceedings, the law would have made express provision for this in the MLCBI.

Question 2.4 [2 marks] 1 mark

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

Following recognition of a foreign main proceeding, pursuant to article 29 a court should review any relief granted under Arts.19 or 21 and modify or terminate the same where inconsistent. Where the proceedings are foreign main proceedings, the court in the enacting State shall modify or terminate the stay or suspension under Arts. 20(1) or (2) if inconsistent with the proceedings commenced.

The correct article is here art. 29(a)

In addition to the foreign representative's obligation for full and frank disclosure to the court in the enacting State, the foreign representative also has an obligation pursuant to Art. 18 to provide updates to the court on developments following the filing of the recognition application. This includes the obligation to promptly inform the court of any substantial change in the status of the recognised foreign proceeding or the status of the foreign representative's appointment. Additionally, Art.18 envisions the foreign representative will be under an obligation to inform the court in the enacting State of any additional proceedings concerning the debtor that may be raised and are known to the foreign representative – this is in effect a continuation of the obligation under Art.15(3) when making the recognition application to inform the court in the enacting State, by way of statement, of any known foreign proceedings in respect of the debtor at the time of the recognition application being filed.

QUESTION 3 (essay-type questions) [15 marks in total] 9,5 marks

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

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

Question 3.1 [maximum 4 marks]

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

The rights of access under Art.9 benefit foreign representatives by freeing them from the obligation to meet formal requirements such as licences or consular actions to access the courts of an enacting state – this allows the foreign representative to sue (and be sued) in these courts. Under Art.11 the foreign representative has access to the courts of a state and has standing (subject to the commencement conditions applicable under the law of that state) to request commencement of an insolvency proceeding – recognition is not a precondition to that commencement – this is of particular benefit to the foreign representative where commencement may be required on an urgent basis in order to protect or preserve the assets of a debtor. These access rights save time and costs which is beneficial in ensuring the value of the assets is not eroded and in fact may increase the value of certain assets where the ability to act quickly is crucial.

The objective in the access/co-ordination rights is to allow the foreign representative adequate "breathing space" on an interim basis and to allow the courts to determine co-ordination and co-operation envisioned under Arts. 25-27 to the overall benefit of the proceedings and stakeholder in the insolvency including creditors. As with access, recognition is not a precondition for co-operation. This allows the foreign representative with the ability to manoeuvre at an early stage before an application for recognition has been made. Art.25 provides a mandatory provision for courts to co-operate with foreign representatives. This allows the foreign representative to request and be provided with assistance in State A, which may assist their ability to achieve solutions to the circumstances of the insolvency or debtor/creditor position in the foreign jurisdiction. Art. 27 provides foreign representatives with the ability to co-ordinate concurrent legal proceedings to ensure findings are consistent or claims are otherwise not prejudiced by asymmetric findings by courts in differing jurisdictions. This may be of practical use in allowing for the timely collation of e.g. proofs of debt/claims against an insolvent company and may prevent duplication and, by extension, wasted costs of repeating, the same exercise in multiple jurisdictions.

The rights of access and co-ordination afford a foreign representative in State A will allow the foreign representative to undertake extensive pre-planning in its jurisdiction prior to recognition and crucially before and substantive steps are taken in the insolvency.

Question 3.2 [maximum 5 marks] 3 marks

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

A court must consider the following in granting an application for recognition:

Under Art.15 the requirements the foreign representative will need to meet are set out – these are limited to the jurisdictional pre-conditions set out in the definition in Art.2(a). Provided the proceedings satisfy the requirements of Art.15 recognition should follow per Art.17.

The court must be satisfied the foreign proceedings are properly constituted under Art.15 – it is not for the court to embark on consideration of whether the foreign proceedings are correctly commenced under the applicable law – if there is a certified copy of the decision commencing proceedings and appointing the foreign representative or a certificate from the foreign court confirming the existence of foreign proceedings and the appointment of the foreign representative, or other evidence acceptable to the receiving court confirming the same.

The court must receive a statement identifying any and all foreign proceedings known to the foreign representative in connection with the debtor.

In deciding the recognition application the court is under an obligation pursuant to Art.17(3) to determine the application at the earliest opportunity. In order to facilitate a prompt decision Art. 16 provides a series of presumptions to alleviate some of the evidential burdens, particularly with reference to the COMI of the debtor.

The court must consider whether proceedings are "foreign main proceedings" or "foreign non-main proceedings" both as defined under Art.2(b) and (c). The main proceedings will be where the proceedings take place in a State where the debtor has its COMI (noting the presumption in Art.16), and non-main proceedings will be where the debtor has an "establishment" in the State.

The court will need to determine whether the debtor has an establishment, namely "any place of operations where the debtor carries out non-transitory economic activity with human means and goods or services" (Art.2(f)).

For the purposes of recognition, the choice is binary – foreign proceedings can however be neither main nor non-main. This would be the case where e.g. a provisional liquidation did not establish either the debtor's principal place of business or that some non-transitory activity occurred in the State as was the case in *Bear Stearns*. In such cases the proceedings will not be recognised.

In recognising proceedings as main or non-main the court will, by extension, determine the relief available upon recognition. Main proceedings will trigger an automatic stay of execution, subject to certain exceptions under Art.20(2).

The court will also have to factor in any public policy exceptions – as this is not defined in the MLCBI there will be an interpretation based on the domestic law in each jurisdiction. Public policy considerations may result in an application being refused. Other than public policy exceptions the MLCBI makes no provisions for a receiving court to determine or examine the merits of a foreign court's decision.

For full marks on this question, the answer should include:

1. **Exclusions:** If the debtor is an entity that is subject to a special insolvency regime in State B, the foreign representative should first of all check if the foreign proceedings regarding that type of a debtor are excluded in State A based on Article 1(2) of the implemented Model Law in State A.
2. **Restrictions;- Existing international obligations of State A:** Based on Article 3 of the Model Law, the court in State A should also check if there are no existing international obligations of State A (under a treaty or otherwise) that may conflict with granting the recognition application under the implemented Model Law in State A.

Question 3.3 [maximum 5 marks] 2 marks

As far as relief is concerned, briefly explain (with reference to the relevant MLCBI articles) what pre- and post-recognition relief can be considered in the context of the MLCBI, as well as any restrictions, limitations or conditions that should be considered in this context. For purposes of this question, it can be assumed that there is no concurrence of proceedings.

Pre-recognition relief

Pursuant to Art. 19, prior to the recognition application being determined the court may, upon the request of the foreign representative grant relief including:

A stay of execution against the assets of the debtor.

Entrusting all or part of the debtor estate to the foreign representative to protect and preserve these assets – this is particularly so where the assets may be perishable or susceptible to devaluation if an intervention is not made.

Provisional relief is also available in connection with the relief specified in Art.21 (c)(d) and (g) namely, i) suspending the right of *inter alia* transfer or disposal of assets (under Art.21(c)); ii) examination of witnesses, taking evidence or delivery of information concerning the debtor's assets, affairs, rights, obligations or liabilities.

Typically this pre-recognition relief will terminate upon the application being determined (save for where it is extended under Art.21(f)), this is similar to civil proceedings where an interim interdict will fall away once the matter has been determined, and superseded by either a more permanent form of relief or the interim relief is not carried forward at all.

The interim relief set out in Art.19 is available only where the relief is urgently needed to protect the assets of the debtor/interests of the creditors. In the absence of a demonstrable urgent need it is difficult to see a rationale for the court granting such relief (see the case of Chow Cho Poon)

The pre-recognition relief available under Art.19 may not be granted where a court determines such relief would interfere with the administration of foreign main proceedings. This would ordinarily necessitate a degree of co-operation between the respective courts and foreign representative in the manner envisioned by Art.25.

In order to obtain the relief set out in Art.19, the recognition application itself has to already have been made (i.e. the relief cannot be granted *pending* an application for recognition, the application must be extant).

An underlying function of Art.19 is to give effect to the provisions of Art.20 once recognition has been granted in order that the relief under Art.20 is not rendered redundant or ineffective because e.g. the assets have not been preserved in the interim.

It should be noted that Art.19 is non-exhaustive. There is flexibility in the approach and the type of interim relief available can be bespoke to the circumstances of the case. This issue was raised in Simpson v Williams where Art.19 was used to assist in obtaining a search warrant to ascertain whether assets had been concealed.

Post-recognition relief

Upon the granting of recognition (either main or non-main proceedings), under Art.20 actions against the debtor's assets are stayed as well as executions against the debtor's assets in addition to suspension of *inter alia* the right of transfer are automatic. The stay/suspension is subject to the limitations and exceptions of the domestic law in the relevant State – this may

apply in cases such as set-off, hire purchase agreements or where security has been taken. There are further exceptions for domestic regimes that make provision for e.g. governmental units acting in a regulatory capacity or police capacity (Art.20(3)).

Upon recognition, the courts have discretionary powers to grant relief pursuant to Art. 21 to grant "appropriate relief" – as a non-exhaustive list this would include the reliefs noted above under Arts 19 and 20 to the extent these had not been requested or granted. Art. 21 also provides for the granting of relief that may be available to domestic liquidators or insolvency practitioners under the laws of the enacting State.

Pursuant to Art. 21, at the request of the foreign representative, the main or non-main proceedings, the Court can entrust the distribution of all or part of the debtor's assets located in that State to the foreign representative (or other designated person). This can only be done where the court is satisfied it is in the creditors' interests and that these are adequately protected. For foreign non-main proceedings the court has the additional consideration that the relief must relate to local assets to be administered in foreign proceedings (Art.21(3)).

The relief provided under Art.21 is not unlimited. Three English cases have set out the restrictions/limitations on the Art.21(1) relief. In *Rubin v Eurofinance* the court held that enforcement of a insolvency related *in personam* default judgment was not covered by the MLCBI. The court in *Pan Ocean Co. Ltd* held that the application of foreign insolvency law to an English law governed contract is outside the scope of the relief the court can grant under Art.21 and in the *IBA Case* (first instance and appeal) the court determined that it did not have jurisdiction to grant a foreign representative an indefinite moratorium continuation resulting from a previous recognition order. The latter case may have received different treatment however based on the forum in which the case was heard as the court in *Re Condor Insurance Co.* would provide a legitimate basis for the US courts to depart from the jurisprudence and reasoning of the English court *the IBA Case*.

For full mark on this question, the answer should include the following:

1. **Adequate protection:** Pursuant to Article 22 of the Model Law any interim relief under Article 19 of the Model Law or any post-recognition relief under Article 21 of the Model Law require the court in State A to be satisfied that the interests of the creditors and the other interested persons, including the debtor, are adequately protected and any relief may be subject to conditions as the court considers appropriate.
2. **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.
3. **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] ½ mark

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

Art.19(3) states that pre-recognition relief will terminate upon recognition being determined and while this can be extended under Art. 21(f) this will typically only occur where on recognition of the foreign proceedings there is a failure of the debtor or debtors to comply with the relief ordered under Art. 19 and where the foreign representative is unable to discharge its obligations without that relief under Art.19 being extended as was in issue in *Lawrence v Northern Crest*.

Here it should be mentioned that art. 21 provides for other forms for protection leaving the freezing order un-warranted.

QUESTION 4 (fact-based application-type question) [15 marks in total] 12 marks

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

(1) Background

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

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

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

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

Classification of the bank as troubled

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

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

Classification of the bank as insolvent

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

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

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

Provisional administration

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

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

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

Liquidation

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

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

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

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

- (i) the power to exercise management powers and take over management of the property (including the money) of the bank;
- (ii) the power to compile a register of creditor claims and to seek to satisfy those claims;

- (iii) the power to take steps to find, identify and recover property belonging to the bank;
- (iv) the power to dismiss employees and withdraw from/terminate contracts;
- (v) the power to dispose of the bank's assets; and
- (vi) the power to exercise "such other powers as are necessary to complete the liquidation of a bank".

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

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

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

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

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

(2) The Bank's liquidation

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

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

Those operations included:

- (i) a breach, for eight consecutive reporting periods, of the NB's minimum capital requirements;
- (ii) 10 months of loss-making activities;
- (iii) a reduction in its holding of highly liquid assets;

- (iv) a critically low balance of funds held with the NB; and
- (v) 48% of the Bank's liabilities being dependent on individuals and a significant increase in "adversely classified assets" which are understood to be loans, whose full repayment has become questionable.

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

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

Ms G's appointment was pursuant to a Decision of the Executive Board of the Directors of the DGF, No 1513 (Resolution 1513). Resolution 1513 notes that Ms G is a "leading bank liquidation professional". It delegates to her all liquidation powers in respect of the Bank set out in the DGF Law and in particular articles 37, 38, 47-52, 521 and 53 of the DGF Law, including the authority to sign all agreements related to the sale of the bank's assets in the manner prescribed by the DGF Law. Resolution 1513 expressly excludes from Ms G's authority the power to claim damages from a related party of the Bank, the power to make a claim against a non-banking financial institution that raised money as loans or deposits from individuals, and the power to arrange for the sale of the Bank's assets. Each of the excluded powers remains vested in the DGF as the Bank's formally appointed liquidator.

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

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

QUESTION 4.1 [maximum 15 marks] 12 marks

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

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

- 4.1.1 whether the Bank's liquidation comprises a "foreign proceeding" within the meaning of article 2(a) of the MLCBI **[maximum 10 marks]**; 9 marks and

4.1.2 whether the Applicants fall within the description of “foreign representatives” as defined by article 2(d) of the MLCBI [**maximum 5 marks**]. 3 marks

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

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

Foreign Proceedings

The starting point is to consider the definition of "Foreign Proceedings" under Art.2(a). This contains the following elements summarised as follows:

A judicial or administrative proceeding, collective in nature, in a foreign state authorised under the insolvency laws of that country, in which the assets and affairs to the debtor are subject to control or supervision by a foreign court and are for the purpose of reorganisation or liquidation.

Judge's considerations:

1. Are the proceedings judicial or administrative?

Given the operation of the LBBA/DGF Law this question can be answered in the affirmative. The matter appears to be an administrative proceeding via the provisions of the LBBA, without at this stage the need for judicial intervention. This aspect of the test is passed.

2. Are the proceedings collective in nature?

In this instance, we need to assess whether the DGF qualifies as collective.

The Model Law is not intended to be used for only one class of creditor, nor is it designed to act as a means of gathering in assets as part of a winding up. In this case substantially all of the assets and liabilities are dealt with in the proceedings. In any event, the test would not be failed if it happened not to affect the rights of one class of creditors. The DGF is a single insolvency representative with the ability to control the realisation of assets for the purpose of distribution among creditors. The proceedings here would qualify as collective for the purposes of the MLCBI.

3. Are the proceedings authorised under the insolvency laws of another country?

The provisions of the LBBA make it clear that the proceedings are authorised and are expressly designed to deal with matters of insolvency, in this instance, the law is specific to Banks and banking activity but it is not necessary for this to be labelled an "insolvency law" – the very fact this deals with financial distress and under which an insolvency proceedings can be commenced.

4. Is the DGF subject to the supervision and control of the foreign court?

There is no definition of "Foreign Court" under the MLCBI. In this instance the DGF is a governmental body of Country A, albeit. It would be safe to assume there is a degree of judicial oversight in the process (or recourse to such), although the level of supervision is necessarily low under the MLCBI. As was the case in *Agrokor* the LBBA giving control to the DGF (an arm of the government) does not negate the supervision of the court. The supervision may be

actual or potential should the situation arise. In this case there appears little or no judicial supervision and while additional information/evidence/submissions on the precise workings of the LBBA or DGF Law may be required by the court, it is not a bar to the recognition being granted on the proviso that there is some mechanism for court supervision should the need arise. As these appear to be administrative proceedings, the need for the court's involvement at this stage does not arise and their supervisory capacity appears to be potential rather than actual at this juncture.

In the US case of *Betcorp* the Australian Securities and Investment Commission was held to be "an authority competent to control and supervise a foreign proceeding" – this case would provide persuasive authority and guidance on the principle that an administrative body can meet the control or supervision criterion. On the basis there is some avenue for an appeal against any action or determination taken by the DGF this arm of the test appears to be met.

5. Are the proceedings for the purpose of reorganisation or liquidation?

The operation of article 77 of the LBBA provides that the DGF automatically becomes the liquidator of the bank upon revocation of its licence by the NB. It is evident that the proceedings in Country A are for the purposes, initially reorganisation between 17 September and 17 December 2015 and thereafter liquidation.

6. Are proceedings foreign main or foreign non-main?

On the basis the COMI of the Bank is Country A, these would appear to be foreign main-proceedings. The registered office being in Country A creates a rebuttable presumption that the COMI is Country A.

Foreign Representative

The starting point is to consider the definition of "Foreign Representative" under Art.2(d). This contains the following elements summarised as follows:

A person or body (including interim) authorised in a foreign proceeding to administer the reorganisation or liquidation of the debtor's assets or affairs or to act as the representative of the foreign proceedings.

Although the person requires to be authorised in a foreign proceeding the MLCBI does not specify that the foreign representative must be authorised by the foreign court. The definition is sufficiently broad to include appointments made by a special agency other than the court. In this case Ms. G as the authorised officer and DGF (as the Applicants), would have standing as a foreign representatives.

On the basis the proceedings are foreign proceedings for the purpose of the MLCBI, the Applicants are administering "collective judicial or administrative proceedings" and as such fall within the definition of Art.2(d).

The foreign representative is authorised to act in accordance with the applicable law of Country A. It may be the case the court would require additional expert evidence on the precise terms of the DGF Law/LBBA, however on its face it appears there is a prima facie valid appointment of the Applicants and therefore they would qualify as foreign representatives under the MLCBI. The nature of the DGF and Ms G appointment is evidently for the purpose of the liquidation of the debtor.

It would be open to the court to rely on the presumption in Art.16(1) in order to confirm the foreign representative.

The MLCBI envisages the foreign representative will have commenced before they can be classed as a foreign representative – in this case both the DGF and Ms G have been appointed consistent with the law of Country A.

Other than public policy considerations, which the facts do not lend themselves to, there is no provision to evaluate the underlying merits of the decision to appoint the foreign representatives.

For full marks a discussion on the powers of both DGF and Ms G should be made

*** End of Assessment ***