



SUMMATIVE (FORMAL) ASSESSMENT: MODULE 2A

THE UNCITRAL MODEL LAWS RELATING TO INSOLVENCY

Commented [BB1]: TOTAL = 44.5 MARKS

89% - excellent mark!

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

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

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

## INSTRUCTIONS FOR COMPLETION AND SUBMISSION OF ASSESSMENT

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

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

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

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

**ANSWER ALL THE QUESTIONS**

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

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

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 = 9.5 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 Model Law does not expressly indicate the relevant date for determining the COMI of a debtor. Para. 157 of the UNCITRAL Guide to Enactment provides that, having regard to the evidence required to accompany an application for recognition under Article 15 and the relevance accorded to the decision commencing a foreign proceeding and appointing the foreign representative, the date of the commencement of the foreign proceeding is the appropriate date for determining the COMI of the relevant debtor.**

**Taking the date of commencement of the foreign proceedings to determine the COMI of a debtor is intended to provide a test that can be applied with certainty to all insolvency proceedings. Some jurisdictions have, however, taken a more novel approach towards the date for determining a debtor's COMI. In the US, the Second Circuit of Appeals - in *Morning Mist Holdings Ltd -v- Krys (Matter of Fairfield Sentry Ltd)* (2nd Cir Appeals Apr. 16, 2013) - held that a debtor's COMI should be determined based on its activities at, or around, the time the Chapter 15 petition is filed, albeit the court may consider the period between the commencement of the foreign proceedings and the filing of the Chapter 15 petition to ensure a debtor has not manipulated its COMI in bad faith.**

**The UK followed the US approach in the *Re Toisa Limited* judgment by ICC Judge Catherine Burton on 29 March 2019 (judgment unpublished). However, in the later judgment in *Li Shu Chung -v- Li Shu Chung* [2021] EWHC 3346 (Ch), the so-called "Commencement Approach" instead of the "Filing Approach" was followed in contrast to *Re Toisa Limited*, which is indicative of the different approaches enacting states will take in interpreting the appropriate date for determining a debtor's COMI.**

Question 2.2 [maximum 3 marks]

Commented [SL5]: 2.5 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 3 - Art 16(3)

**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: Timely Notice - Article 14**

**Statement 2: Safe Conduct - Article 10**

**Statement 3: Centre of Main Interests ("COMI") - Article 16**

**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 International Bank of Azerbaijan ("IBA") entered into a restructuring plan under Azeri law. Under Azeri law, the restructuring plan was binding on all creditors including those who did not vote and those who voted against the plan. The foreign representative of IBA successfully applied to the High Court in England for recognition of the Azeri restructuring as main proceedings under the Cross Border Insolvency Regulations 2006 ("CBIR"), which implement the Model Law into UK law.**

**The foreign representative then unsuccessfully applied for an indefinite moratorium in relation to all debts listed in the restructuring plan, including those governed by English law. The foreign representative of IBA appealed the High Court's decision.**

**The Court of Appeal was tasked with deciding whether the English court had the power on the application of a foreign representative under the CBIR to direct that the claims of English creditors be stayed indefinitely, even after the foreign restructuring had come to an end, and whether it should exercise that power.**

**The English case of *Antony Gibbs and Sons -v- La Société Industrielle et Commerciale des Métaux* (1890) 25 QBD 399, says that a debt may only be discharged by its own governing law. The "Gibbs Rule" has been criticised by commentators and academics, with the judge noting that the rule may be thought of as "increasingly anachronistic in a world where the principle of modified universalism has been the inspiration for much cross-border cooperation in insolvency" and further commenting that it is thought to "sit uneasily" with principles of English law that expect foreign courts to recognise English insolvency judgments.**

**The Court of Appeal concluded it did not have jurisdiction to order an indefinite stay. It stated that it was important to look at whether the stay was necessary to protect the interests of IBAs' creditors and whether the stay was an appropriate means of**

achieving that protection. The court concluded that neither condition was satisfied since the stay was not necessary to protect IBA's creditors given they had already received everything which they were entitled to through the Azeri restructuring process which had since come to an end.

*In relation to the "Gibbs Rule", the Court of Appeal - notwithstanding the criticisms levied against the rule - agreed with the judge at first instance that "the Model Law and the CBIR do not empower the English court, in purported appliance of English law, to vary or discharge substantive rights conferred under English law by the expedient of procedural relief which as a practical matter has the same effect, and has been fashioned with the intention, of conforming the rights of English creditors with the rights which they would have under the relevant foreign law."*

The Court of Appeal also considered whether the stay of proceedings was to be extended beyond the end of the restructuring of IBA. The Court said that it would be inconsistent with the Model Law approach to extend the stay beyond the restructuring since the purpose of a stay is to provide "*breathing space*" to companies in financial distress. Given IBA was subsequently trading normally, the Court's view was that the restructuring plan was being "*kept artificially alive, but as an insolvency proceeding it had served its purpose and run its course.*"

The Court of Appeal's decision confirms that creditors whose debts are governed by English law have greater rights in foreign insolvency proceedings than creditors from many other jurisdictions.

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.*

*Where domestic proceedings are already opened, and a foreign proceeding is then recognised, the court in the enacting State - in accordance with Article 29(a)(i) - should ensure that any relief granted under Article 21 in relation to the foreign proceeding is consistent with the domestic insolvency proceedings.*

*Article 18 requires the foreign representative to inform the court promptly, after the time of filing the recognition application of "any substantial change in the status of the recognised foreign proceeding or the status of the foreign representative's appointment." The purpose of the obligation is to allow the Court to modify or terminate the consequences of recognition.*

**Article 18(a) considers technical modifications in the status of the foreign proceedings or the foreign representative's appointment, which can occur frequently, but recognises that only some of those modifications would affect the decision granting relief or the decision recognising the proceeding, which is why the provision only calls for information of "substantial" changes.**

**Article 18(b) extends the duty to the time after the application for recognition has been filed. Such information will allow the Court to consider whether relief already granted should be coordinated with insolvency proceedings commenced after the decision on recognition.**

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

Commented [BB8]: SUB TOTAL = 10.5 MARKS

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

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

Question 3.1 [maximum 4 marks] [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.**

**A foreign representative applying in the enacting State has the right:**

- (i) of direct access to the courts in the enacting State (Article 9); [1]**
- (ii) to apply to commence a local proceeding in the enacting State on the conditions applicable in that State (Article 11); [1]**
- (iii) to apply for recognition of the foreign proceeding in which they have been appointed (Article 15);**
- (iv) Upon recognition, to participate in insolvency-related proceedings conducted in the enacting State under the law of that State (Article 12);**
- (v) to initiate in the enacting State an action to avoid or otherwise render ineffective acts detrimental to creditors (Article 23); and**
- (vi) to intervene in any local proceedings in which the debtor is a party (Article 24).**

**The Model Law is intended to expedite and simplify the process required to recognise foreign proceedings and to provide a clear framework for obtaining recognition. Recognition allows the foreign representative to access certain tools and protections available to local insolvency officeholders in the enacting State. Significant cost and**

time can be saved, [1] and complications avoided, as the foreign representative - through the recognition process - is able to request tailor-made relief without the need to commence local insolvency proceedings. For example, a foreign representative is able to seek powers allowing for the examination of witnesses, the taking of evidence, or the delivery of information concerning the debtor's assets, liabilities, and affairs generally. The use of such powers, if granted, can assist in gathering information to ascertain whether insolvency, "claw-back" actions or claims against the directors, exist.

**For full marks you must refer to articles 25-27 of the MLCBI - Cooperation: Similar to access rights, the cooperation provisions in the MLCBI (articles 25-27) also operate independently of recognition and it is not a prerequisite to the use of the cooperation provisions that recognition of the foreign proceedings is obtained in advance. Courts in State A can freely cooperate with the foreign representative without having to worry whether the status in State B of the foreign representative can be recognised in State A.**

Question 3.2 [maximum 5 marks] [3.5 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.**

**The evidential requirements for recognition of a foreign proceeding are set out in Article 15 of the Model Law. Article 15 provides that: [½]**

**"1. A foreign representative may apply to the court for recognition of the foreign proceeding in which the foreign representative has been appointed.**

**2. An application for recognition shall be accompanied by:**

**(a) A certified copy of the decision commencing the foreign proceeding and appointing the foreign representative; or**

**(b) A certificate from the foreign court affirming the existence of the foreign proceeding and of the appointment of the foreign representative; or**

**(c) In the absence of evidence referred to in subparagraphs (a) and (b), any other evidence acceptable to the court of the existence of the foreign proceeding and of the appointment of the foreign representative. [½]**

**3. An application for recognition shall also be accompanied by a statement identifying all foreign proceedings in respect of the debtor that are known to the foreign representative.**

**4. The court may require a translation of documents supplied in support of the application for recognition into an official language of this State."**

**If these requirements are met, recognition will be granted pursuant to Article 17 of the Model Law. In deciding whether to recognise the foreign proceedings, the court in the enacting State is further limited to the jurisdictional pre-conditions set out in the definition of "foreign proceeding" set out in Article 2(a) of the Model Law. [½] - more detail required in your answer, see below.**

**Paragraph 2 of Article 1 permits the enacting State to exclude certain proceedings from the application of the Model Law. In the UK, for example, the Cross-Border Insolvency Regulations 2006, which implements the Model Law, excludes certain water and sewage undertakers or qualified licensed water suppliers, a building society, an English credit institution and others. Banks and insurance companies are mentioned as examples of entities that enacting States may wish to exclude from the Model Law since they may require to be administered under special regulatory regimes. However, an enacting State should be careful not to inadvertently limit the right of a foreign insolvency representative or court from seeking assistance or recognition abroad of an insolvency proceeding conducted in the territory of the enacting State merely because that insolvency is subject to a special regulatory regime. [1]**

**Article 6 contains the so-called public policy exception, which acts as the ultimate safeguard to the enacting State's sovereignty and which the Model Law respects. In essence, nothing in the Model Law prevents the court of an enacting State from refusing to take an action governed by the Model Law where to do so would be manifestly contrary to the public policy of the enacting State. [1]**

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

**1. Judicial scrutiny: While the court in State A is able to rely on the rebuttable presumptions set forth in Article 16 of the Model Law, in the context of Article 17 of the Model Law the court will have to assess whether either the COMI or at least an establishment of the debtor is located in State B where the foreign proceedings were opened. If the COMI of the debtor is in State B the foreign proceedings should be recognised as foreign main proceedings and if only an establishment of the debtor is in State B the foreign proceedings should be recognised as foreign non-main proceedings. Without a COMI or at least an establishment of the debtor in State B, recognition cannot be granted by the court in State A.**

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.***

***Pre-recognition, the court in the enacting State is entitled to grant urgently needed interim relief upon application for the recognition of a foreign proceeding based on Article 19 of the Model Law. Such relief includes:***

- ***Staying execution against the debtor's assets;***
- ***Entrusting the administration or realization of all or part of the debtor's assets located in the enacting State to the foreign representative, or another person designated by the court, in order to protect and preserve the value of assets that, by their nature or because of other circumstances, are perishable, susceptible to devaluation or otherwise in jeopardy;***
- ***Any relief mentioned in paragraph 1 (c), (d) and (g) of Article 21.***

***The court can refuse to grant relief under Article 19 if such relief would interfere with the administration of a foreign main proceeding.***

***Article 21 sets out the discretionary powers of the court to provide post-recognition relief, which includes:***

- ***Staying the commencement or continuation of individual actions or individual proceedings concerning the debtor's assets, rights, obligations or liabilities, to the extent they have not been stayed under paragraph 1 (a) of Article 20 (automatic mandatory relief);***
- ***Staying execution against the debtor's assets to the extent it has not been stayed under paragraph 1 (b) of Article 20;***
- ***Suspending the right to transfer, encumber or otherwise dispose of any assets of the debtor to the extent this right has not been suspended under paragraph 1 (c) of Article 20;***
- ***Providing for the examination of witnesses, the taking of evidence or the delivery of information concerning the debtor's assets, affairs, rights, obligations or liabilities;***
- ***Entrusting the administration or realisation of all or part of the debtor's assets located in the enacting State to the foreign representative, or another person designated by the court;***

- **Extending relief granted under paragraph 1 of Article 19; and**
- **Granting any additional relief that may be available to a domestic liquidator / officeholder under the laws of the enacting State. [insert the title of a person or body administering a reorganization or liquidation under**

**Paragraph 1 of Article 22 provides that, in granting or denying relief based on either Article 19 (interim pre-recognition relief) or Article 21 (discretionary post-recognition relief), the court in the enacting State must be satisfied that the interests of the debtor's creditors and other interested parties are adequately protected. Accordingly, the court is granted the power to subject relief to conditions it considers appropriate as set out in Paragraph 2 of Article 22.**

**Further, Paragraph 3 of Article 22 also permits the court in the enacting State, at the request of the foreign representative or a person affected by relief granted under Article 19 or 21, or at its own motion, to modify or terminate such relief.**

**Your answer should have also included a discussion on the following:**

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

Question 3.4 [maximum 1 mark] [1 mark]

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

**In *Igor Vitalievich Protasov and Khadzhi-Murat Derev* [2021] EWHC 392 (Ch), the English court considered the question as to whether - under Article 21 of the Model Law - a worldwide freezing order that was granted as provisional relief under Article 19 could continue following recognition in the UK of a Russian bankruptcy as a foreign main proceeding. While the English court held to have jurisdiction in the strict sense to grant such post-recognition discretionary relief, it found that relevant restrictions and limitations existed which served to inhibit the proper exercise of that jurisdiction.**

**The English court found that the English bankruptcy regime offers other forms of protection which meant that relief in the form of a freezing order, or similar injunction, was simply not warranted. According to the court, "(...) the scheme of the Model Law is intended to put the foreign trustee or bankruptcy manager in the same position, as far as practicable, as an officeholder appointed under domestic law, and consistent**

*with that, the effect of recognition of a foreign main proceeding is to bring into play the same wide infrastructure of the insolvency legislation. Absent some exceptional reason, a freezing order or other similar order will not in my view be required or justified. In this case, I am not persuaded that any special or exceptional reasons exist."*

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

Commented [BB9]: SUB TOTAL = 14.5 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] [14.5 out of 15]

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

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

**4.1.1 whether the Bank's liquidation comprises a "foreign proceeding" within the meaning of article 2(a) of the MLCBI [maximum 10 marks]; and [9.5 out of 10]**

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

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

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

#### **4.1.1**

**To be recognised, the Bank's liquidation is required to satisfy the prescribed elements comprising the definition of "foreign proceeding" set out in Article 2(a) of the Model Law. The elements are cumulative [there are 7 separate elements], and Article 2(a) of the Model Law is to be considered as a whole in determining a recognition application from Ms G and the DGF relating to the liquidation of the Bank in Country A.**

(i) "Collective [element 1] proceeding [element 2] of a foreign State [element 3]"

***The Judicial Perspective (2013)* explains that since the essence of the Model Law is to provide a tool for achieving a co-ordinated, global solution for all stakeholders of an insolvency proceeding, it is necessary for the proceeding in Country A to be a collective proceeding in order to qualify for relief under the Cross-Border Insolvency Regulations 2006 - the English adopted version of the Model Law.**

**The Model Law is not to be used merely as a collection device for a particular creditor or group of creditors of the Bank who may have initiated a collection proceeding in Country A. It is also not to be used as a tool for gathering up assets in a winding up or conservation proceeding that does not also include provision for addressing the claims of creditors (i.e., the English Proceedings).**

**Further, in evaluating whether a given proceeding is collective for the purpose of the Model Law, *The Guide to Enactment and Interpretation of the UNCITRAL Model Law (2014)* ("Guide to Enactment") explains that a key consideration is whether substantially all of the assets and liabilities of the Bank are dealt with in the proceeding, subject to local priorities and statutory exceptions, and to local exclusions relating to the rights of secured creditors.**

**The Affidavit evidence states that the Bank's liquidation is a collective process. Under Article 77 of the LBBA, the DGF automatically became the liquidator of the Bank on 17 December 2015 when the NB formally revoked the Bank's banking licence and resolved that it be liquidated. At that point, the DGF acquired the full powers of a liquidator under the law of Country A, including the power to *inter alia* exercise management powers, take control and dispose of the Bank's assets, and compile a register of creditor claims and to seek to satisfy those claims.**

**If the amount received from the Bank's assets proves to be insufficient to satisfy claims within the same priority, creditors' claims will be satisfied in proportion to the claims within the priority class as a whole. Claims which are not satisfied due to there being**

**an insufficiency of funds within the Bank are deemed to be extinguished. The Affidavit states that the Bank's estimated deficiency in this regard exceeds USD 823 million. However, all creditors of the Bank are entitled to claim in the liquidation and their claims are met from available assets, according to the statutory order of priorities. Consequently, the Bank's liquidation constitutes a "collective proceeding" for the purposes of Article 2(a) of the Model Law.**

**Please also separately elements 2 and 3.**

(ii) The collective proceeding, must be "judicial or administrative" [element 4] where "the assets and affairs of [the Bank] are subject to control or supervision by a foreign court. [element 5]"

**The term "foreign court" is defined at Article 2(e) of the Model Law as meaning "a judicial or other authority competent to control or supervise a foreign proceeding."**

**The Guide to Enactment states (at para. 87) that:**

**"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."**

**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.**

**The Guide to Enactment further states (at para. 74) that:**

**"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."**

**DGF has control of all of the Bank's assets and overall control of the liquidation. The Affidavit confirms its role in Country A as an institution that is a:**

*" ... governmental body ... tasked principally with providing deposit insurance to bank depositors ... [and] ... is also responsible for the process of withdrawing insolvent banks from the market and winding down their operations via 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.

Taking these factors into account, the Bank's liquidation is administrative. 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 to constitute a "foreign court" for the purpose of satisfying the definition in Article 2(a) of the Model Law.

(iii) "Pursuant to a law relating to insolvency [element 6]"

The Guide to Enactment provides (at para. 48) that:

*"Acknowledging that different jurisdictions might have different notions of what falls within the term "insolvency proceedings", the Model Law does not define the term "insolvency". However, as used in the Model Law, the word "insolvency" refers to various types of collective proceedings commenced with respect to debtors that are in severe financial distress or insolvent."*

Further, at para. 73 of The Guide to Enactment, it states:

*" ... liquidation and reorganization might be conducted under law that is not labelled as insolvency law ... but which nevertheless deals with or addresses insolvency or severe financial distress. The purpose was to find a description that was sufficiently broad to encompass a range of insolvency rules irrespective of the type of statute or law in which they might be contained and irrespective of whether the law that contained the rules related exclusively to insolvency."*

Article 76 of the LBBA and the relevant provisions of the DGF Law clearly set out Country A's specific insolvency procedures for insolvent banks. The Bank's liquidation was commenced pursuant to those provisions and ought to, therefore, be considered as being "pursuant to a law relating to insolvency" in accordance with Article 2(a) of the Model Law.

(iv) "In which proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganisation or liquidation"  
[element 7]

**Since DGF falls within the definition of "foreign court", and through the legislative provisions set out above, it has control of all of the Bank's assets and affairs for the purposes of administering the Bank's liquidation.**

**There are no public policy considerations which should prevent the English Court from recognising the Bank's liquidation under Article 17 of the Model Law.**

**In light of the above, the Bank's liquidation in Country A comprises a "foreign proceeding" within the meaning of Article 2 of the Model Law.**

**Excellent response.**

#### **4.1.2**

**"Foreign representative" is defined by Article 2(j) of the Model Law to mean:**

***"a person or body, including one appointed on an interim basis, authorised in a foreign proceeding to administer the reorganisation or the liquidation of the debtor's assets or affairs or to act as a representative of the foreign proceeding."***

**Article 16(1) of the Model Law 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."***

**The application for recognition is brought jointly by the DGF and Ms G. The Affidavit explains that the DGF's role as liquidator arises under statute. 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 (here, 17 December 2015). 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 Bank, have a criminal record, have any obligations to the 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.**

**Ms G's appointment - effective from 17 August 2020 - 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", and delegates to her all relevant powers in respect of the Bank's liquidation as set out in the DGF Law, particularly 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.**

**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 is likely that depending on the nature and timing of relief sought from the English Court, the appropriate applicant may, in the future, be either or both of Ms G and the DGF. Subject to the express limitations on Ms G's powers, they are both (i) authorised to administer the Bank's liquidation; (ii) meet the definition of "foreign representative"; and (iii) hold the necessary standing to apply in that capacity for recognition of the Bank's liquidation.<sup>1</sup>**

**Excellent response!**

\* End of Assessment \*

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<sup>1</sup> Ms Svitlana Vasylyvna Groshova (in her capacity as authorised officer of the Deposit Guarantee Fund of Ukraine in respect of the liquidation of PJSC Bank Finance and Credit, Deposit Guarantee Fund of Ukraine [2021] EWHC 1100 (Ch))