



SUMMATIVE (FORMAL) ASSESSMENT: MODULE 2A

THE UNCITRAL MODEL LAWS RELATING TO INSOLVENCY

Commented [SL1]: TOTAL = 37.5

75%

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]

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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

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

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

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

(d) *All of the above.*

Question 1.3

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?

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Commented [SL4]: Correct answer is (b).

(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 [SL6]: 3 marks

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

*The COMI is an important concept in the Model Law even though it is not defined in the Model Law. There is a rebuttable presumption under Article 16(3), that the debtor's registered office for a company or the habitual residence for an individual, is the COMI. The test for the COMI is an objective test and the court would look into a number of factors to determine a debtor's COMI. The appropriate date for determining the COMI is the date of commencement of the foreign proceeding although there is conflicting case law on this for example in the US, the court in the case of *Morning Mist Holdings Ltd v Krys (Matter of Fairfield Sentry Ltd)* held that the appropriate date for determining the COMI is on or around the date that the relevant US Chapter 15 proceedings are filed. A debtor can move its COMI but the closer this move happens to the filing foreign proceedings, the courts may look into whether the reasons for the move were genuine.*

Question 2.2 [maximum 3 marks]

Commented [SL7]: 3 marks

The following three (3) statements relate to particular provisions / concepts to be found in the Model Law. Indicate the name of the provision / concept (as well as the relevant Model Law article), addressed in each statement.

Statement 1 *"This Article lays down the requirements of notification of creditors."*

Statement 2 *"This Article is referred to as the 'Safe Conduct Rule'."*

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

Statement 1: *This refers to Article 14 whereby foreign creditors must be given all the notices that local creditors would be entitled to receive. Such notices should be given individually to each foreign creditor unless the court determines that a different way of giving notice is more suitable. No letters rogatory or other similar formality are required. When a local proceeding is commenced, the*

foreign creditors must be notified of all the relevant details including the deadline and place for filing their claims.

Statement 2: This refers to Article 10 under which a court in the enacting State does not assume jurisdiction over the foreign representative or the debtor's foreign assets and affairs simply because a foreign representative has filed a recognition application in the enacting State. The jurisdiction of the court in the enacting State is limited to matters related to the recognition application.

Statement 3: This refers to Article 16(3) which deals with the rebuttal presumption concerning the debtor's COMI. In the absence of contrary evidence, the debtor's registered office (if the debtor is a corporate entity) or the debtor's habitual residence (in the case of debtor who is a natural person) will be presumed to be the 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.

Under Article 21(1), the court is empowered to grant appropriate relief requested by a foreign representative where it is necessary to protect the assets of the debtor or the interests of the creditors. The court of appeal found that granting the indefinite moratorium was not necessary to protect the interests of IBA's creditors nor was it an appropriate way of protecting creditors' interests. The court determined that the IBA creditors did not require any further protection in order for the objective of the foreign proceeding to be achieved.

The court also found that it was a material issue that the foreign representative had the option of conducting a parallel scheme of arrangement in the UK, which could bind creditors whose debts were governed by English law, but she chose not to do so. Therefore, the power to grant a stay of commencement of individual actions or proceedings in Article 21 was not intended to override the substantive rights of creditors under the law governing their debts.

Under Article 18, a foreign representative has ongoing information obligations to the court in the enacting State. They are required to inform the court of:

- (a) any substantial change in the status of the recognized foreign proceeding or the status of the foreign representative's appointment; and*
- (b) any other foreign proceeding regarding the debtor that they become aware of.*

The court was of the view that this strongly implies that once a foreign proceeding has ended and the relevant foreign representative is no longer in office, there is no scope for reliefs under Article 21 to continue to be granted and any relief

Commented [SL8]: 1.5 marks

Gibbs Rule

previously granted should terminate. If the Model Law had intended otherwise, it would have expressly dealt with such a situation.

Question 2.4 [2 marks]

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

The court in the enacting State can exercise its discretionary power to grant appropriate relief to the foreign representative under Article 21. Article 21 (1) lists examples of the types of relief that could be granted but the list is not exhaustive.

Pursuant to Article 18, the foreign representative is under an ongoing duty to inform the court in the enacting State of (i) any substantial change in the status of the recognised foreign proceeding (main or non-main) or in the status of his/her appointment, and (ii) any other foreign proceeding instituted against the debtor that the foreign representative becomes aware 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 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.

Under Article 9, the foreign representative has direct access to the courts in State A without needing to be a licenced insolvency representative in State A or obtain any special approvals. The foreign representative therefore has standing to appear in the courts in State A even if their recognition order has not yet been granted. [1]

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Art 29(a)

Commented [SL10]: SUBTOTAL = 11.5 MARKS

Article 10 makes it clear that the sole fact that an application for recognition has been made by a foreign representative does not mean that the foreign representative or the foreign assets of the debtor are subject to the jurisdiction of the court in State A for any reason other than the application made. This should give the foreign representative comfort that their recognition application will not trigger exposure to external jurisdiction.

The foreign representative can apply for interim relief to commence domestic proceedings in State A under Article 11 [1] if the relevant local law conditions for commencing such proceedings are met, as they await the determination of their recognition application. This is of great benefit to the foreign representative to enable him to determine what assets are in State A and to take steps to protect those assets.

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?

Under Article 12, if the foreign representative applies for a recognition order and it is granted by the court in State A, the foreign representative can apply to participate in an existing local proceeding. This will allow the foreign representative to make applications to the court regarding various matters such as the protection of the debtor's assets or co-operation with the foreign proceeding.

If the foreign representative recognition order is successful, they would also have locus to look into local voidable transactions under Article 23.

In terms of co-operation, the Model Law empowers courts in the enacting State to co-operate with foreign representatives or foreign courts under Articles 25 and 27. [Articles 25 - 27] Under Article 25(1), the court in State A is required to co-operate to the maximum extent with the foreign representative or the foreign court in State B. The benefit for the foreign representative is that co-operation is not based on recognition therefore can happen even before a recognition application is determined. [1] Even if the foreign proceeding is not recognized as a foreign proceeding under Article 17, co-operation by the court in State A is still available to the foreign representative if the debtor has assets in State A.

The type of co-operation granted could for example be that the foreign representative is entitled to receive information on the debtor's assets by such means as the court in State A consider appropriate or for the courts in both countries to co-ordinate in the administration or supervision of the debtor's assets and affairs.

Your answer should have included the key benefits of both the access provisions and the cooperation provisions in that they are to 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] **[5 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.

Evidence

Supporting documents: *The foreign representative must provide the supporting documents listed in Article 15(2). Under Article 16 (2), the court is entitled to presume that the supporting documents are authentic, whether or not they have been legalised. **[½]***

The foreign representative is also required to provide a statement setting out all other foreign proceedings that the debtor is subject to, that the foreign representative is aware of (Article 15 (3)). **[½]**

Under Article 15(4), the court may require that the supporting documents are translated into the language of the enacting State.

Exclusions

Special entities: *Under Article 1, paragraph 2, an enacting state is permitted to exclude the application of the Model Law to certain entities such as banks and insurance companies. Entities may be excluded for policy reasons or because of their importance to the enacting State and be administered under a different regulatory regime. If the corporate debtor falls under the category of excluded entities in State A, the recognition application will not be successful. **[1]***

Reciprocity: State A should not have reciprocity provisions in relation to recognition in its Model law whereby recognition would only be given to the foreign representative by the courts in State A, if the courts in State B would grant recognition to an insolvency representative from state A. This can really undermine the effectiveness of the Model law as can be seen in South Africa where the designated states that meet the reciprocity requirement have not been stipulated so the Model law is not in operation. If State A has such provisions, the recognition application would only succeed if State B is listed as a reciprocal state.

Limitations

Public policy: Under Article 6, the court in State A can refuse to grant the recognition order if it would be manifestly contrary to the public policy of State A [1]

Supremacy of other treaties: Under Article 3, if the Model Law of State A conflicts with any treaty or international agreement that State A is bound by, that treaty or agreement will prevail. [1]

Restrictions

Under Article 17, the recognition application must be decided upon by the court in State A at the earliest time possible and the recognition order can be modified or terminated if it is shown that the grounds for granting it were lacking (in part or fully) or have ceased to exist.

Judicial scrutiny

Since the proceedings have already been determined to be foreign proceedings and the foreign representative meets the requirements for a foreign representative, the recognition order will be granted as a matter of course if the requirements of Article 15(2) dealing with the supporting documents are met and the recognition order is brought before a competent court under Article 4. The court in State A does not need to look into whether the foreign proceedings were properly commenced in State B.

If the foreign proceeding was started in the debtor's COMI, it will be recognised as a foreign main proceeding and if the debtor only has an establishment in State B as defined in Article 2(f), it will be recognised as the foreign non-main proceeding. [1] In relation to the COMI, there is a rebuttable presumption under Article 16 (3) that the debtor's registered office is the COMI. Under the UNCITRAL Guide to Enactment and Interpretation of the Model Law, an important aspect in determining whether the debtor has an establishment in a particular country is how the activity appears externally to creditors, rather than the intention of the debtor. The type of proceeding

is important because a main proceeding entitles the foreign representative to automatic mandatory relief while non-main proceedings do not have such relief. The relief granted by the courts in the latter proceedings is discretionary and only applies post recognition. The type of proceeding also affects co-ordination of the foreign proceeding with local proceedings in State A or concurrent proceedings in other countries.

Question 3.3 [maximum 5 marks] [2.5 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.

Article 19 Interim Relief

A foreign representative can apply for interim pre- recognition relief under Article 19.

The interim relief includes but is not limited to:

- staying execution against the debtor's assets;*
- allowing the foreign representative or another person authorised by the court to administer or realise all or part of the debtor's assets in State A; and*
- any of the reliefs set out in points (b), (c) and (f) below under Article 21.*

An interim relief granted under Article 19 ends when the recognition application is determined unless extended under Article 21. [1]

Articles 20 and 21

Post recognition relief is dealt with under Article 21 which sets out examples of the type of relief that can be granted. The list is not exhaustive.

Importantly, relief under Article 21 is not automatic and is granted at the discretion of the courts unless the foreign proceeding is a foreign main proceeding in which case, Article 20 provides for the reliefs listed in (a) and (b) below to happen automatically once the recognition application is successful. However, under Article 20, State A may have set out restrictions or limitations or exclusions in its law which would allow the court in state A to disapply or modify the automatic relief that arises under Article 20. Article 20 also does not prohibit the right to commence individual actions or proceedings to the extent necessary to preserve a claim against the debtor or the right to request for the commencement of a proceeding under State A's insolvency laws or the right to file claims in those proceedings.

The types of reliefs that can be granted under Article 21 (1) are:

- a) staying the commencement or continuation of individual actions or proceedings (including arbitration) against the debtor or execution against the debtor's assets;*

- b) *suspending the right to transfer, encumber or otherwise dispose of the debtor's asset;*
- c) *providing for the examination of witness or the taking of evidence or delivery of information on the debtor's assets, liabilities, rights, obligations and affairs;*
- d) *allowing the foreign representative or any other person authorised by the court to administer or realise all or part of the debtor's assets in State A;*
- e) *extending any interim relief granted pursuant to Article 19;*
- f) *granting such other reliefs as may be available to a local insolvency representative in State A.*

Under Article 21(2), the court in State A can also, upon the request of the foreign representative, entrust the foreign representative or any other person authorised by the court with distributing all or part of the debtor's assets in State A as long as the interests of local creditors in State A are protected. This relief applies to both foreign main and non-main proceedings. [½]

Before granting any relief under Article 21 to a foreign representative in a foreign non-main proceeding, the court is required to be satisfied that the relief relates to assets or information that under the laws of State A, should be administered or provided in the foreign non-main proceeding. This should not be a problem in this case as there are no other proceedings against the debtor in state A or elsewhere.

Article 22

Under Article 22, the court in State A is required to be satisfied that the interests of the debtor's creditors in state A and other interested persons (including the debtor) are adequately protected before granting relief under Article 19 or 21. The court is entitled to grant relief with such conditions as it deems appropriate or modify or terminate the relief granted. [1]

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

Question 3.4 [maximum 1 mark] [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?

This point was considered in the English case of Igor Vitalievich Protasov and Khadzhi-Murat Derev where the English court held that while it had jurisdiction to extend the freezing order, upon a recognition order being granted, the Model law was intended to make available to a foreign representative, all the tools under English law that a local insolvency representative has access to. Therefore, extending the worldwide freezing order was not necessary because English law had other forms of protection that the foreign representative could rely on. The court did not find any special circumstances that warranted such an extension. [1]

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] [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 [6.5 out of 10]

A "Foreign proceeding" as defined under Article 2 has the following components which will be discussed by reference to the facts:

- a) It is a judicial or administrative proceeding, including an interim proceeding,
- b) in a foreign State
- c) that is collective in nature
- d) pursuant to a law relating to insolvency
- e) in which the assets and affairs of the debtor are subject to control or supervision by a foreign court,
- f) for the purpose of reorganization or liquidation of the debtor

A. It is a judicial or administrative proceeding, including an interim proceeding,

Mrs G will need to show that the liquidation procedure is a judicial or administrative proceeding. The liquidation was not commenced via a court process and is therefore not a judicial process but it has been commenced via a statutory process and would therefore qualify as an administrative process. The liquidation process is an insolvency process as it is intended to wind up the affairs of the bank.

B. in a foreign State

The liquidation process was started in Country A which is a foreign state as the recognition application has been made in the UK.

C. that is collective in nature

Paragraph 70 of the Guide to Enactment of the Model Law states that in determining whether a proceeding is collective, an important consideration is whether substantially all of the assets and liabilities of the debtor are dealt with in the proceeding subject to local priorities and statutory exceptions and

local exclusions relating to the rights of secured creditors. It is clear from the facts that under the laws of Country A, the liquidation process is meant to deal with all of the assets and liabilities of the debtor. The liquidator has wide ranging powers to deal with the insolvent estate. The liquidator can for example compile a register of creditor claims and seek to satisfy those claims.

D. pursuant to a law relating to insolvency

This does not mean that the liquidation process needs to be conducted under an Insolvency Act for this element to be satisfied. The Guide to Enactment states at paragraph 73 that the purpose of his description was to make it sufficiently broad to encompass a range of insolvency rules regardless of the type of statute they are contained in. The DGF law is clearly a law that is intended to deal with bank insolvencies.

E. in which the assets and affairs of the debtor are subject to control or supervision by a foreign court

The Model Law does not specify the extent of supervision or control or the period within which supervision or control should be done by the court. Supervision or control under this point can be potential rather than actual. Court control or supervision can be exercised indirectly by having control or supervision over the relevant insolvency representative rather than the debtor. Article 37 of the DGF law states that the DGF or Mrs G (as its authorized delegatee) has powers to file property and non-property claims with a court. This means that a court could potentially have supervisory powers over the assets of the Bank. However, this element of the description requires control or supervision over both the assets and affairs of the Bank. There is nothing in the facts to suggest that a court in Country A has any such control or supervision (potential or actual) over the affairs of the Bank. Therefore, this element has not been satisfied.

It seems to us that along the following lines it could be argued this element can be satisfied as well:

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”.

F. for the purpose of reorganization or liquidation of the debtor

It is clear from the facts that the DCF law is intended to deal with the liquidation of the Bank. The court in the English case of *In the matter of Sturgeon Central Asia Balanced Fund Ltd [2020] EWHC 123 (Ch) at 6* held that when assessing the purpose, the words “for the purpose” should be read as meaning the purpose of insolvency (liquidation) or severe financial distress (reorganisation). The role of DCF’s role, is to among other things, withdraw insolvent banks from the markets and wind down their operations via liquidation. The liquidation process therefore satisfies this element of the definition even though on 4 December 2020, the liquidation was extended to an indefinite date.

All in all, the recognition application in the UK would not be successful because it does not appear to meet all of the elements that make up the meaning of a “foreign proceeding”. [See comments above]

4.1.2 whether the Applicants fall within the description of “foreign representatives” as defined by article 2(d) of the MLCBI [maximum 5 marks]. [2.5 out of 5]

A “Foreign representative” as defined under Article 2 means:

- a) a person or body, including one appointed on an interim basis,
- b) authorized in a foreign proceeding,
- c) to administer the reorganization or the liquidation of the debtor’s assets or affairs or to act as a representative of the foreign proceeding;

A. a person or body, including one appointed on an interim basis, authorized in a foreign proceeding

Mrs G is a person who has been authorized by DGF to deal with certain elements of the liquidation of the Bank. Under paragraph 86 of the the Guide to Enactment, a **foreign representative need not be authorised by a court and can be authorised by a special agency. Therefore, the authorisation by DGF would satisfy the authorisation requirement. A foreign proceeding under this element does not specifically mean a foreign proceeding under Article 2 therefore, the liquidation process could qualify as a foreign proceeding However, because the liquidation process does not satisfy all of the elements of a foreign proceeding - particularly the element relating to the control or supervision of a foreign court, it cannot be said that Mrs G is authorised in a foreign proceeding.**

B. to administer the reorganization or the liquidation of the debtor’s assets or affairs or to act as a representative of the foreign proceeding;

The authority that has been deleted to Mrs G is limited is all of the liquidation powers under the DGF law except the power to arrange for the sale of the Bank’s assets or claim damages from a related party of the Bank or claim money from non-banking financial institutions that raised money from individuals. While it is not clear from the facts what the Articles 37,38,47-52, 521 and 53 state, it is clear that overall, Mrs G is intended to administer the liquidation of the Bank’s assets and affairs. This element of the definition would therefore be satisfied.

If the liquidation process is not deemed to be a foreign proceeding then Mrs G would not be regarded as a foreign representative authorized in a foreign proceeding as defined under Article 2(a).

For full marks on this Q 4.1.2 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 *