



SUMMATIVE (FORMAL) ASSESSMENT: MODULE 2A

THE UNCITRAL MODEL LAWS RELATING TO INSOLVENCY

Commented [SL1]: TOTAL = 43.5

87%

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

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

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

INSTRUCTIONS FOR COMPLETION AND SUBMISSION OF ASSESSMENT

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

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

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

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

ANSWER ALL THE QUESTIONS

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

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

Commented [SL2]: SUBTOTAL = 10 MARKS

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

Question 1.1

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

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

Question 1.2

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

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

(d) All of the above.

Question 1.3

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

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

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

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

Question 1.4

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

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

(b) The public policy exception.

(c) The safe conduct rule.

(d) The "hotchpot" rule.

Question 1.5

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

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

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

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

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

Question 1.6

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

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

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

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

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

Question 1.7

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

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

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

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

(d) All of the above.

Question 1.8

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]: 3 marks

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

*Whilst not defined in the MLCBI, COMI ("Centre of Main Interest" of an individual debtor interest) is of central importance to insolvency under the MLCBI - it is referred to or used as a reference point in various article of the MLCBI. Whilst undefined in the MLCBI, two key factors from the EIR that assist in determining a debtors COMI are the location in which its central administration takes place, and that can be readily ascertainable by its creditors. The appropriate date for determining COMI, or whether an establishment of a debtor might exist, is the date that foreign proceedings were commenced (NB: US case law (in *Morning Mist*) takes a slightly divergent approach towards determining the date for determining a debtor's COMI - the Second Circuit of Appeals Court held that a debtor's COMI should be assessed based on the activities at or around the time of the Chapter 15 petition). Should a debtor's COMI change, particularly if close to the data of commencement of foreign proceedings, the evidentiary requirements for establishing the appropriate date for COMI can become very difficult.*

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'".

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

Statement 1 concerns Article 14 titled, "Notification to foreign creditors of a proceeding under [identify laws of the enacting State relating to insolvency]" - this provides for an equal treatment principle.

Statement 2 concerns Article 10 titled, "Limited jurisdiction". This article aims at ensuring the Court's of the enacting state do not assume jurisdiction over all the assets of a debtor on the ground solely of the fact that a foreign representative applies for recognition of a foreign proceeding.

Statement 3 concerns Article 16, paragraph 3 titled, "Presumptions concerning recognition". Whilst the MLCBI does not define COMI, paragraph 3 of Article 16 presumes, absent proof to the contrary, that a debtor's registered office, or the habitual residence (for individuals), is the debtor's centre of main interest

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.

An indefinite Moratorium Continuation is a type of relief sought under article 21 of the MLCBI. At first instances, Justice Hildyard held that a permanent stay could not be used as a way around the "Gibbs Rule", which is a general proposition that a UK law governed debt could not be discharged or compromised by a foreign insolvency proceeding.

The issue for determination by the English Court of Appeal (the "COA") concerned whether the English Court lacked jurisdiction to grant the indefinite Moratorium Continued as requested by the foreign representative. Whilst the COA stated that the case did not involve a jurisdictional issue in the strict sense, the crux of the issues concerned whether, as a matter of accepted Court practice, the Court ought not to exercise its jurisdiction to grant the indefinite Mortatorium Continuation in circumstances where doing so would: (i) practically prevent creditors in England from enforcing English law rights, pursuant to the "Gibbs Rule" (on this point, the COA held that an English Court may only grant the indefinite Moratorium Continuation where it was both necessary to protect the interests of creditors, and that the stay was an appropriate way of achieving protection. The COA found that the creditors did not need further protection in order for the foreign proceeding to achieve its goal in this case), and (ii) extend the stay following a foreign reconstruction process concluding (on this point, the COA found that the MLCBI strongly implied that once a foreign proceeding concludes and the foreign representative no longer holds office, the MLCBI affords no scope for further orders in respect of the foreign proceeding and any extant relief granted under the MLCBI ought be terminated).

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

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Art 29(a) and art 18

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 the granting of recognition of a foreign main proceeding, the Court in the enacting State must cooperate to the maximum extent possible with the foreign Court and foreign representative (pursuant to Article 25(1) MLCBI). The Court in the enacting State may also communicate directly with the foreign Court or foreign representative, and may request information or assistance from the same (pursuant to Article 25(2) MLCBI).

In relation to the foreign representatives in the foreign proceeding, they have an ongoing obligation (pursuant to Article 18 MLCBI), from the time of filing the recognition application, to promptly inform the Court in an enacting State of two things: (1) any substantial changes to the status of the recognised foreign proceeding or the status of the foreign rep's appointment and (2) the existence of any other foreign proceeding in respect of the same debtor that the foreign rep learns of.

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

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

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

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

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.

In considering their options to secure value of the debtor's assets located within State A, it is imperative that the foreign representative obtain the assistance of the State A (enacting) Court in order that he make use of rights in State A so that the debtor's assets located can be considered for the purposes of potential recovery. In particular, access and co-operation between the foreign rep and the State A Court's can provide the foreign rep with access to the courts of the enacting State A, which will enable the foreign rep to seek short-term "breathing space" and enable the State A Court's to determine what co-ordination amongst the jurisdictions or other forms of relieve are warranted to facilitate optimal disposition of the debtor's assets in the insolvency.

Articles 9 through 14 of the MLCBI (contained in Ch II of the MLCBI) concern access for foreign representatives and creditors. These provisions provide for standing before

the local Court's in State A (as enacting state here) for each of foreign representatives and creditors, as well as non-discrimination principles - this ensures that a foreign creditor (who the foreign rep on these facts acts for) is afforded the same rights as local creditors and will benefit from any timely notice (per Article 14) concerning events occurring in State A. The access rights and non-discriminatory provisions ensure that time and costs is saved, avoiding value destruction of the debtor's estate. [1] In particular:

- **Article 9 provides that a foreign representative will have standing in the State A Court's without needing to apply for recognition - no further powers are gained, however; [1]**
- **Article 11 also provides standing to the foreign rep in the State A Courts, but enables the foreign rep to commence a domestic insolvency proceeding; [1]**
- **Article 12 also provides standing, but requires recognition of the foreign proceeding. Once standing is provided, the foreign rep can make petitions, requests or arguments regarding the protection, realisation or distribution of assets and or cooperation with the foreign proceeding. This clearly provides benefits to the foreign rep in requiring assistance of the debtor and may enable the identification and valuation of the debtor's assets in State A.**

If the foreign proceeding is recognised, appropriate relief under Article 21(1) of the MLCBI provides the court in State A with discretionary power to grant appropriate relief to the foreign rep, including:

- **Staying proceedings against the debtor's assets preventing further dissipation of the value (Article 20(1)(a));**
- **Staying execution against the debtor's assets (Article 20(1)(b));**
- **Suspending the right to transfer, encumber or otherwise dispose of debtor's assets (Article 20(1)(c)).**

It is through the access and co-operation provisions that the foreign rep may be able to orders for the examination of witnesses, taking of evidence, delivery of information, etc. concerning the debtor's assets, affairs, obligations liabilities, including to identify the following types of information to help it secure the value of the debtor's assets in State A:

- **Location of the debtor's books and records;**
- **Any financing organised by the debtor;**
- **Debtor's primary bank account;**
- **Debtor's assets held in the jurisdiction.**

Finally, to the extent that any other assistance is provided for under the local laws of State A that the foreign rep may make use of, Article 7 of the MLCBI confirms that the Model Law doesn't displace any existing cross-border assistance provisions in such local laws of State A.

For full marks you must refer to articles 25-27 of the MLCBI which deal with 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.

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

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

On the assumption that the foreign proceeding in State B qualifies as a "foreign proceeding" for the purposes of Article 2(a) of the MLCBI (being a proceeding, judicial or administrative, collective in nature in a foreign state authorised or conducted under insolvency laws in which the assets/affairs of the debtor as subject of control or supervision by a foreign Court, such proceeding is for the purposes of liquidation or reorganisation) and the foreign rep qualifies as a "foreign representative" for the purposes of article 2(d) of the MLCBI (being a person or both authorised by a foreign proceeding to administer the liquidation or reorganisation of the debtor's affairs/assets or to act as the rep of the foreign proceeding), various other considerations must be assessed in respect of the recognition application, including:

- **Recognition requirements:** as prescribed by Article 15, an application by the foreign representative to the Courts of State A for recognition of the foreign proceeding in State B must be accompanied by (i) a certified copy of the decision commencing the State B proceeding and appointing the foreign rep, or (ii) a certificate from the State B Court affirming the existence of the foreign proceeding and appointment of the foreign rep, or (iii) any other evidence acceptable to the State A Court [1] re the existence of the State B proceeding and appointment of the foreign rep (such other evidence might include verified copies of Court orders, minutes of meetings, reports to creditors and Company searches confirming the appointment and work of the foreign rep, or relevant correspondence with the registrar of companies or registration of the foreign rep as liquidator of the debtor - see para 5 on page 36 of Digest of Case Law on the UNCITRAL Model Law on Cross-Border Insolvency). Compliance with these

requirements are strictly construed (see for e.g. *United States: Basis Yield Alpha Fund (Master)*, 381 B.R. 37, 52 (Bankr. S.D.N.Y. 2008), CLOUT 789.). [1]

- Any recognition application need also state all foreign proceedings in respect of the debtor that the foreign rep is aware of and, if required, a translation of the documentation in support of recognition may be required into the official language of State A.

- Other considerations may include:
 - o Whether the proceeding is a main or non-main proceedings: whether the State B proceeding is "main" in nature may impact the relief that can be obtained under Articles 20 and 21 of the MLCBI, any coordination of the State A and State B proceedings (under Ch IV of the MLCBI) and with any concurrent proceedings.

 - o Whether the foreign (State B) proceeding is opened in the jurisdiction of the debtor's COMI and or has at least an establishment in State B: if the State B proceeding were not opened in the jurisdiction of the debtor's centre of main interest ("COMI") [1] and it does not have an establishment in State B, that proceeding will not be regarded as a foreign proceeding for the purposes of the Model Law. Under the MLCBI, the COMI of a debtor (not defined in the Model Law) determines the consequences of any recognition. If COMI exists in the jurisdiction of the foreign proceedings (here, State B), the proceedings are main insolvency proceedings with automatic mandatory relief. If, however, the debtor only maintains an establishment in State B, the proceedings are non-main proceeding and do not come with automatic relief; instead, they receive only discretionary post-recognition relief as granted by the Court. Should the debtor's COMI not be clear, evidence the Court may consider includes the location of the debtor's books and records, location of financing, location of primary bank accounts, etc.

 - o Does the foreign representative have standing: depending on what the foreign rep hopes to achieve, it may be afforded standing without further powers or rights in State A pursuant to Articles 9 or 11 of the MLCBI. However, seeking to establish standing pursuant to Article 12 of the MLCBI requires that the foreign rep have the foreign proceeding recognised by the Court's of State A.

Finally, the judicial scrutiny that must be overcome for a recognition application to be successful requires that the State A Court be satisfied that an appropriate balance is struck between the relief that may be granted to the foreign rep and the interests of persons that may be affected by such relief. Article 22 of the MLCBI refers to the interests of creditors, the debtor and other interested parties. Such interest ought clearly to guide the State A Court in its exercise of the discretionary powers to grant relief under the Model Law.

Your answer should have included a brief discussion on the following elements:

1. **Exclusions:** If the debtor is an entity that is subject to a special insolvency regime in State B, the foreign representative should first 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.
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] [4 out of 5 marks]

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

In the context of the MLCBI, there are various forms of relief that can be obtained with respect to recognition. The relief varies depending on whether the relief is pre- or post- recognition being granted. The forms of relief available are set out below by reference to the relevant MLCBI articles.

Article 19 of the MLCBI permits a Court in the enacting state to grant urgently required interim relief upon receipt of an application for the recognition of a foreign proceeding; such relief being described as interim relief pre-recognition. Such relief includes (amongst other things):

- Stay execution against the assets of a debtor;
- Entrusting the administration of the debtor's assets in the foreign rep; and
- Any of the Article 21 post-recognition relief (below).

Article 21 of the MLCBI prescribes the Court's discretionary powers to provide relief following recognition being granted. Such relief includes (amongst other things):

- Staying execution against debtor's assets;
- Suspension of the right to transfer or otherwise deal with any debtor assets;
- Stay the commencement or continuation of any individual actions or proceedings concerning the debtor; and
- Examination of witnesses or taking of evidence and delivery of information re debtor's assets.

Article 20 of the MLCBI provides for an automatic mandatory relief in circumstances where the foreign proceeding qualifies as a foreign main proceeding. This results in a stay of actions against the debtor, a stay of execution against the assets of the debtor and a restriction on otherwise dealing with the debtor's assets.

When faced with a recognition application, the Court should be guided by being satisfied that the adequate protections are afforded as between the interests of debtor's creditors and other interested parties (pursuant to Article 22 of the MLCBI).

On recognition, a foreign representative obtains standing to initiate actions pursuant to the law of the enacting state in order to avoid or otherwise overcome legal acts detrimental to the creditors of the debtor (pursuant to Article 24 of the MLCBI). Further, on recognition and provided local requirements are satisfied, the foreign rep is able to intervene in local proceedings in the enacting State to which the debtor is party.

For full marks, you answer could have included a brief discussion on the following:

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

Question 3.4 [maximum 1 mark] [1 mark]

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

By reference to the English case of *Igor Vitalievich Protasov and Khadzhi-Murat Derev*, the English Court found that, whilst it strictly had jurisdiction to grant post-recognition discretionary relief, it held that relevant restrictions and limitations exist that limit the proper exercise of such jurisdiction. In particular, the Court noted that the English bankruptcy regime offers other protections, meaning that relief in the form of a worldwide freezing order (granted as a pre-recognition interim relief) or similar injunction wasn't required to continue following recognition.

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

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

(1) Background

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

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

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

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

Classification of the bank as troubled

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

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

Classification of the bank as insolvent

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

- (i) the bank's regulatory capital amount or standard capital ratios have reduced to one-third of the minimum level specified by law;**
- (ii) within five consecutive working days, the bank has failed to meet 2% or more of its obligations to depositors or creditors; and**

(iii) the bank, having been declared as troubled, then fails to comply with an order or decision of the NB and / or a request by the NB to remedy violations of the banking law.

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

Provisional administration

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

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

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

Liquidation

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

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

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

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

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

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

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

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

DGF for their actions and may exercise the powers delegated to them by the DGF in pursuance of the bank's liquidation.

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

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

(2) The Bank's liquidation

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

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

Those operations included:

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

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

Three months later, on 17 December 2015, the NB formally revoked the Bank's banking licence and resolved that it be liquidated. The following day, the DGF initiated

the liquidation procedure and appointed Ms C as the first of the DGF's authorised persons to whom powers of the liquidator were delegated. Ms C was replaced as authorised officer with effect from 17 August 2020 by Ms G.

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

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

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

QUESTION 4.1 [maximum 15 marks] [13.5 out of 15]

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

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

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

4.1.2 whether the Applicants fall within the description of "foreign representatives" as defined by article 2(d) of the MLCBI [maximum 5 marks]. [4.5 out of 5]

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

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

4.1.1. In relation to the question whether the Bank's liquidation comprises a "foreign proceeding" within the meaning of article 2(a) of the MLCBI, we must consider the facts in light of the definition of "foreign proceeding" under the MLCBI and its operation. Specifically, the definitional elements under article 2(a) must be considered:

- a. *There must be a proceeding (interim or full proceeding) - on the facts of this question, a proceeding commenced on either 17 September 2015 (the day NG classified the Bank as insolvent and entered into provisional administration) or 17 December 2015 (the date the NB formally resolved that the Bank be liquidated), following which a liquidation procedure commenced the following day. Based on the powers afforded to the DGF via Articles 35(5) and 36(1) of the DGF Law, and fact the DGF has full and exclusive rights to manage the Bank and all powers of the bank's management during provisional administration, it is more likely than not that a proceeding commenced on 17 September 2015. This would be the date on which the moratorium preventing claims being made against the Bank, pursuant to article 36(5) of the DGF Law. This definitional requirement would be satisfied.***

- b. *The proceeding must be either judicial or administrative in nature - Courts have interpreted this requirement to mean that the proceeding must be one of either judicial or administrative in nature (see the Digest of Case Law on the Uncitral Model Law on Cross-Border Insolvency, Chapter I, page 6, para 4) - it need not be both, though that may typically be the case (see for e.g. Raithatha v Ariel Industries PLC [2012] FCA 1526 at [31]-[33] (for the Australian perspective); New Paragon Investments Limited [2012] BCC 371 at [7]) (for the UK perspective)). In particular, and as found in one judicial decision, in the context of corporate insolvencies, a "proceeding" is defined by "a statutory framework that constrains a company's actions and that regulated the final distribution of a company's assets" (in the US case of Irish Bank Resolution Corporation (IBRC) Limited, 538 B.R. 692, 697 (D. Del 2015), CLOUT 1628 citing Betcorp Limited 400 B.R. 266, 278 (Bankr. D. Nev. 2009), CLOUT 927). As above, during provisional administration, the DGF Law provides that the DGF has full and exclusive rights to manage the bank and all powers of management. Thereafter, during liquidation, all powers of the bank's management and control terminate, as do all the bank activities, its debts are deemed due, and the DGF is afforded extensive powers over the Bank, including to recover any property, dispose of assets, make claims and to pay to creditors. It is likely that a UK Court would find that both the provisional administration process and the liquidation process (the finding is stronger for the latter given the broader powers noted above) in Country A would be sufficiently administrative in nature to meet this definitional element of article 2(a) MLCBI.***

- c. *It must be collective in nature* - the Guide to Enactment and Interpretation of the UNCITRAL Model Law on Cross-Border Insolvency (adopted on 18 July 2013) (the "GEI") outlines that "collective" is intended to focus on the desirability of achieving a co-ordinated solution for all stakeholders involved in an insolvency proceeding. This does not mean a collective device for a single creditor and debtor, or even group of creditors and debtor; a key consideration is whether substantially all of assets and liabilities can be dealt with in the proceeding, subject, of course, to local priority debts and statutory exceptions. A proceedings has been found to be collective in nature where it imposes an orderly regime impacting the rights and obligations of creditors, and all of the assets of the debtor (see for e.g. Larsen v Navios International Inc. [2011] EWHC 878 (Ch) at [23(j)], CLOUT 1273 (for a UK perspective); British-American Insurance Co., Ltd. 425 B.R. 884, 903 (Bankr. S.D.Fla. 2010) (for a US perspective). The facts of this case (and the power of the liquidator to deal with all assets and liabilities of the Bank) appear to support a finding that the proceeding is collective in nature, or as was found in the UK decision of In the matter of Agrokor DD [2017] EWHC 2791 (Ch), that the liquidation process under the DGF Law is "more collective rather than not collective enough". This definitional element is also likely satisfied.
- d. *It must be in a foreign state* - as the application before the English Court is for recognition of the liquidation of the Bank in Country A (a foreign state), this definitional element will be satisfied and uncontentious.
- e. *That is conducted or authorised by a law relating to insolvency* - this does not require that the proceeding be conducted under a law titled "insolvency" of Country A - this requirement operates as one of substance over form. That is, it will be sufficient if the operative law deals with or addresses insolvency or even severe financial distress, which the DGF Law does. It should also be noted that this definitional element may also be satisfied if insolvency is just one of the grounds on which the proceeding could be commenced, despite a finding of insolvency not actually being made out on the facts (which is also the case on these facts). Case law has broadly interpreted this requirement, finding that even a scheme of arrangement was a proceeding conducted pursuant to a law relating to insolvency (see for e.g. the Canadian decision in Syncreon Group B.V., 2019 ONSC 5774 at [28]). The DGF Law concerning liquidation is one concerned with insolvency, so this definitional element will be satisfied.
- f. *The assets and affairs of the debtor are subject to control of supervision by a foreign Court* - whilst the MLCBI is silent as to the level of control or timing at which control or supervision must arise, the GEI (at para 74) indicates that it is intended that the control or supervision be formal in nature, but the control of supervision afforded by the DGF Law need only be potential, rather than actual control or supervision. The level of supervision by the Court required is low under the MLCBI, however it must exist in some potential form. Under the DGF Law, extensive powers are afforded to the liquidator (as representative of the

DGF). The authorised person is accountable to the DGF for their actions, not to any Court. Further, articles 3(3) and 3(7) of the DGF Law confirm that the DGF is an economically independent institution, and that no public authorities (presumably including judicial bodies like the Court in Country A) have any right to interfere with its function and powers. It may be that this definitional element is not met, in light of the lack of any apparent supervision or oversight of the Bank liquidation by any Court. Should any form of Court supervision over the liquidators be found to exist, it may be sufficient to qualify as the Country A court supervising or controlling the proceeding, albeit indirectly (as was the case in Betcorp Limited 400 B.R. 266, 283-284 (Bankr. D.Nev. 2009), CLOUT 927).

As to whether this element of the “foreign proceeding” definition can be met as well, please also note the following:

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. In this case the DGF has control of all of the Bank’s assets and overall control of the liquidation.
5. 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.
6. 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.
7. 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”.

g. The proceeding must be for the purpose of reorganisation or liquidation - in order for this definitional element to be met, the liquidation must be for the purpose of reorganisation or liquidation. Some types of proceedings, such as

those designed to prevent dissipation or waste or prevent investor loss, as not going to meet this standard - this is contrasted with those proceedings to liquidate a company or reorganise an insolvent estate, which will meet the definitional element (see the UK case of Stanford International Bank Limited [2010] EWCA 137 (Civ) at [25] to [29], CLOUT 1003). The foreign proceeding on these facts is for the purposes of liquidating the Bank. The liquidation should meet this definitional element.

The GEI explains at paragraphs 62 to 80 that, for a foreign proceeding to be eligible for recognition under the MLCBI, all of the elements discussed above at (a) to (g) must be satisfied (see also the Digest of Case Law on the Uncitral Model Law on Cross-Border Insolvency, Chapter I, page 5, para 3). Courts have in fact found that whilst the subparagraphs are cumulative, they ought to be considered as a whole, and in accordance with article 8 MLCBI, they should be interpreted and applied in view of their international origins.

In view of the response provided above, all elements above (save for (f) re Court supervision [See comments above]) are likely satisfied on these facts. If the Applicants can show that the liquidation, or liquidators, remain subject to some form of Court supervision (even indirectly), the liquidation may be found to be a "foreign proceeding" for the purposes of article 2(a) of the MLCBI. If no Court Supervision is proven (which on these facts appears possible), the liquidation will fail to meet the definition of a "foreign proceeding" as all sub-elements of the definition in article 2(a) must be met.

[Excellent response, very well-reasoned, but please note the comments made above]

4.1.2 In relation to the question of whether the Applicants fall within the description of "foreign representatives" as defined by article 2(d) of the MLCBI, the following definitional elements must be considered:

- a. *A person or body, including those appointed in an interim capacity* - whilst "person" and "body" are undefined in the MLCBI, the fact of appointment of a foreign rep to act in a foreign proceeding in either or both capacities will be sufficient to meet this definitional element (see the Digest of Case Law on the Uncitral Model Law on Cross-Border Insolvency, Chapter I, page 5, para 3). The fact of Ms G's appointment in the liquidation of the Bank, would likely meet this definitional element of article 2(d) MLCBI.**
- b. *Authorised in a foreign proceeding* - Courts have shown that the focus is on the authorisation that is provided in the context of the proceeding, as opposed to the body providing the authorisation, which can include the Court, the law or even a debtor-appointment, like a decision by the debtor's board of directors (see for e.g. the US decision of *Vitro S.A.B. de C.V.* 701 F.3d 1031, 1047 (5th Cir. 2013), CLOUT 1310). The MLCBI does not specify that a foreign rep must be authorised by the foreign Court. Further, "foreign court" is defined in article 2(e) of the MLCBI to mean "*a judicial or other authority competent to control or supervise a foreign proceeding*". From this definition, it can be seen that a**

person or body authorised by a judicial body, or other authority competent to control or supervise a foreign proceedings, should meet this definitional element. This definition is broad enough to encompass appointments made by special authorities other than the Court (Williams v Simpson (No. 5) [2010] NZHC 1786 [2011] NZLR 380 at [65]). Ms G's appointment was made pursuant to a decision of the Executive Board of Directors of DGF. This was made following the commencement of formal liquidation proceedings (after the NB formally revoked the Bank's banking licence and resolve that it be liquidated), in which the DGF automatically became liquidator of the Bank, with all powers of management being vested exclusively in the DGF. The DGF is able to delegate its powers to an "authorised officer" (i.e. Ms G) pursuant to article 48(3) of the DGF Law, and provided Ms G meets the professional and moral requirements of the DGF Law (article 35(1)) and independence requirements of articles 3(3) and 3(7) of the DGF Law, her appointment is valid according to the Country A DGF Law. In the context of the liquidation proceeding, it is likely that the authorisation definitional requirement is satisfied.

- c. To administer the liquidation or reorganisation of a debtor's assets or affairs, or to act as the representative of the foreign proceeding - this definitional requirement clearly denotes that the authorised rep can be the person/body authorised to administer those proceedings (which would include seeking recognition, relief and/or co-operation in other jurisdictions), or for representing those proceedings (see the GEI at [86]). As the DGF has delegated its power to Ms G, and she has brought the proceeding in the UK seeking recognition of the foreign liquidation proceeding, this final definitional element is also most likely satisfied. In particular, Ms G has all the powers of a liquidator at the time the application for recognition was made - there is no question that she was not therefore authorised, nor that she does not have the power to administer the reorganisation or liquidation of the Bank's assets or affairs.*

Whilst the applicants are ostensibly a national banking authority, potentially raising the issue of whether or not the MLCBI applies to a such an entity (per Article 1(2) MLCBI), because a special insolvency regime in Country A might apply, this is not an issue on these facts given the instruction that we are to assume that the Bank is not excluded from the scope of the MLCBI. This may be problematic in other fact scenarios involving banks and would need to be given careful consideration.

Another well-reasoned response. For full marks, your response should also address the assumption of article 16(1) MLCBI.

** End of Assessment **