



SUMMATIVE (FORMAL) ASSESSMENT: MODULE 2A

THE UNCITRAL MODEL LAWS RELATING TO INSOLVENCY

Commented [SL1]: TOTAL = 32.5

65%

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

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

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

INSTRUCTIONS FOR COMPLETION AND SUBMISSION OF ASSESSMENT

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

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

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

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

ANSWER ALL THE QUESTIONS

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

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

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

Question 1.1

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

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

Question 1.2

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

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

(d) All of the above.

Question 1.3

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

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

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

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

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

Question 1.4

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

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

(b) The public policy exception.

(c) The safe conduct rule.

(d) The "hotchpot" rule.

Question 1.5

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

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

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

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

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

Question 1.6

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

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

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

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

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

Question 1.7

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

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

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

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

(d) All of the above.

Question 1.8

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]

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Question 2.1 [maximum 3 marks]

Commented [SL4]: 2 marks

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

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

Under the MLCBI, the appropriate date for determining the COMI of a debtor is the date of the commencement of the foreign proceeding. This means that the court should assess the debtor's COMI at the time when the foreign proceeding was initiated. However, this does not preclude the possibility that the debtor's COMI may have changed at a later date, which could result in a shift of jurisdiction. In such a case, the foreign representative or interested parties may seek to challenge the jurisdiction of the court on the grounds that the debtor's COMI has shifted to another jurisdiction.

It is important to note that the appropriate date for determining the COMI of a debtor is not necessarily the same as the date of the recognition proceeding. The recognition proceeding may take place at a later date, after the foreign proceeding has already been initiated. Therefore, the court must determine the debtor's COMI as of the date of the foreign proceeding, not the date of the recognition proceeding.

A 2019 Dentons article notes that 'The absence of uniformity of approach to timing may be attributed to the lack of guidance from UNCITRAL prior to 2014. The first edition of the UNCITRAL Guide to Enactment (1997) was silent on the issue of timing, leaving national courts free to make their own decision. Three approaches have since emerged in answer to the question: at which point in time COMI should be determined? Either: (i) upon commencement of the foreign insolvency proceeding ('the European approach'); (ii) upon filing of the recognition application in respect of the foreign insolvency proceeding ('the US approach'); or (iii) upon the hearing of the recognition application ('the Australian approach')' and explains these points in further detail.¹

Question 2.2 [maximum 3 marks]

Commented [SL5]: 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'".*

¹ www.mondaq.com/insolvencybankruptcy/837102/timing-is-everything-different-approaches-to-the-relevant-date-for-determining-comi-in-cross-border-recognition-proceedings

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

Statement 1: Article 14 of the Model Law lays down the requirements of notification to foreign creditors of a proceeding.

Statement 2: Article 10 of the Model Law, which is referred to as the "Safe Conduct Rule".

Statement 3: Article 16(3) of the Model Law contains a rebuttable presumption in respect of the Centre of Main Interest (COMI).

Question 2.3 [2 marks]

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

In the IBA case appeal, the English Court of Appeal upheld the decision of the first instance court that the indefinite Moratorium Continuation should not be granted.

The Moratorium Continuation is a relief available under Article 20 of the Model Law, which provides for an automatic stay of proceedings against the debtor in the enacting state when a foreign main proceeding has been recognized. The stay is intended to protect the assets of the debtor and ensure the success of the foreign proceeding.

However, the court has the power under Article 21 of the Model Law to grant post-recognition relief to vary, terminate, or revoke the stay. In this case, the liquidators of the International Bank of Azerbaijan (IBA) sought an indefinite continuation of the moratorium because they believed that it was necessary to preserve the value of the assets for the benefit of all creditors.

The Court of Appeal held that the indefinite Moratorium Continuation sought by the liquidators was not necessary for the protection of the assets of the debtor or the interests of the creditors. The court found that there was no evidence that the liquidators had a credible plan for the restructuring or rescue of the bank, and that the indefinite continuation of the moratorium would be detrimental to the interests of creditors who were seeking to enforce their claims against the bank.

Furthermore, the Court of Appeal emphasized that the moratorium should be a temporary measure and should not be used to indefinitely suspend proceedings and delay the enforcement of creditors' rights. The court noted that the objectives of the Model Law include the fair and efficient administration of cross-border insolvency proceedings and the protection of the interests of creditors, and that the indefinite continuation of the moratorium would not serve these objectives.

In summary, the English Court of Appeal upheld the decision of the lower court that the indefinite Moratorium Continuation sought by the liquidators of IBA should not be granted because it was not necessary for the protection of the assets of the debtor or the interests of the creditors and would be contrary to the objectives of the Model Law.

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Also discussion of Gibbs rule

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.

Article 12, Participation of a foreign representative in a proceeding, provides that 'Upon recognition of a foreign proceeding, the foreign representative is entitled to participate in a proceeding regarding the debtor'. Article 12 requires recognition of the foreign proceeding for the foreign representative to obtain standing. Once the foreign proceeding is recognized, the foreign representative can make petitions, requests, or submissions about asset protection, distribution, realization, or cooperation. However, it should be noted that this article does not confer any particular rights or powers upon the foreign representative.

Under Article 18 of the MLCBI, the foreign representative in the foreign main proceeding has an ongoing duty of information towards the court in the enacting State. The foreign representative is required to inform the court of any significant development in the foreign proceeding that is likely to affect the recognition, enforcement, supervision or termination of the foreign proceeding in the enacting State. The foreign representative is also required to provide the court with any information that the court may reasonably request regarding the foreign proceeding. This duty of information continues for as long as the foreign proceeding is pending.

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] [1 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.

The Model Law's provisions on access and co-operation provide foreign representatives with certain rights to access and administer the debtor's assets and affairs located in the enacting State. However, these rights are only available to foreign

Commented [SL7]: 1 mark

Art 29(a) and art 18

Commented [SL8]: SUBTOTAL = 6 MARKS

representatives who have been recognized as such by the court in the enacting State through a recognition proceeding under the Model Law.

Article 9 provides for a right of direct access; Article 11 confers the right to commence proceedings in State A's laws if the conditions for doing so are otherwise met [1] (except for the fact that this is a foreign representative rather than a domestic action); Article 12 provides that, following recognition, the foreign representative is entitled to participate in proceedings regarding the debtor; Article 13 provides that foreign creditors have the same rights regarding the commencement of, and participation in, a proceeding as domestic creditors; and Article 14 concerns notification rights.

Without recognition, the foreign representative does not have the authority to act on behalf of the foreign proceeding in the enacting State. This means that the foreign representative would not have the power to take control of the debtor's assets or manage the debtor's affairs in State A. This can be particularly problematic for foreign representatives who need to secure the debtor's assets in the enacting State to ensure that they are available for distribution to creditors in the foreign proceeding.

Furthermore, even if the foreign representative is able to take some action in State A without recognition, such as commencing legal proceedings, their actions may not be given effect or may be challenged by other parties, leading to increased costs and delays. Recognition is therefore a critical step for foreign representatives to obtain the legal authority needed to manage the debtor's assets and affairs in the enacting State, and to protect the interests of creditors in the foreign proceeding.

Your answer should include a discussion on the following elements:

- **Legal standing (Article 9 MLCBI):** The key access for the foreign representative is set forth in Article 9 MLCBI. In the capacity of foreign representative, the foreign representative has automatic standing before the courts in State A without having to meet any formal requirements such as a license or any consular action. In other words, the "status" in State B of the foreign representative is automatically recognised in State A for the purpose of granting the foreign representative standing before the courts in State A. This allows the foreign representative to safeguard and pursue assets of the debtor estate in State A before its courts.
- **Opening domestic insolvency proceedings (Article 11 MLCBI):** The foreign representative is further specifically entitled to apply for the opening of domestic insolvency proceedings in State A, as reflected in Article 11 of the MLCBI. Whether or not the foreign representative would wish to do this will depend on what the requirements are for opening such domestic proceedings. Can these requirements be met? On the other hand, it will depend on what the foreign representative believes he/she can get in terms of (interim) relief for the foreign proceedings in State B. In other words, are domestic insolvency proceedings really needed, or just additional time and costs that should be avoided?
- **Cooperation:** Similar to access rights, the cooperation provisions in the MLCBI (articles 25-27) also operate independently of recognition and it is not a prerequisite to the use of the cooperation provisions that recognition of the foreign proceedings is obtained in advance. Courts in State A can freely cooperate with the

foreign representative without having to worry whether the status in State B of the foreign representative can be recognised in State A.

- **Save Time & Costs:** The key benefits of both the access provisions and the cooperation provisions are that they save time and therefore also costs, as a result of which value destruction can be avoided and value enhancement is being promoted.

Question 3.2 [maximum 5 marks] [2 out of 5 marks]

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

Article 15 concerns application for recognition of a foreign proceeding, and allows for a foreign representative to apply to for recognition. It requires such an application to be accompanied by a certified copy of the decision commencing the foreign proceedings and appointing the representative, or a certificate from the foreign court confirming the same, or evidence acceptable to the Model Law's court. [1]

Article 16 lists presumptions regarding recognition, Article 17 establishes a presumption that recognition will be granted subject to satisfying the relevant criteria, and Article 18 imposes upon the foreign representative a continuing duty of full and frank disclosure of any substantial information regarding the application.

Article 1(2) of the Model Law allows the enacting State to exclude certain proceedings from its application. While the Model Law applies to any foreign proceeding that qualifies under Article 2(a), certain entities such as banks and insurance companies may be excluded due to their special regulatory regime. [1] However, the enacting State should be cautious not to limit the right of the insolvency representative or court to seek recognition abroad for an insolvency proceeding conducted in the territory of the enacting State. Any exclusions from the Model Law should be clearly stated by the enacting State to enhance transparency.

With reference to the question, your answer should have also included a discussion on the following:

1. **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.
2. **Judicial scrutiny:** While the court in State A is able to rely on the rebuttable presumptions set forth in Article 16 of the Model Law, in the context of Article 17

of the Model Law the court will have to assess whether either the COMI or at least an establishment of the debtor is located in State B where the foreign proceedings were opened. If the COMI of the debtor is in State B the foreign proceedings should be recognised as foreign main proceedings and if only an establishment of the debtor is in State B the foreign proceedings should be recognised as foreign non-main proceedings. Without a COMI or at least an establishment of the debtor in State B, recognition cannot be granted by the court in State A.

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

Question 3.3 [maximum 5 marks] [2 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.

The foreign representative may access certain tools and protections available to a local insolvency office-holder in the enacting State through the recognition process (Article 17). This can save significant cost and time, as the foreign representative can request tailor-made relief without the need to commence local insolvency proceedings. For example, the foreign representative can seek powers to examine witnesses, take evidence, or deliver information about the debtor's assets, liabilities, and affairs more generally. The use of such powers, if granted, can assist in gathering information to ascertain whether insolvency claw-back actions or claims against the directors exist.

Even prior to a decision on the recognition application, the court in the enacting State is entitled to grant urgently needed interim relief upon application for the recognition of a foreign proceeding based on Article 19 of the Model Law. Article 20 of the Model Law provides for automatic mandatory relief in case the recognised foreign proceeding qualifies as a foreign main proceeding, while Article 21 of the Model Law sets out the court's discretionary power to provide post-recognition relief. [1]

According to Article 22 of the Model Law, the court in the enacting State must be satisfied that the interests of the debtor's creditors and other interested parties are adequately protected when granting or denying relief based on either Article 19 (interim pre-recognition relief) or Article 21 (discretionary post-recognition relief). The court may subject relief to conditions it considers appropriate (paragraph 2) and at the request of the foreign representative or an affected person, may further modify or terminate the relief (paragraph 3). [1]

A recognition decision also gives the foreign representative standing to initiate actions under the law of the enacting State to avoid or otherwise render ineffective legal acts detrimental to the creditors of the debtor, such as claw-back rights and the power to avoid antecedent transactions (Article 23). According to Article 24, the foreign

representative has the right to intervene in any local proceedings in the enacting State in which the debtor is a party, provided the foreign representative meets the local requirements for this.

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

1. Post-recognition relief (automatic or discretionary): In case of a foreign main proceeding, there will be automatic relief as set forth in Article 20 of the Model Law. For both foreign main and non-main proceedings, article 21 of the Model Law set forth what post-recognition relief can be requested by the foreign representative. Appropriate relief under Article 21(1) of the Model Law must be necessary to protect the assets of the debtor or the interests of the creditors. The relief set forth in Article 21(2) of the Model Law requires the court to be satisfied that the interests of the creditors in State A are adequately protected. In case of a foreign non-main proceeding there is an additional requirement that needs to be met before relief can be granted. According to Article 21(3) of the Model Law the court in such a case must also be satisfied that the relief relates to assets that, under the law of State A, should be administered in the foreign non-main proceeding or concerns information required in that proceeding.

[In this context of relief, the foreign representative of State B could also think about the need to exercise any anti-avoidance powers in State A based on article 23 of the MLCBI]

2. 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.

3. 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.

4. 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?

A worldwide freezing order (WFO) is an injunction issued by a court that restrains a party from disposing of or dealing with their assets, both within and outside the jurisdiction of the court. Such an order can be granted as pre-recognition interim relief

under Article 19 of the Model Law to preserve the value of the debtor's assets before the court decides on recognition of the foreign proceeding.

However, it is unlikely that a WFO granted as pre-recognition interim relief under Article 19 of the Model Law will continue post-recognition under Article 21 of the Model Law. This is because post-recognition relief under Article 21 of the Model Law is discretionary, and the court will consider whether the relief is necessary to protect the interests of the debtor's creditors and other interested parties.

The 2021 English case of *Protasov v Derev*² examined whether a worldwide freezing order, granted as provisional relief under Article 19, could be continued following recognition in the UK of a Russian bankruptcy as a foreign main proceeding under Article 21. While the English court had jurisdiction to grant post-recognition discretionary relief, it found that that the English bankruptcy regime provides other forms of protection that make relief in the form of a freezing order or similar injunction unwarranted. The court reasoned that the Model Law aims to put the foreign bankruptcy manager in the same position, as far as possible, as a domestic officeholder, and that recognition of a foreign main proceeding brings into play the same wide infrastructure of insolvency legislation. Therefore, absent exceptional reasons, a freezing order or similar order will not be required or justified. The court found no evidence of any exceptional reasons in this case.

Therefore, while a WFO may be necessary to preserve the value of the debtor's assets before a recognition decision, it may not be appropriate to continue the WFO post-recognition if it is no longer necessary to protect the interests of the debtor's creditors and other interested parties. The court will consider all relevant circumstances when deciding whether to grant post-recognition relief, including the status of the foreign proceeding, any relief granted by the foreign court, and the utility of continuing the WFO.

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).

² [2021] EWHC 392 (Ch); [2021] Bus. L.R. 685; [2021] 2 WLUK 364.

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

Classification of the bank as troubled

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

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

Classification of the bank as insolvent

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

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

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

Provisional administration

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

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

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

Liquidation

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

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

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

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

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

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

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

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

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

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

(2) The Bank's liquidation

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

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

Those operations included:

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

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

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

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

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

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

QUESTION 4.1 [maximum 15 marks] [9 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 of 10]

The Model Law on Cross-Border Insolvency (MLCBI) defines a "foreign proceeding" as a collective judicial or administrative proceeding in a foreign state, including an interim proceeding, pursuant to a law relating to insolvency in which assets and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganization or liquidation.

Article 2(a) of the MLCBI defines a "foreign proceeding" as follows:

"Foreign proceeding" means a collective judicial or administrative proceeding in a foreign State, including an interim proceeding, pursuant to a law relating to insolvency in which proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganization or liquidation.

To qualify as a "foreign proceeding" under the MLCBI, the following elements must be present:

- **Collective judicial or administrative proceeding ["collective nature" and "judicial or administrative" are two separate elements to consider]:** The proceeding must be a collective proceeding, which means it must involve the debtor's assets and affairs as a whole, rather than individual creditors pursuing individual claims against the debtor. (This element is addressed in the UNCITRAL Guide to Enactment, pp 39-40 at paras 69-70. However, The Judicial Perspective, p 25 at para 72, also highlights that a proceeding should not be considered to fail the test of collectivity purely because a particular class of creditors' rights is unaffected by it).
- **Conducted in a foreign state:** The proceeding must be conducted in a state other than the state where the debtor's main interests are located. The main interests of a debtor are typically located in the state where the debtor has its centre of main interests (COMI).
- **Pursuant to a law relating to insolvency:** The proceeding must be conducted under a law that deals with insolvency or financial distress, such as a bankruptcy law or a law providing for the reorganization of companies.
- **Assets and affairs of the debtor are subject to control or supervision by a foreign court:** The foreign court must have some form of control or supervision over the assets and affairs of the debtor. This may include the power to stay or enjoin proceedings against the debtor, or the power to approve or reject a proposed reorganization plan.
- **Purpose of reorganization or liquidation:** The purpose of the proceeding must be either reorganization or liquidation of the debtor's assets and affairs.

It is important to note that the MLCBI provides a broad definition of a "foreign proceeding," and it is not limited to formal insolvency proceedings. It includes any collective proceeding conducted by a foreign court, regardless of its label or form, that has the objective of dealing with the debtor's financial distress, whether by reorganization or liquidation.

This example case is similar to two established cases:

- **The Chancery Division's decision in Agrokor DD, Re³, in which it was held to be possible under the Cross-Border Insolvency Regulations 2006 to recognise a foreign proceeding brought in a foreign court in respect of a group of companies, where recognition was sought only in relation to one specific company identified in the application.**

And even more relevantly:

- **The Chancery Division's decision in PJSC Bank Finance and Credit (In Liquidation), Re (PJSC Bank)⁴ recognised the liquidation of a Ukrainian bank as a foreign main proceeding under the Cross-Border Insolvency Regulations 2006. The liquidation had commenced pursuant to the relevant provisions of the DGF Law and Article 76**

³ [2017] EWHC 2791 (Ch); [2018] Bus. L.R. 64; [2017] 11 WLUK 209; [2018] B.C.C. 18.

⁴ [2021] EWHC 1100 (Ch); [2021] 4 WLUK 366 [2021]; B.P.I.R. 1228.

of the Law of Ukraine on Banks and Banking Activity. The liquidation met the definition of a "foreign proceeding" under art.2(j) of the GB Model Law, as it was a collective judicial or administrative proceeding in a foreign State pursuant to a law relating to insolvency, in which the assets and affairs of the debtor were subject to control or supervision by a foreign court. DGF, which exercised its powers in the liquidation free from intervention by the government or the National Bank of Ukraine, was considered a "foreign court" for the purposes of the definition. The bank's liquidation was also a "main proceeding" taking place in Ukraine, where the debtor had its centre of main interests. The court found no public policy considerations preventing recognition of the liquidation under art.17 of the GB Model Law, and the procedural requirements of art.15 had been satisfied. The first applicant had been appointed as DGF's authorized officer in respect of the bank's liquidation, and all of the bank's creditors were entitled to claim in the liquidation, with their claims met from available assets, according to the statutory order of priorities.

The fact pattern in this question therefore closely mirrors that in PJSC Bank. Similar assurances re. DGF's independence are addressed at articles 3(3) and 3(7) of the DGF Law in the question's facts.

For full marks, your response should address each element in sufficient detail, provide guidance and source references, as appropriate and apply the facts. For the "subject to control or supervision by a foreign court" element, for example, we are looking for something along the following lines:

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

example, the insolvency representative is subject to control or supervision by the court. Mere supervision of an insolvency representative by a licensing authority would not be sufficient."

5. *In this case the DGF has control of all of the Bank's assets and overall control of the liquidation.*
6. *The DGF's independence is addressed at articles 3(3) and 3(7) of the DGF Law which confirm that it is an economically independent institution with separate balance sheet and accounts from the NB and that neither public authorities nor the NB have any right to interfere in the exercise of its functions and powers.*
7. *Article 37 establishes that the DGF (or its authorised person, insofar as such powers are delegated) has extensive powers, including powers to exercise managerial and supervisory powers, to enter into contracts, to restrict or terminate the bank's transactions, and to file property and non-property claims with a court.*
8. *The assets and affairs of the Bank are subject to the control of the DGF, an official body which exercises its powers in the liquidation free from intervention by government or the NB and which should be considered, for the purposes of the definition set out in article 2(e) of the MLCBI, as a "foreign court".*

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 out of 5]

Article 2(d) of the Model Law defines "foreign representative" as a person or body authorized in a foreign proceeding to administer the reorganization or liquidation of the debtor's assets or affairs or to act as a representative of the foreign proceeding.

To qualify as a foreign representative under the Model Law, a person or body must be authorized in a foreign proceeding to perform one of the following functions:

- *Administer the reorganization or liquidation of the debtor's assets or affairs; or*
- *Act as a representative of the foreign proceeding.*

The Model Law does not specify who may serve as a foreign representative. However, it requires that the person or body be "authorized" in the foreign proceeding. This implies that the foreign representative must be appointed or recognized in the foreign proceeding in accordance with the laws of the country where the proceeding is taking place.

Moreover, the foreign representative must meet the requirements of the relevant laws and regulations in the country where the proceeding is taking place. These requirements may include, for example, the need to be licensed to practice law or accounting.

In addition, the foreign representative must comply with the provisions of the Model Law and any other applicable laws and regulations in the country where the proceeding is taking place.

All of the above requirements appear to be met in this case. Also, articles 48(3) and 35(1) reflect similar provisions to the insolvency practitioner regime in England and

Wales, and therefore Mrs G appears to effectively be an officer of Country A's court, and this application appears substantively identical to a domestic insolvency practitioner's application in the UK.

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.

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

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

* End of Assessment *