



SUMMATIVE (FORMAL) ASSESSMENT: MODULE 2A

THE UNCITRAL MODEL LAWS RELATING TO INSOLVENCY

Commented [BB1]: TOTAL = 47 MARKS

94% - very well done!

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]

Commented [SL3]: SUBTOTAL = 10 MARKS

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?

The MLCBI doesn't expressly state what is the appropriate date for the determination of the debtor's COMI. However, the Guide to Enactment and Interpretation prescribes that the date of commencement of the foreign proceedings should be taken into consideration, as this would make it possible to harmonise the recognition decisions of different enacting States.

Also, the date of application for recognition could be many years after the commencement of the insolvency proceeding and at that time the business activities of the debtors could be stopped or moved. Therefore, the date of application for recognition is not the most appropriate criterion. For example, Japanese jurisdictions (Think3 case, Tokyo High Court of 2012) and a US court (Millennium Global Emerging Credit Master Fund Ltd. of 2011) rejected the date of application for recognition as a criterion.

However, to determine the COMI of the debtor some jurisdictions relied on Article 17 (2) which states "The foreign proceeding shall be recognized: (a) As a foreign main proceeding if it is taking place in the State where the debtor has the centre of its main interests; or (b) As a foreign non-main proceeding if the debtor has an establishment within the meaning of subparagraph (f) of article 2 in the foreign State." and the fact that present tense is used to apply the criterion of the date of application for recognition. In this way, the court asked for recognition can take into account changes made by the debtor to the conduct of its business in the time lapse between the commencement of insolvency proceeding and the application for recognition. (USA, Morning Mist Holdings Ltd v. Krys, Betcorp Limited)

Finally, a third possibility is to take the date the court is called upon to decide on the application as article 18 of the MLCBI requires the court to take into consideration the latest information about the debtor's situation. (Moore, as Debtor-in-possession of Australian Equity Investors [2012])

In my opinion, I think the most relevant criterion is the first one: the date of the commencement of the insolvency proceeding because when determining the COMI the court must take into account elements that are ascertainable by third parties. The date of commencement of proceeding is a public information. On the other hand, the date of application for recognition depends on the action of the foreign representative that third parties can't know.

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: This statement relates to the "Timely Notice" concept, laid down in Article 14 of the Model Law "Notification to foreign creditors of a proceeding". It's a corollary principle to the equal treatment principle laid down in Article 13.

Statement 2: This statement relates to the "Safe Conduct" concept, laid down in Article 10 of the Model Law "Limited jurisdiction" that prevents courts receiving an application for recognition of a foreign proceeding to assert jurisdiction over the foreign representative, debtors' assets and affairs.

Statement 3: This statement relates to the "COMI" concept, laid down in paragraph 3 of Article 16 of the Model Law "Presumptions concerning recognition". The MLCBI provides for a rebuttable presumption on the location of the debtor's COMI whether the debtor is a corporation or an individual.

Question 2.3 [2 marks]

Commented [SL6]: 2 marks

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

The IBA case appeal dealt with the confrontation between the Gibbs Rule and application under Article 21 by an Azeri insolvency representative for continuation of a moratorium granted under Article 19. Some creditors challenged this application for continuation before an English court.

The Gibbs Rule provides that a debt governed by English law can only be discharged in the context of a foreign insolvency proceeding if the applicable law to that insolvency proceeding is the same applicable law to the contract. The Gibbs Rule aims to protect creditors who signed a contract with a debtor under a certain law and could have their rights diminished under a foreign insolvency law. There is an exception to that rule when the creditor applied to the foreign insolvency proceeding.

In this case, the first instance court considered that granting the continuation of an indefinite moratorium would prevent creditors which claims were governed by English Law to recover them, which would be contrary to the Gibbs Rule. It must be kept in mind that Article 22 of the Model Law requires courts of enacting State to balance interests when granting or refusing to grant relief before (article 19) or upon recognition (article 21). Since the success of the Azeri restructuring plan didn't rely on the indefinite Moratorium Continuation application, Justice Hildyard held that the continuation of the moratorium was not a justified measure to protect the interests of the debtor and its creditors.

When analysing the first instance decision, the English Court of Appeal held that an indefinite moratorium continuation could only be granted if two conditions were satisfied. First that the stay is necessary to protect the interests of creditors, and secondly that the stay was an appropriate measure to ensure this protection. In this case, neither of the two conditions were met.

Therefore, the English Court of Appeal upheld the decision of the first instance court

Question 2.4 [2 marks]

Commented [SL7]: 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.

One of the consequences of recognition of a foreign main proceeding is the automatic mandatory relief provided by Article 20 of the Model Law. In the case where there was already a domestic insolvency proceeding opened, according to Article 29 (a), because of the supremacy of the domestic proceeding, the automatic relief of Article 20 won't apply (Article 29 (a) (ii)). And if the domestic court of an enacting State; that has recognised a foreign main proceeding, is asked to take relief measures, it must assess if those relief measures are consistent with the laws of the existing domestic proceedings. (Article 29 (a) (i))

Whether relief measures are granted by the domestic court, Article 22 provides that the court must verify that both debtor's and creditors' interests are protected.

According to Article 18 of the Model Law, the foreign insolvency representative has the duty to keep the domestic court of the enacting State updated on developments in the main foreign proceeding, and most specially about two matters: first, if there is any important change in the status of the foreign proceeding or in the status of the foreign insolvency representative; second, if there is another foreign insolvency proceeding opened for the same debtor.

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

Commented [BB8]: SUB TOTAL = 13 marks

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

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

Question 3.1 [maximum 4 marks] **[4 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 order to apply for recognition in State A, the foreign representative will benefit from the direct access principle laid in Article 9 of the Model Law. This means that the insolvency representative will have standing to apply for recognition of the foreign proceeding before the insolvency court of State A without any other requirement. This article simplifies access to courts of an enacting State. In this way, if recognition is granted and if the foreign proceeding is a main proceeding, Article 20 would apply immediately and as a consequence there will be an automatic stay in State A. [1] This will stop and/ or prevent actions from creditors on the debtor's assets in State A.

Moreover, the insolvency representative will benefit from Article 11 which also provides for standing of the foreign insolvency representative before court of the enacting State, without prior recognition of the foreign insolvency proceeding in the enacting State, [1] for an application to open a domestic insolvency proceeding. In this case, the insolvency representative would have standing to ask for opening of an insolvency proceeding in State A. In some cases, a domestic insolvency proceeding could be more efficient to protect the debtor's assets from individual actions of creditors.

Additionally, Article 12 of the Model Law provides for standing of the foreign representative after recognition of the foreign insolvency proceeding to act in the domestic insolvency proceeding. This means that if a domestic insolvency proceeding is commenced and once it is recognized in the enacting State, the foreign insolvency representative can make petitions or request before domestic courts in order to protect and preserve the value of the debtor's assets.

These 3 provisions accelerate and make easier the access to courts for the foreign insolvency representative to take actions and measures in order to secure the value of the debtor's assets in State A. [1]

The Model Law also contains provisions about co-operation between proceedings and between courts and insolvency representatives in order to set up a framework of communication in cross border insolvency cases. This aims to avoid individual actions from one proceeding that could be detrimental to the other(s) and to result in

consistent treatments between creditors of the different proceedings. Articles 25, 26 and 27 of the Model Law provides for co-operation principles between courts, but also between courts and foreign representatives in order to achieve these goals. [1] They allow direct communication between courts and representatives.

Direct access to court of an enacting State is part of cooperation principles as it facilitates actions of the foreign representative for recognition, commencement or specific requests before domestic courts.

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.**

In order for a recognition application to be successful, there are several steps (Article 17) to go through.

First, the insolvency representative must verify if the insolvency proceeding that recognition is asked for is not excluded from the scope of the Model Law. Paragraph 2 of Article 1 provides for exclusion of the scope of the Model Law. The examples of most common exclusions in the Guide to enactment and interpretation, relate to bank and insurance companies because insolvencies of such companies raise many specific issues regarding protection of interest of their clients. [1]

Secondly, the insolvency representative must find the competent court or competent authority for recognition applications in the enacting State. Article 4 of the Model Law provides that enacting states must clearly indicate if the competent authority for recognition is either a judicial court or another authority.

The insolvency proceeding will also have to provide some evidence regarding the foreign insolvency proceeding. However article 15 of the Model Law simplifies the number of documents that have to be given. The goal is to prove the existence of the foreign insolvency proceeding. To do so, paragraph 2 of Article 15 provides for 3 alternative documents: (i) either a certified copy of the foreign decision of commencing or (ii) a certificate affirming the existence of the foreign insolvency proceeding or (iii) if none of these documents is available, any other evidence of the existence of the foreign proceeding and the appointment of the insolvency representative. Moreover, article 15 (3) states that the application must be accompanied by the list of all other foreign insolvency proceedings in respect of the same debtor known to the insolvency representative. [1]

When granting recognition of a foreign insolvency proceeding, court of enacting State will also have to determine the location of the COMI (center of main interest) of the debtor. According to paragraph 3 of Article 16, as under the European Regulation of 2015, there are presumptions of location of the debtor's COMI. Those presumptions

are rebuttable ones and consist in: for an individual person, their habitual residence and for a corporate debtor, their registered office. The important factor taken into account when determining the location of the COMI is the perception of third parties of the place from where the debtor conducts its business. [½]

If the debtor's COMI is not located in the State where the foreign proceeding was opened, courts of the enacting State will also have to verify if the debtor has an establishment in this State. The definition of "establishment" in the context of the Model Law is stated in paragraph f of article 2 as "any place of operations where the debtor carries out a non-transitory economic activity with human means and goods or services." This definition is close to the notion of establishment under the European Regulation.

According to Article 17 (2), if the foreign proceeding was opened in the State where the COMI is located, then the proceeding will be a foreign main-proceeding. If the foreign insolvency proceeding is not opened in a State where the COMI is located, but where the debtor has an establishment, under Article 2, then the proceeding will be recognized as a foreign non-main proceeding. And finally, if the foreign proceeding was commenced in a State where debtor has no COMI, neither establishment, it cannot be considered as a foreign insolvency under the Model Law. (paragraph 2 of article 17) [1]

Finally, there are limitations to recognition. First, Article 3 provides for supremacy of international obligations over provisions of the Model Law. This means that if provisions of the Model Law are contradictory to international treaties, treaties will prevail. [1] Moreover, the Model Law provides for a public policy exception (Article 6). This means that the enacting State courts can refuse to recognize a foreign insolvency proceeding if such breaches the fundamental rights of the enacting State. [1]

Well answered!

Question 3.3 [maximum 5 marks] [3 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.

Relief dispositions always aim to protect the assets of the debtor and/or the interests of the creditors. Article 19 provides for pre-recognition relief and Article 21 for post-recognition relief, whether the foreign insolvency proceeding is a main or non-main proceeding.

Regarding pre-recognition collective relief measures, Article 19 provides that the court of the enacting State can grant provisional measures if they are "urgently needed". It is an option for the court, at the request of the insolvency representative. The court can refuse to grant such provisional measures if this would interfere with the main proceeding as coordination principles must be applied between proceedings. Because there are only provisional, measures granted under Article 19 only last until

recognition is decided, whether it is granted or not. They can be extended after recognition, if Court apply article 21.

As pre-recognition provisional relief measures, Article 19 provides for staying of execution against the debtor's assets and conservatory measures to protect the value of perishable assets or assets susceptible to devaluation or in jeopardy. These collective measures granted before the recognition of the foreign proceeding in the enacting State are naturally limited in time (Article 19 paragraph 3) and restricted as the recognition of the insolvency proceeding has not been yet granted.

Once recognition is granted, the court can grant appropriate relief at the request of the insolvency representative (Article 21). Automatic relief effects attached to the recognition of the foreign insolvency proceeding only apply to the recognition of a foreign main proceeding (article 20). That's why Article 21 is useful when the insolvency proceeding recognized is not a main insolvency proceeding. In such case, the insolvency representative can ask to the court of the enacting State to grant the same measures than Article 20 provides for. However, it is a discretionary power of the court to grant such measures.

Because pre-recognition and post recognition relief measures are subjected to the discretionary power of the court, Article 19 reminds that they must be "urgently need" and Article 21 underlines that relief measures must be "appropriate". Additionally, Article 22 reminds that the court can subject its decision to conditions it considers appropriate. This means that these relief measures will be granted in consideration of the situation and tailored to it.

Finally, Article 22 establishes a principle of protection of the interests of both debtor and creditors. In granting, refusing to grant, modifying or ending relief measures, courts must always check if the interests creditors and debtor are adequately protected. There must be a balance between these interests as it is necessary for coordination between cross-border proceedings. In contrast, if one party considers that a relief measure undermines its rights to a disproportional extent, they can petition before the court to modify the relief measure.

Your answer should also include a brief discussion on the following:

- 1. Adequate protection:** Pursuant to Article 22 of the Model Law any interim relief under Article 19 of the Model Law or any post-recognition relief under Article 21 of the Model Law require the court in State A to be satisfied that the interests of the creditors and the other interested persons, including the debtor, are adequately protected and any relief may be subject to conditions as the court considers appropriate.
- 2. Existing international obligations of State A:** Based on Article 3 of the Model Law, the court in State A should again verify that there are no existing international obligations of State A (under a treaty or otherwise) that may conflict with granting the requested relief under the implemented Model Law in State A.

3. Public policy exception: The court in State A should, based on Article 6 of the Model Law, also again verify that the relief application is not manifestly contrary to public policy of State A.

Question 3.4 [maximum 1 mark] [1 mark]

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

In the recent case of Igor Vitalievich Protasov and Khadzhi-Murat Derev case, also known as the Protasov v Derev Case (Order of 24 February 2021 of the England and Wales High Court), the British court had to analyze the request of the insolvency representative of a Russian main insolvency proceeding to continue as a post-recognition relief the worldwide freezing order that was granted before recognition as a provisional measure.

This request asks the question about the balance of interests of the debtor and its creditors and the necessity of some relief provisions.

In this decision, the English court held that the pursuit of the freezing order was not necessary to protect the interests of creditors. There are provisions in English Insolvency Law that could equally protect the interests of parties and that are more appropriate and relevant to the situation.

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

Commented [BB9]: SUB TOTAL = 14 MARKS

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

(1) Background

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

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

Proceedings were 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] [14 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 [9.5 out of 10]

The Cross Border Insolvency Regulation (CIBR) doesn't provide for reciprocity provisions. This means that for the purpose of recognition of a foreign insolvency proceeding in England, it doesn't matter if State A didn't implement the Model Law into its national law.

There are many elements to verify in order to qualify a liquidation proceeding as a "Foreign proceeding" under the definition of the Model Law. Article 2 (a) states that a "Foreign proceeding means a collective judicial or administrative proceeding in a foreign State, including an interim proceeding, pursuant to a law relating to insolvency in which proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganization or liquidation".

There are seven elements to verify. These criteria are cumulative in order to qualify for "foreign proceeding" within the meaning of the Model Law.

- 1) The proceeding takes place in a foreign State**
- 2) It is either a proceeding or an interim proceeding**
- 3) The proceeding must be collective in nature**
- 4) It can be either judicial or administrative proceeding**
- 5) The applicable law must be a law relating to insolvency**
- 6) Both assets and affairs of the debtor are under control or supervision of a foreign court**
- 7) The purpose of the proceeding is either reorganization or liquidation**

1) In this case, the Commercial Bank for Business Corporation liquidation takes place in Country A and the Applicants would like to apply for recognition in England.

Therefore, **the cross-border criterion is fulfilled.**

2) A proceeding or an interim proceeding. The definition of the Model Law of the "foreign proceeding" includes either proceeding or interim proceeding. The Guide to enactment states that the terms "interim" were used on purpose because in many States insolvency proceedings are first commenced under provisional or interim grounds and after confirmed by a court. However, they would meet all the requirements of a foreign proceeding under the Model Law.

In this case, **the liquidation of Commercial Bank for Business Corporation is not an interim proceeding but a process which aims to put an end to the activity of a bank after its license was revoked.**

Therefore, **this second criterion is fulfilled.**

3) The foreign proceeding must be collective by nature. The main concern is to determine if substantially all the assets and liabilities of the debtor are covered by the foreign proceeding and the aim of the proceeding is to achieve a coordinated, global solution for all stakeholders. The Guide to Enactment although specifies that it's not because a class of secured creditors is excluded from the effect of the proceeding that the latter fails the test of collectivity.

In this case, **the Law of Country A on Banks and Banking Activity (LBBA) provides that the liquidation proceeding comprehend all the assets of the bank. All its property and funds are administered by the liquidator.**

Therefore, **the proceeding of country A can be considered as collective.**

4) The foreign proceeding can be a judicial or administrative proceeding. In some States, an insolvency proceeding can be conducted by an administrative body rather than a court appointed insolvency representative.

In this case, **the liquidation of the Bank is ruled by the LBBA of Country A. However, it involves governmental and administrative bodies, the National Bank (NB) and the Deposit Guarantee Fund (DGF). The National Bank initiates the liquidation process by revoking the license. And the DGF is automatically appointed as liquidator. There are provisions about independence of the DGF from the NB or other public authorities.**

Therefore, **the liquidation proceeding of the Bank qualifies meets this fourth criterion.**

5) The applicable law must relate to insolvency. According to the Guide to enactment, this criterion means that it is not necessary that the foreign law is labelled as "insolvency law". Courts must look if the foreign law addresses or is about financial distress or insolvent situations. The requirement is fulfilled if one the ground of commencement of the foreign proceeding is financial distress, even if there could be other grounds. According to the Guide to enactment, this criterion is voluntarily wide to comprehend various legislations related, but not exclusively, to insolvency and financial distress.

In this case, **the commencement of the liquidation proceeding is when the National Bank revokes the license of the bank (article 77 of the LBBA). There are usually 2 steps before liquidation of a bank under State A legislation. First, the**

bank is qualified as “troubled”, then “insolvent” and finally its license is revoked. All of the grounds to commenced this proceeding are issues regarding the solvency of the bank.

Therefore, *the LBBA can be considered as a law relating to insolvency within the meaning of the Model Law.*

- 6) *Both assets and affairs of the debtors are under control or supervision of a court. The guide to enactment provides that cumulatively assets and affairs must be covered by the proceeding. Regarding the court supervision, the model law doesn't provide for a more specific definition, regarding the degree of control, its duration and.*

The guide also states that even if the control is meant to be formal, it can be more potential rather than actual. The control can be indirect through an insolvency representative, who will be controlled by the court. However, according to the Guide to enactment a “mere supervision of an insolvency representative by a licensing authority would not be sufficient”. Under the CBIR (English adopted version of the Model Law), it is stated that the control can be potential and indirect.

In this case, *once liquidation is commenced under country A's LBBA, it is said that the liquidator has extensive powers over the bank's estate. All the activities of the bank are terminated. The liquidator is automatically the Deposit Guarantee Fund (DGF), which is an independent institution for the National Bank or any other governmental institution. In the Affidavit, it is not stated that the DGF's actions are controlled or supervised by a specific court. At all the different stages and status of the bank, the only bodies involved are the National Bank and the DGG. A control from a judicial court seems to be hypothetical and indirect. It seems only to happen when one of the two authorities breaches its obligations.*

Therefore, *the liquidation proceeding of the Commercial Bank for Business Corporation can be qualified as a proceeding where the affairs and the assets of the debtor are under control or supervision of a court.*

Regarding this element, please also consider 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".

7) The purpose of the proceeding must be reorganization or liquidation. This criterion can exclude some legislations which stated purpose is not reorganization or liquidation. A recent English decision (*In the matter of Sturgeon Central Asia Balanced Fund Ltd*(2020) of the England and Wales High Court) held that the words "reorganization" must be read as severe financial distress and "liquidation" as insolvency. In *Agrokor Case*, the English Court held that *Lex Agrokor* purpose was to deal with consequences of financial difficulties of companies with systemic importance. And the English Court qualified *Lex Agrokor* as a law for the purpose of reorganization or liquidation.

In this case, **the LBBA provisions at stake are designed to deal with the financial difficulties of the bank, when its solvency was questioned and finally its license revoked. The shutdown of a bank can have systemic consequences on the economic system of a country. The LBBA aims to deal with these consequences. Therefore, the LBBA can be qualified as a law for the purpose of reorganization or liquidation within the meaning of the CBIR.**

In conclusion, **all the criteria of the definition of a "foreign proceeding" of article 2(a) of the Model Law are fulfilled for the liquidation of the Commercial Bank for Business Corporation**

Excellent response!

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]

Article 2 (d) of the Model Law defines the "Foreign representative" as "a person or body, including one appointed on an interim basis, authorized in a foreign proceeding to administer the reorganization or the liquidation of the debtor's assets or affairs or to act as a representative of the foreign proceeding;"

It's important to note that the criterion stated in the definition are alternative and not cumulative ones. The Guide to enactment states that the foreign representative can be appointed to act in either of the two capacities: (i) administer the liquidation of the debtor's affairs or assets, or (ii) act as a representative of the foreign proceeding. The Model Law doesn't specify that the foreign representative has to be appointed by a court or authorized by the foreign court. The term "foreign court" is also defined in article 2(e) as "a judicial or other authority competent to control or supervise a foreign proceeding". This definition is quite broad, so it can include not only judicial authority but also administrative authority.

In this case, the LBBA provides that the DGF is automatically appointed as liquidator when the license is revoked. The powers of the liquidator are extensive and include the power to exercise management powers, to dispose and manage the bank's assets and property, to receive creditors claims and powers of sale and distribution. The liquidator also has power to investigate and bring claims against third parties that did damageable actions against the insolvent bank. Also, the LBBA provides that it can delegate its powers to a qualified person to exercise them. The DGF can appoint an "authorised officer" which would exercise the powers delegated to them in order to ensure the bank's liquidation. According to article 35 of the LBBA, the authorised officer is accountable to the DGF.

Therefore, under the LBBA the liquidator has the power to administer the liquidation proceeding. Since the "authorised officer" only acts on behalf of the DGF who is the appointed liquidator, we can conclude that the "applicants" (e.g Ms G as the authorized officer and the DGF) qualify as "foreign representative" under article 2 (d) of the MLCBI.

For full marks you response should also address the assumption of article 16(1) MLCBI.

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 *