



SUMMATIVE (FORMAL) ASSESSMENT: MODULE 2A

THE UNCITRAL MODEL LAWS RELATING TO INSOLVENCY

Commented [BB1]: TOTAL = 43.5 MARKS

87% - 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 = 8 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

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

**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.**

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

**(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 [SL5]: SUBTOTAL = 8 MARKS

**Question 2.1** [maximum 3 marks]

Commented [SL6]: 3 marks

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

The appropriate date for determining the debtor's **COMI** is the date of commencement of the foreign proceeding. Even if the COMI of the debtor has moved around the time of the commencement of the foreign proceedings, this new location may not be readily ascertainable to creditors or other third parties; hence, it will be harder to establish. This is contrary to the view taken in the US, which determines the debtor's COMI from the activities at or around the time the Chapter 15 petition is filed.<sup>1</sup> Despite the different approaches, courts may take into consideration the period between commencement of a winding-up proceeding and when the petition is filed to ensure that the Debtor's COMI hasn't been manipulated in bad faith.

**Question 2.2** [maximum 3 marks]

Commented [SL7]: 3 marks

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

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

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

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

**ALL references to articles below are references to articles of the Model Law on Cross-Border Insolvency.**

The **name of the provisions** and Model Law articles of the below statements are as follows:

- **Statement 1** – Article 14 – the concept of this article is inform creditors of the commencement of local insolvency proceedings regarding the debtor in the enacting state and the time-limit for which creditors have to file claims in the relevant proceedings. This ensures one creditor doesn't gain an unfair **advantage over others**.
- **Statement 2** – Article 10 – the safe conduct rule is a concept that prevents the court in the enacting state from assuming jurisdiction over all of the debtor's assets solely on the ground that a recognition application of a foreign proceedings was made by the foreign representative.

<sup>1</sup> Morning Mist Holdings Ltd v Kryz (Matter of Fairfield Sentry Ltd) (2<sup>nd</sup> Cir Appeals Apr. 16, 2013)



- **Statement 3** – Article 16(3) – this article relates to the rebuttable presumption that a debtor's COMI (an undefined term) is the registered office of the debtor is the debtor is a company and its habitual address if the debtor is an individual.

**Question 2.3** [2 marks]

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

The court is of the opinion that, when balancing interests under Article 22 for such relief, the court should not exercise such power to grant relief under article 21 where it would prevent creditors from enforcing their rights and/or prolong the stay after the end of reconstruction.<sup>2</sup> This relief can only be granted by the court under article 21 if the stay is necessary for the protection of creditors' interests and the stay would've been appropriate to achieve such protection for them.<sup>3</sup> In the IBA case, further protection was not needed in that instance for the restructuring to achieve its purpose. Hence, article 21 shouldn't be used to override creditors rights. Once proceedings end or a foreign representative no longer has its office, then the need for further orders in support of foreign proceedings and previous relief shall cease to exist.

**Question 2.4** [2 marks]

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

As per Article 29(a), the court shall seek cooperation and coordination under articles 25-27 and shall ensure that any relief granted under article 19 or article 21 must be consistent with the domestic insolvency proceeding. From the time the recognition application in foreign proceedings is filed, the foreign representative has an ongoing duty under Article 18 to inform the court in the enacting state of: (1) any other proceedings commencing against/regarding the same debtor; or (2) any material changes in regards to the status of foreign proceedings recognized or the representative's appointment.<sup>4</sup> This duty not only updates the court on any developments but also allows the court to obtain more information regarding the debtor's affairs globally to figure out whether it needs to modify or terminate any relief granted to avoid it from being inconsistent with the domestic proceeding.

<sup>2</sup> [2108] EWCA Civ 2802 (the IBA case appeal)

<sup>3</sup> Professor Peter J M Declercq, Module 2A Guidance Text, UNCITRAL Model Laws Relating to Insolvency, 2022/2023, p 40

<sup>4</sup> The Judicial Perspective, p17, para 14 also emphasized the continuing duty of disclosure the foreign representative has.; see Digest of Case Law, Ch III, Recognition of a foreign proceedings and relief, paras 2-3

**Commented [SL8]:** 1 mark

Gibbs rule; Court's conclusion based on art 18

**Commented [SL9]:** 1 mark

Art 18

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

Commented [BB10]: SUB TOTAL = 13.5 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] [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.***

Under article 9, the foreign representative has access rights giving him standing (direct access) in the courts in an enacting state without the foreign proceedings opened in the foreign state being recognized by the enacting state. [1] Also, the foreign representative has standing to open domestic insolvency proceedings in the enacting state under article 11 once the requirements for opening proceedings have been met requirements. [1] This is beneficial to the foreign representative because it not only saves time and costs [1] in cross-border insolvencies but provides the platform for him to seek breathing space to implement appropriate measures to deal with the liquidation, protect assets from being dissipated, properly raise any breaches involving the company and find the necessary solutions that will be in the best interests of the debtor, creditors and other interested parties. Upon recognition, the foreign representative will be able to: (1) participate in insolvency proceedings conducted in the enacting state A under article 12; (2) initiate any actions in the enacting state to prevent detrimental acts to creditors (article 23); and (3) intervene in any local proceedings to which the company is a party (article 24). This access also allows the foreign representative and enacting state court the opportunity to be able to coordinate with the other foreign courts any relief that may be necessary for optimal disposition of the insolvency.

Cross-border cooperation between the courts or with the foreign representative under articles 25-27 is a huge benefit to foreign representative to make the insolvency process more efficient by directly communicating with foreign courts, [1] under Article 25(1), to request information or assistance regarding the protection, realization and distribution of assets of the debtor or any other forms suitable under Article 27. The enacting state court must be cooperative with the foreign representative in dealing with matters involving the debtor under Article 1. Since it isn't dependent upon a recognition application and with some jurisdictions having outdated insolvency regimes, cooperation between foreign courts or a foreign representative not only promotes efficiency in cross-border insolvencies and enables the representative or courts to achieve the best outcomes but it also allows courts to be more consistent in their treatment of stakeholders in various jurisdictions. The cooperation of the foreign courts would ensure that there's transparency and predictability in these proceedings and makes it easier for the foreign representative or courts to use the insolvency legislation relevant to the issue; hence, making it an almost seamless process.

Question 3.2 [maximum 5 marks] [4.5 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.***

There are many **requirements** for the courts to consider in order before a **recognition** application can be successfully granted. As per article 15(2), these evidential requirements must be satisfied in order for recognition to be granted successfully. **Articles for:**

- **Evidence** – the evidential requirements for recognition under Article 15(2) have to be satisfied before an order can be granted for recognition of foreign proceedings. Under this article, a recognition application would have to be accompanied by: (1) a certified copy of the decision commencing foreign proceedings or appointment of the foreign representative; or (2) a certificate from the foreign court affirming the existence of a foreign representative’s appointment or the existence of some foreign proceeding; or (3) any other evidence which the court deems acceptable to confirm the existence of the existence of a foreign proceeding and the appointment of the foreign representative. As laid out in Article 16, [1] the court is entitled to presume that these documents accompanying the application are true to form and are authentic court documents indicating that there is a foreign proceeding within the meaning of article 2(a) and a validly appointed foreign representative within the meaning of article 2(d). The court will then analyse whether the proceeding meets the requirements set out, and once these requirements have been satisfied, a decision for recognition of a foreign proceeding shall follow under Article 17.
- **restrictions**- however, some restrictions to this procedure can be seen under Article 6 which allows the court to refuse recognition of a foreign proceedings where it would be “manifestly contrary to the public policy”<sup>5</sup> of the State in which recognition is sought. Although this exception should rarely be the reason for refusing a recognition application, it may be a valid reason for limiting relief. [1]
- **Exclusions**- Under Article 1(2), the court will have to bear in mind that recognition cannot be granted in relation to entities a part of the exclusions list like a bank or insurance companies, as the model law does not apply to these kinds of proceedings. These excluded entities will most be governed by or require a special insolvency regime. However, the enacting state should be care not to limit the right for recognition solely on the basis of the insolvency being subject to a special regulatory regime.<sup>6</sup> [1]
- **Limitations**- Before deciding whether to recognize a foreign proceeding, the court is limited to jurisdictional pre-conditions under article 2(a) but this was satisfied as assumed. Also, the jurisdictional limitation over foreign representatives under Article 10 has the potential of shielding the foreign representative to the extent necessary to make court access meaningful (for the purpose of requesting recognition) but wouldn’t expose the entire estate under the foreign representative’s supervision to the jurisdiction of those courts. [1]

<sup>5</sup> UNCITRAL Model Law on Cross-Border Insolvency with Guide to Enactment and Interpretation, p19

<sup>6</sup> UNCITRAL Guide to Enactment pp36-37 at paras 57-61

- Another limitation can be seen in the case of Rubin v Eurofinance SA<sup>7</sup> whereby the English court had to rule on whether to recognize and enforce a US judgement based on insolvency avoidance powers obtained in default of appearance in the UK. In approaching the issue as one of pure policy, [1/2] the court refused to grant recognition related to in personam default judgment. There are limits to recognition in cases of default judgment as this is not covered by the Model law. **Your discussion must refer to the relevant Article which is Article 6 in this instance which deals with public policy exception.**

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.***

Article 19 provides pre-recognition relief that may be given at the discretion of the court. The court in the enacting state must be satisfied that the interests of the creditors and other parties are adequately protected.<sup>8</sup> Court given power to subject relief to condition it considers appropriate and further modify/terminate the relief at the request of the foreign rep or an affected person.

- **Restrictions** – This relief is only available in collective proceedings which may be urgently needed for the protection of a debtor's assets or the interests of creditor. Hence this pre-recognition relief is restricted to urgent and provisional measures. Also, there must be a recognition application pending for this type of relief to be granted. If there's no pending recognition application, the court doesn't have authority to consider such a request.<sup>9</sup> Also, if the court is of the opinion that granting such relief would interfere with the administration of a foreign main proceeding, then it refuse to grant such relief as per Article 19(4).<sup>10</sup>
- **Limitations** – relief under article 19 terminates when the recognition application is decided upon; however, the court has the opportunity to extend such measure under article 21 to prevent confusion between the reliefs given before and after recognition.
- **Conditions** – the court is able to create conditions it considers appropriate before making a decision on a recognition application. Any provisions in force in the enacting state A which stipulate the type of notice to be given by either the foreign representative or the foreign court shall be used. Protection of all interested persons is connected to provisions in national laws of notification requirements (like general publicity requirements). These provisions are designed to notify interested parties that foreign proceeding has been recognized and notifications that court, under its own procedural rules, has to issue to persons directly affected by recognition or relief granted.<sup>11</sup> Also, in order to foster such coordination of pre-recognition relief with any foreign main proceeding, there is a requirement for the the foreign representative applying for

<sup>7</sup> [2010] UKSC 46

<sup>8</sup> UNCITRAL Model Law on Cross-Border Insolvency with Guide to Enactment and Interpretation, p 30

<sup>9</sup> UNCITRAL Guide to Enactment p 81

<sup>10</sup> UNCITRAL Model Law on Cross-Border Insolvency with Guide to Enactment and Interpretation, p33

<sup>11</sup> UNCITRAL Guide to Enactment P 91

recognition, under article 15(3) to attach to the application for recognition a statement identifying all foreign proceedings with respect to the debtor that are known to the foreign representative at that time.<sup>12</sup>

Article 21 provides post recognition relief which is discretionary relief that the court may grant upon recognition, in accordance with Article 21(1) for the protection of local interests, assets and proceedings as well. Relief may be given to any conditions the court finds appropriate under the enacting state. Several safeguards are designed to ensure the protection of local interest creditors before assets are turned over to the foreign representative such as: the general statement of the principle of protection of local interests in article 22, paragraph 1; the provision in article 21, paragraph 2, that the court should not authorize the turnover of assets until it is assured that the local creditors' interests are protected. Under article 22, paragraph 2, the court may subject the relief that it grants to conditions it considers appropriate.<sup>13</sup>

Another factor taken into account is whether the foreign recognition is of foreign main or non-main proceedings because non-main interest is typically narrower than a main seeking control of assets. Relief given to non-main is limited to assets in the relief granted to a foreign non-main proceeding should be limited to assets that are to be administered in that non-main proceeding. Any information sought concerning debtor's assets or affairs the relief must concern information required in that non-main proceeding. Such relief should not give too much power to the representative of non-main to interfere with the administration of main proceedings.

**Your answer must also include a brief discussion on the following:**

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

Question 3.4 [maximum 1 mark] [1 mark]

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

The reason why a worldwide freezing order granted as a pre-recognition interim relief ex article 19 is unlikely to continue post-recognition ex article 21 was discussed in the case of *Igor Vitalievich Protasov and Khadzgu-Murat Derev*.<sup>14</sup> It was decided here, that the English bankruptcy regime offers other forms of protection which meant that relief in the form of freezing order wasn't warranted. In other words, the court won't continue to grant post recognition relief in instances where it's most likely not going to be needed anymore, as there may be another regime in place offering such protection or even greater protection than the initial relief granted.

<sup>12</sup> UNCITRAL Model Law on Cross-Border Insolvency with Guide to Enactment and Interpretation, 81

<sup>13</sup> UNCITRAL Model Law on Cross-Border Insolvency with Guide to Enactment and Interpretation, p88

<sup>14</sup> Order of 24 February 2021 by Mr Justice Adam Johnson, [2021] EWHC 392 (CH) (the Protasov v Derev Case).

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

Commented [BB11]: 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 out of 10]**

There are various elements that must be satisfied before the proceedings involving the Bank before it can be recognized in England as a foreign proceeding. The DGF commenced a compulsory winding-up or liquidation proceeding (a judicial proceeding) on 18 December 2015, the day after the Bank's banking licence was formally revoked in Country A (which is a foreign state). The DGF being obliged to commence liquidation proceedings soon after, this liquidation (by virtue of decisions made by the NB) also satisfies the evidential requirement under article 15(a) confirming the foreign insolvency proceeding and the automatic appointment of the DGF in Country A, as liquidator, dealing with the Bank's liquidation (Article 77 of the LBBA) which was a judicial proceeding. So, DGF providing a copy of order made after commencing liquidation proceedings against the Bank or even the order making the liquidation indefinite would be sufficient proof of a foreign proceeding existing. The

appointment under Article 77 of the LBBA once the licence was revoked, would also be sufficient evidence of the DGF's appointment as liquidator in the foreign proceeding, as the appointment was validly authorized by the NB and acknowledged by the court.

As per article 2(a), this proceeding in Country A appears to be a collective proceeding relating to insolvency law because all of assets and affairs of the debtor Bank are being dealt within the proceeding to achieve a global solution for all stakeholders and the assets being subjected to the control or supervision of the court in State A. This proceeding would affect all creditors if it realized assets for the general benefit of all creditors. The rights and obligations of all creditors must be taken into account, not just those of the petitioning creditor. The Bank's assets are being supervised or preserved by the DGF in the proceeding which automatically became the liquidator, under article 77 of DBBA, for the purpose of liquidation. The bank's financial position continued to deteriorate so, this proceeding can be defined broadly as a proceeding involving the bank as debtor that is in severed financial distress or insolvent – hence, the liquidation is being authorized or conducted under a law relating to insolvency. It is collective in nature as all of the assets and liabilities of the Bank are being dealt with in the proceeding which does relate to insolvency law (the LBBA of Country A) and are subject to the control or supervision of by the court in Country A.

With the liquidation being extended to an indefinite date, this leaves the DGF as liquidator to proceed with its duties to administer the Bank's assets and affairs that are not only in Country A but those that may be in foreign jurisdictions as well. Therefore, not only are all of the Bank's assets are under the control or supervision by the court in Country A, but this gives the Liquidator, having acquired full powers of a liquidator, an opportunity to investigate the affairs of the Bank, realise assets or preserve as the case may be. Having been formally classified as troubled (articled 75 LBBA) by the NB on 19 January 2015 and the NB resolution records is evidence of a foreign proceeding existing under article 15(2)(c) regarding the Bank, having been in breach of its duties under article 76 (i)of the LBBA in Country A. Despite that Bank making slight improvements in its financial position, it has started to deteriorate the Bank was firstly classified as insolvent under article 76 or the LBBA and was removed from the market. The failure to comply with the NB's orders as per article 76(iii) of the LBBA, showed that the Bank had clearly been insolvent or severely financially distressed, having first been declared as troubled, having breached the minimum capital requirements and a critically low balance of funds held with the NB to name a few; hence, satisfying the criteria of this proceedings being one relating to the law of insolvency.

Since the registered office (COMI) of the Bank is in Country A, this should be recognized as a foreign main proceeding in the English Courts. The fact that country A has not adopted the MLCBI still leaves a chance of the proceedings being recognized on the principle of comity. It should be noted that there's no reciprocity requirement in respect of recognition applications. Therefore, it is unlikely that the foreign proceeding in Country A will be denied recognition by the English court solely on the basis of that country probably won't provide equivalent relief to an English insolvency representative or from the English Courts.<sup>15</sup> Also, the proceeding involves assets (various establishments or entities) registered in England which makes it viable for recognition by the English court to ensure that all assets and affairs of the bank are dealt with in the liquidation. Foreign non-main proceedings were commenced in the High Court of England and Wales(Chancery) against various defendants on 11 February 2021 in respect of these establishments.

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<sup>15</sup> The Judicial Perspective, p18, para 47

It's fine for the English court to presume the authenticity of resolution, formal notice of the revocation of the Bank's banking licence under article 16 and the order which may have been made in relation to the extension of the liquidation indefinitely on 14 December 2020 in order to perhaps find solution for all stakeholders (having an amended list of creditors' claims totaling approximately USD 1.113 billion and estimated deficiency exceeding USD 823 million) in this collective proceeding being subject to the scrutiny of the English court.

Under Article 15 of the MLCBI, the DGF could provide a copy of the petition commencing the foreign proceeding in Country A or even the order made in the judicial proceeding for the purpose of proving its existence for the English Court. Other evidence for proof of foreign proceeding existing could be the NB formal notice revoking the banking licence and obviously Article 77 of the LBBA which automatically appointed DGF as the liquidator in this instance. If there are any other proceedings known to the DGF or Mrs G, they should be attached as part of the recognition application.

With the court able to presume that all documentation provided by the DGF or Mrs. G on behalf of the DGF in relation to the foreign liquidation proceedings in Country A are authentic under Article 16 MLCBI, this includes those documents provided in respect of the appointment of DGF as liquidator under the LBBA laws in Country A. Having said this, this proceeding commenced by the DGF in Country A in respect of the Bank's liquidation should be eligible for recognition under article 17 MLCBI by the English Court, as it satisfies the criteria of a foreign proceedings within the meaning of Article 2(a) of the MLCBI and would qualify as a foreign proceeding recognition application under the requirements set out in Article 15(2) of the MLCBI.

***There are 7 separate elements your response should address: the "proceeding" element, the "judicial or administrative" element, the "of a foreign State" element, the "collective nature" element, the "subject to control or supervision by a foreign court" element, the "pursuant to a law relating to insolvency" element, and the "for the purpose of reorganisation or liquidation" element.*** For full marks your response must address in sufficient detail each of these 7 separate elements, provide guidance and source references as appropriate and apply the facts.

***While your response was well-reasoned, in respect of the "collective nature" element, the following supporting guidance could have been added:***

***1. UNCITRAL's guide for judiciary, "The Model Law on Insolvency: The Judicial Perspective" (2013) explains the requirement for proceedings to be "collective":***

*"The UNCITRAL Model Law was intended to apply only to particular types of insolvency proceedings. The Guide to Enactment and Interpretation indicates that the notion of a "collective" insolvency proceeding is based on the desirability of achieving a coordinated, global solution for all stakeholders of an insolvency proceeding. It is not intended that the Model Law be used merely as a collection device for a particular creditor or group of creditors who might have initiated a collection proceeding in another State, or 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. The Model Law may be an appropriate tool for certain kinds of actions that serve a regulatory purpose, such as receiverships for such publicly regulated entities as insurance companies or brokerage firms, provided the proceeding is collective as that term is used in the Model Law."*

***2. The Guide to Enactment and Interpretation of the UNCITRAL Model Law (2014) explains that when:***

“evaluating whether a given proceeding is *collective* for the purpose of the Model Law, a key consideration is whether substantially all of the assets and liabilities of the debtor are dealt with in the proceeding, subject to local priorities and statutory exceptions, and to local exclusions relating to the rights of secured creditors. A proceeding should not be considered to fail the test of collectivity purely because a class of creditors’ rights is unaffected by it.”

**In respect of the “subject to control or supervision of a foreign court”, your response could be further clarified along the following lines:**

- 1. The term “foreign court” is defined at article 2(e) of the MLCBI and means: “a judicial or other authority competent to control or supervise a foreign proceeding”.**
- 2. The Guide to Enactment notes: “87) A foreign proceeding that meets the requisites of article 2, subparagraph (a), should receive the same treatment irrespective of whether it has been commenced and supervised by a judicial body or an administrative body. Therefore, in order to obviate the need to refer to a foreign non-judicial authority whenever reference is made to a foreign court, the definition of “foreign court” in subparagraph (e) includes also non-judicial authorities.”**
- 3. In *Re Sanko Steamship Co Ltd* [2015] EWHC 1031 (Ch) Simon Barker QC, noted that a foreign proceeding may be recognised where the control or supervision of the proceeding is undertaken by a non-judicial administrative body.**
- 4. The Guide to Enactment states: “74) The Model Law specifies neither the level of control or supervision required to satisfy this aspect of the definition nor the time at which that control or supervision should arise. Although it is intended that the control or supervision required under subparagraph (a) should be formal in nature, it may be potential rather than actual. As noted in paragraph 71, a proceeding in which the debtor retains some measure of control over its assets, albeit under court supervision, such as a debtor-in-possession would satisfy this requirement. Control or supervision may be exercised not only directly by the court but also by an insolvency representative where, for example, the insolvency representative is subject to control or supervision by the court. Mere supervision of an insolvency representative by a licensing authority would not be sufficient.”**
- 5. In this case the DGF has control of all of the Bank’s assets and overall control of the liquidation.**
- 6. The DGF’s independence is addressed at articles 3(3) and 3(7) of the DGF Law which confirm that it is an economically independent institution with separate balance sheet and accounts from the NB and that neither public authorities nor the NB have any right to interfere in the exercise of its functions and powers.**
- 7. Article 37 establishes that the DGF (or its authorised person, insofar as such powers are delegated) has extensive powers, including powers to exercise managerial and supervisory powers, to enter into contracts, to restrict or terminate the bank’s transactions, and to file property and non-property claims with a court.**
- 8. The assets and affairs of the Bank are subject to the control of the DGF, an official body which exercises its powers in the liquidation free from intervention**

**by government or the NB and which should be considered, for the purposes of the definition set out in article 2(e) of the MLCBI, as a "foreign court".**

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

The following elements of foreign representative which will need to be satisfied are:

**Person/body appointed on an interim basis-** the DGF is a governmental body which was automatically appointed upon the Bank losing its banking licence as per Article 77 of the LBBA, having commenced liquidation proceedings shortly after against the Bank. It is primarily responsible for the management of assets and affairs belonging to the Bank. As mentioned above, the law (LBBA) in Country A setting out the automatic appointment of the DGF would be sufficient proof as well for the foreign representative's recognition.

**Authorized in a foreign proceeding** – once the DGF commenced liquidation proceedings in State A under article 77 of the LBBA, the DGF automatically became the liquidator of the Bank upon the revocation and acquired full powers of a liquidator; hence the DGF was properly appointed as liquidator of the insolvent bank in accordance with the LBBA laws of Country A and not done necessarily by the court. Under the Model Law, it doesn't specify that a foreign representative must be authorized by the foreign court. This would have been authorized in the by the NB under the LBBA Act and the court has acknowledged DGF's role as liquidator in the course of the proceeding for the purpose of the liquidation and allows it to continue the investigation of the assets and affairs of the Bank. Hence, the court in Country A acknowledges such appointment of the DGF as liquidator.

**To administer the liquidation of the debtor's assets or affairs or to act as a representative of the foreign proceeding** – The DGF is appointed to administer the assets and affairs of the Bank as well as to be the representative in any jurisdiction in which recognition is needed. The appointment of Mrs. C and then replacing her with Mrs. G would equate to them being authorized officers, delegated by the DGF and can also be seen as a valid appointment under article 48(3) of the DGF which allows the DGF to delegate its liquidation powers to an authorized officer. Mrs. G is an employee of the DGF is a competent individual, who is allowed to perform actions to ensure that bank's withdrawal from the market during the liquidation. Also she is a leading bank liquidation professional so she has the expertise in dealing with liquidation and therefore, is a good representative for investigating the affairs of the Bank. She effectively is controlling or trying to preserve or realise assets belonging to the Bank for the purpose of the liquidation by virtue of being delegated these roles by the DGF under article 48(3) of the DGF Law, although she does not have powers for selling the assets of the Bank but DGF retains this power and can engage in any sale of any assets so that creditors can be paid out of the proceeds of such sales if need be. If there are any other proceedings known to the DGF or Mrs G, they should be attached as part of the recognition application.

Hence, the English court should recognize the Applicants, that being DGF and Mrs. G (on DGF's behalf), as foreign representatives properly appointed and authorized to represent the Bank in foreign proceedings within the meaning of article 2(d) and to administer the assets and affairs of the Bank; having qualified through proof of the LBBA provisions of the automatic appointment as liquidator of the Bank once the banking licence was revoked for the purpose of commencing a liquidation proceeding, under the requirements set out in Article 15(2) of the MLCBI.

Excellent response.

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 \*