



SUMMATIVE (FORMAL) ASSESSMENT: MODULE 2A

THE UNCITRAL MODEL LAWS RELATING TO INSOLVENCY

Commented [BB1]: TOTAL = 28.5 MARKS

57%

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).**
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- 6.1 **If you selected Module 2A as one of your compulsory modules (see the e-mail that was sent to you when your place on the course was confirmed), the final time and date for the submission of this assessment is 23:00 (11 pm) GMT on 1 March 2023. The assessment submission portal will close at 23:00 (11 pm) GMT on 1 March 2023. No submissions can be made after the portal has closed and no further uploading of documents will be allowed, no matter the circumstances.**
- 6.2 **If you selected Module 2A as one of your elective modules (see the e-mail that was sent to you when your place on the course was confirmed), you have a choice as to when you may submit this assessment. You may either submit the assessment by 23:00 (11 pm) GMT on 1 March 2023 or by 23:00 (11 pm) BST (GMT +1) on 31 July 2023. If you elect to submit by 1 March 2023, you may not**

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

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

ANSWER ALL THE QUESTIONS

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

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

Commented [SL2]: SUBTOTAL = 7 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

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

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?

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

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

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

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

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

Question 1.6

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

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

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

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

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

Question 1.7

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

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

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

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

(d) All of the above.

Question 1.8

Commented [SL5]: Correct answer is (d).

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 [SL6]: SUBTOTAL = 4.5 MARKS

Question 2.1 [maximum 3 marks]

Commented [SL7]: 2.5 marks

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

Morning Mist Holdings Ltd v. Krys (Matter of Fairfield Sentry Ltd)

The analysis of COMI is multi-faceted and involves a consideration of a variety of factors and circumstances. As a result, the point at which COMI is analysed may determine the factors which are permitted to be considered. For instance, do the insolvency activities taking place in connection with the foreign insolvency proceedings matter? They may matter to a court which considers COMI as at a point in time occurring after the commencement of the foreign proceedings. However, those activities would be completely irrelevant to a court which determines COMI as at the commencement of the foreign proceedings.

The absence of uniformity of approach to timing may be attributed to the lack of guidance from UNCITRAL prior to 2014. The first edition of the UNCITRAL Guide to Enactment (1997) was silent on the issue of timing, leaving national courts free to make their own decision. Three approaches have since emerged in answer to the question: at which point in time COMI should be determined? Either: of commencement of the foreign proceeding upon commencement of the foreign insolvency proceeding ('the European approach'); upon filing of the recognition application in respect of the foreign insolvency proceeding ('the US approach'); or upon the hearing of the recognition application ('the Australian approach').

In 2014, the updated UNCITRAL Guide to Enactment first addressed the issue of timing in relation to recognition of existing insolvency proceedings. The UNCITRAL Secretariat recommended that the date of the commencement of the purported main foreign proceeding should be the date at which COMI is determined: 'With respect to the date at which the centre of main interests should be determined, having regard to the evidence required to accompany an application for recognition under Article 15 and the relevance accorded the decision commencing the foreign proceeding and appointing the foreign representative, the date of commencement of that proceeding is the appropriate date.'

The reason for this suggested approach is that the business activity of the debtor would have ceased upon the commencement of the foreign insolvency proceeding, and all

that may exist thereafter is the foreign insolvency proceeding and the activity of the foreign representative in administering the insolvent estate.

So, the appropriate date for determining the COMI of a debtor is of commencement of the foreign proceeding upon commencement of the foreign insolvency proceeding

Question 2.2 [maximum 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."*

The first Statement is related to the public policy exception contained in Article 6 of the MLCBI.

The enacting State preserves the discretion to deny recognition to the procedures manifestly contrary to its public policy.

The second Statement is about COMI. The MLCBI in Article 16(3), does not define COMI, but informs that in the absence of proof to the contrary, the debtor's registered office, or habitual residence in the case of an individual, is presumed to be the centre of the debtor's main interests.

The third Statement refers to Article 31 of the MLCBI, which is the presumption of insolvency, however, a rebuttable one considering it only applies to the recognition of a foreign main proceeding.

Question 2.3 [2 marks]

Commented [SL8]: 0 marks

1: Art 14
2: Art 10
3: Art 16(3)

Commented [SL9]: 1 mark

1. The UK court would need to be convinced that (a) the indefinite stay is necessary to protect the interests of IBA's creditors and (b) an indefinite stay is the appropriate way of achieving such protection.
2. Based on Article 18 of the MLCBI, the English Court of Appeal in the IBA case appeal held that had the MLCBI ever contemplated the continuance of relief after the end of the relevant foreign proceeding, it would have addressed the question explicitly and provided appropriate machinery for that purpose.

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.

First, the Court of Appeal held that the CBIR did not grant the Court the power to amend the substantive rights of the English law creditors. The Court of Appeal concluded that the further moratorium was neither necessary nor appropriate to protect the interests of the creditors of the IBA.

In deciding this the Court of Appeal referred to the Guide to enactment of the UNCITRAL model law which provided that the scope of the model law is "limited to some procedural aspects of cross-border insolvency" and that it "does not attempt a substantive unification of insolvency law" and noted that if Article 21 of the CBIR was intended to permit substantive changes to creditors' rights it would have expected this to have been provided expressly.

In deciding this issue the Court of Appeal also paid attention to the fact that the restructuring in Azerbaijan had concluded some time ago and IBA had resumed trading normally. Therefore there was no suggestion that if the indefinite moratorium was not granted the restructuring would fail or that the other creditors would be prejudiced by the English creditors being permitted to enforce their rights.

The Court of Appeal drew a distinction between the position on a liquidation, where the creditors' rights are generally unaffected but merely enforced collectively and the position, as in this case, on a restructuring where the rights of the creditors are amended so that the debtor can continue to trade.

The Court of Appeal also noted that in order to restructure its English debts IBA could have promoted a Scheme of Arrangement in the English Courts but had chosen not to do so, presumably the Court of Appeal reasoned because IBA would have needed to offer English law creditors sufficiently appealing terms to secure their approval.

Second, the Court of Appeal held that the CBIR did not allow the Court to grant relief which would continue to have effect after the foreign insolvency proceedings had come to an end which, IBA had accepted, would be the result of their application for an indefinite moratorium had been successful.

The Court noted that the CBIR had been drafted on the assumption that there would always be a foreign representative of the foreign insolvency process to respond to any applications in relation to the insolvency proceedings. If the indefinite moratorium sought by IBA was granted and the Azeri restructuring process concluded there would be no one with standing to respond to any subsequent applications in relation to the moratorium. Counsel for the IBA had argued that the debtor itself could respond to such applications but the Court of Appeal said that while this was true, if the CBIR had been intended to grant such relief it would have included provisions which provided a mechanism for such proceedings to be handled.

The Court of Appeal concluded that it did not make any difference for these purposes that, pursuant to a change of Azeri law specifically for the purposes of these proceedings, the Azeri restructuring process had been extended. The Court of Appeal concluded that the purpose of the Azeri restructuring process had been achieved before it was extended in January 2018 and therefore the restructuring process was being "kept alive artificially." Accordingly, the extension of the proceedings did not provide justification for continuing the moratorium.

The Court of Appeal refused IBA leave to appeal to the Supreme Court. IBA is now expected to apply directly to the Supreme Court for permission.

Question 2.4 [2 marks]

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

The Model Law does not have a rule that guarantees preference in case of recognition of concurrent foreign non-main proceedings. But Article 30 (c) of the MLCBI determines that, if, after recognition of a foreign non-main proceeding, another foreign non-main proceeding was recognised, the court shall grant, modify, or terminate relief to facilitating coordination between these two proceedings.

In accordance with Article 18 of the MLCBI, from the time of filing the application for recognition of the foreign proceeding, the foreign representative must subsequently inform the court, immediately, of any substantial change in the status of the recognized foreign proceeding, including changes in his appointment and any other foreign proceeding regarding the same debtor that he knows about.

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

A foreign representative of a foreign proceeding opened in State B in respect of a corporate debtor (the Debtor) is considering whether or not to make a recognition

Commented [SL10]: 1 mark

Art 29(a) and art 18 (discussed)

Commented [BB11]: SUB TOTAL = 13 MARKS

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] [2 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.

The Model Law has provisions to allow for the speedy and direct access to courts for foreign representatives [article 2(d)] (foreign representative is defined as "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 9]. [1]

A foreign representative (see paragraph 42.39) is entitled under the Model Law to apply to commence a proceeding if the conditions for commencing such a proceeding are otherwise met [article 11], [1] and/or to participate in proceedings regarding the debtor [article 12].

Under the Model Law, foreign creditors are granted the same rights regarding the commencement of, and participation in, proceedings as creditors in the enacting state [article 13(1)]. The Model Law allows states to make provisions to ensure that the ranking of claims of creditors in the state are not affected by the granting of access or participation to foreign creditors. This said, foreign creditors should not be ranked lower than general unsecured creditors, unless the debt to which their claim relates would normally be ranked lower than general unsecured creditors [article 13(2)].

There are provisions under the Model Law to ensure that foreign creditors are notified of insolvency proceedings in the same way as creditors in the enacting state, or by individual notification if that is not the method used in the state. This is to ensure foreign creditors are not in a less advantageous situation than local creditors. That notification shall indicate a reasonable time for the submission of claims and specify the place for their filing, indicate whether secured creditors need to file their secured claims and contain any other information required to be included under the law of that state. There are provisions allowing for discretion as to the method of notification if individual notification would entail excessive cost or would not be feasible under the circumstances [article 14].

The effects of the Model Law are largely dependent on whether the proceedings to which they relate are "foreign main proceedings" or "foreign non-main proceedings". It is important, therefore, to understand the difference between the two types of

proceeding. A foreign main proceeding is one in a state where the debtor has their "centre of main interests" (COMI) [article 2b] COMI is not defined beyond the presumption, subject to evidence to the contrary, that the debtor's registered office, or habitual residence is the centre of main interests (article 16(3)).

A foreign non-main proceeding (a foreign proceeding other than a main proceeding) is one in a state where the debtor has an establishment [article 2c] (which is defined as "any place of operations where the debtor carries out a non-transitory economic activity with human means and goods or services." [article 2f]. The presence of assets is not, in itself, sufficient to meet the definition of "establishment".

The Model Law states that a foreign representative (see paragraph 42.39) may apply to court for recognition of the foreign proceeding in which the representative has been appointed [article 15].

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

- **Opening domestic insolvency proceedings (Article 11 MLCBI):** The foreign representative is further specifically entitled to apply for the opening of domestic insolvency proceedings in State A, as reflected in Article 11 of the MLCBI. Whether or not the foreign representative would wish to do this will depend on what the requirements are for opening such domestic proceedings. Can these requirements be met? On the other hand, it will depend on what the foreign representative believes he/she can get in terms of (interim) relief for the foreign proceedings in State B. In other words, are domestic insolvency proceedings really needed, or just additional time and costs that should be avoided?
- **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.
- **Save Time & Costs:** The key benefits of both the access provisions and the cooperation provisions are that they save time and therefore also costs, as a result of which value destruction can be avoided and value enhancement is being promoted.

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

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

as well as the judicial scrutiny that must be overcome for a recognition application to be successful.

To be recognized as a foreign proceeding, according to Article 2(a) of the MLCBI, it has to be a collective judicial or administrative proceeding in State B, or an interim proceeding, pursuant to a law relating to insolvency in which the assets and affairs of the debtor are subject to control or supervision by a State B court, for the purpose of reorganization or liquidation.

To be recognized as a foreign representative, according to Article 2(d) of the MLCBI, he has to be a person or body, including one appointed on an interim basis, authorized in a State B proceeding to administer the reorganization or the liquidation of the debtor's assets or affairs or to act as a representative of the foreign proceeding.

For a recognition application to be successful, beyond the recognition as a foreign proceeding and a foreign representative he has to provide the documents described in Article 15, paragraph 2, of the MLCBI, which are a certified copy of the decision commencing the foreign proceeding and appointing the foreign representative; a certificate from the foreign court affirming the existence of the foreign proceeding and of the appointment of the foreign representative. If he does not have these documents, he has to provide other evidence of the existence of the foreign proceeding and of his appointment as a foreign representative. [1]

In accordance with Article 17 of the MLCBI, besides all these requirements, the foreign proceeding also has to be submitted to the competent court or authority (Article 4) to have a recognition judgment. [½]

Under Article 16 of the MLCBI, the court can use the presumptions that documents submitted by the foreign representative in support of the application for recognition are authentic, whether or not they have been legalized and, in the absence of proof to the contrary, that the debtor's registered office, or habitual residence in the case of an individual, is presumed to be the centre of his main interests. [½]

The judicial scrutiny also involves observation to the public policy exception (Article 6, MLCBI) [1]

to safeguard the sovereignty to the enacting State. This way, the courts can refuse to recognize the foreign proceeding if this is manifestly contrary to their public policy. In Article 1(2), MLCBI allows the enacting State to exclude some proceedings from its application. Some examples of exclusions are proceedings involving banks and insurance

companies, because normally they are submitted to special regimes of insolvency. [1]

On the

other hand, Article 3 of the MLCBI also sets forth the supremacy of international obligations of

the enacting State when there is a conflict between internal law and a treaty or other international agreement, which will prevail. So, for the application to be successful, the foreign

representative has to observe these exclusions and limitations. [1]

Question 3.3 [maximum 5 marks] [5 out of 5 marks]

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

The foreign representative should verify what relief is necessary to protect the assets of the debtor or the interests of the creditors against individual actions or individual proceedings concerning the debtor's assets, rights, obligations, or liabilities. The foreign representative should check which measures will be needed to "freeze" debtor's money and property to prevent fraud and to protect the legitimate interests of the parties involved in this procedure.

In accordance with Article 19 of the MLCBI, from the time of filing an application for recognition, even before the decision, the court from the enacting State may, at the request of the foreign representative, grant urgently needed relief of a provisional nature. This interim relief includes:

(a) Staying execution against the debtor's assets; (b) Entrusting the administration or realization of all or part of the debtor's assets located in this 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. Article 19 of the MLCBI also includes any relief mentioned in paragraph 1 (c), (d), and (g) of article 21: (c) 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; (d) 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 (g) Granting any additional relief that may be available under the laws of the enacting State. This relief terminates when the court decides about recognition unless the court extended it under paragraph 1 (f) of article 21 of the MLCBI. The court of the enacting State can refuse to grant this interim relief if it would interfere with the administration of a foreign main procedure, but, in this case, there is no concurrence of proceedings.

After recognition of a main or non-main proceeding, under Article 21 of the MLCBI, the court of the enacting State may, at the request of the foreign representative, grant appropriate relief, including: 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 of the MLCBI; staying execution against the debtor's assets to the extent it has not been stayed under paragraph 1 (b) of article 20 of the MLCBI; 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 of the MLCBI; 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 realization of all or part of the debtor's assets located in this State to the foreign representative or another person designated by the court; extending the pre-recognition relief; granting any additional relief that may be available to under the law of the enacting State (<https://uncitral.un.org/sites/uncitral.un.org/files/mediadocuments/uncitral/en/1997-model-law-insol-2013-guide-enactment-e.pdf>).

There is no information about the proceeding, but in case of recognition as a foreign main procedure, the MLCBI provides an automatic relief under Article 20, which includes staying the commencement or continuation of individual actions or individual proceedings concerning the debtor's assets, rights, obligations or liabilities; staying the execution against the debtor's assets; and suspending the right to transfer, encumber or otherwise dispose of any assets of the debtor. There are some limits to the application of this automatic relief, which are provisions of the Law of the enacting State containing exceptions, limitations and modifications, or termination in respect of the stay. And it is important to mention that this automatic stay does not affect the right to request a commencement of an insolvency proceeding under the Law of the enacting State or the right to commence individual actions or proceedings to the extent necessary to preserve a claim against the debtor.

In addition, the following main issues must be considered:

1. Adequate protection: Pursuant to Article 22 of the Model Law any interim relief under Article 19 of the Model Law or any post-recognition relief under Article 21 of the Model Law require the court in State A to be satisfied that the interests of the creditors

and the other interested persons, including the debtor, are adequately protected and any relief may be subject to conditions as the court considers appropriate.

2. Existing international obligations of State A: *Based on Article 3 of the Model Law, the court in State A should again verify that there are no existing international obligations of State A (under a treaty or otherwise) that may conflict with granting the requested relief under the implemented Model Law in State A.*

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

Well answered!

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 better case to explain 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 is the Protasov v Derev.

The High Court of Justice, in the recent case of Protasov v Derev, determined that there was no basis for a provisional freezing order to continue after recognition of foreign bankruptcy proceedings under the UNICTRAL Model Law on Cross-Border Insolvency (the Model Law) as implemented in England & Wales by the Cross-Border Insolvency Regulations 2006.

The judge held that as Mr Derev was based in London, it had a strict jurisdiction to make the order sought, but determined that it would not be appropriate to do so in this matter.

The parties were able to identify only one case, Raithatha v Williamson, where a freezing order had been made against a bankrupt. That case, however, concerned the bankrupt's future assets under a pensions scheme and the freezing injunction was required to prevent the bankrupt from realising those benefits until the outcome of the trustee in bankruptcy's application to claim them under an income payments order.

Noting that Article 19(2) provides that any interim relief expires when the application for recognition is decided unless expressly extended under Article 21(f), the Court went on to consider whether it would be appropriate to extend the freezing order in this case.

The Court noted that pursuant to Article 20(1)(c), upon recognition of foreign proceedings, the bankrupt's rights to deal with any of his assets are suspended. According to Article 20(2)(a) and (b) the scope and effect of the suspension is the same as if the bankruptcy order had been made under the Insolvency Act 1986 (IA 1986) and is subject to the same court's powers, prohibitions, limitations and conditions as would apply under English law. The Court, in particular, mentioned the fact that, under IA 1986:

- *the bankrupt has no control over his assets (section 306),*
- *a trustee in bankruptcy has broad powers over the bankrupt and his assets (for example, section 366)*
- *and the whole process is under the general control of the court (section 363) which has a power to order the arrest of a bankrupt (section 364).*

The Court held that, when the recognition order was made, the provisional suspension under the freezing order was superseded by a permanent suspension of the bankrupt's rights by way of Article 20(1) and Article 20(2) of the Model Law. There was therefore no reason for the freezing order to be extended.

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

Commented [BB12]: SUB TOTAL = 4 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:

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- (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] [4 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 [2.5 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]. [1.5 out of 5]

For a recognition application in the English Court to be successful, the foreign proceeding opened in State A 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.

To be recognized as a foreign proceeding, according to Article 2(a) of the MLCBI, it has to be a collective [element 1] judicial or administrative [element 2] proceeding [element 3] of a foreign State [element 4], or an interim proceeding, pursuant to a law relating to insolvency [element 5] in which the assets and affairs of the debtor are subject to control or supervision by a foreign court [element 6], for the purpose of reorganization or liquidation [element 7].

In that case, the liquidation of the Bank comprises a "foreign proceeding" within the meaning of article 2(a), insofar as there is 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, for example: Provisional administration and Liquidation.

To be recognized as a foreign representative, according to Article 2(d) of the MLCBI, he has to be a person or body, including one appointed on an interim basis, [element 1] authorized in a foreign proceeding [element 3] to administer the reorganization or the liquidation of the debtor's assets or affairs

or to act as a representative of the foreign proceeding [element 3].

In that case, the Applicants fall within the description of “foreign representatives” as defined by article 2(d) of the MLCBI, because Ms G is the 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).

For full marks your response must address in sufficient detail each of the 7 separate elements of the definition of “foreign proceeding” as set forth in article 2(a) of the MLCBI and each of the 3 separate elements of the definition of “foreign representative”, as set forth in article 2(d) of the MLCBI, provide guidance and source references as appropriate and apply the facts. Unfortunately, your response to a large extent only limits itself to mentioning the elements, without discussing each one of them and providing supporting guidance and reference sources. In addition, the application of the facts in your response is insufficient.

By way of illustration, in response to Q 4.1.1. for element 6, we are looking for something 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”.

For full marks on Q 4.1.2., we are looking for a response along the following lines:

1. "Foreign representative" is defined by article 2(d) of the MLCBI 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'

2. Article 16(1) of the MLCBI provides:

'If the decision or certificate referred to in paragraph 2 of article 15 indicates that the foreign proceeding is a proceeding within the meaning of sub-paragraph (i) of article 2 and that the foreign representative is a body or person within the meaning of sub-paragraph (j) of article 2, the court is entitled to so presume.'

3. This application is brought jointly by the DGF and Ms G. The DGF's role as liquidator arises under statute and article 77 of the LBBA provides that the DGF is automatically appointed as liquidator on the day it receives the NB's decision pursuant to article 77 revoking a bank's licence and commencing its liquidation.

4. 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".

5. 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.

6. 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.

7. As a result of the sharing of some, but not all of the liquidator's powers and the division of responsibility between Ms G and the DGF, it seems likely that depending on the nature and timing of relief sought from this Court pursuant to the CBIR (if any), the appropriate applicant may, in the future, be either or both of Ms G and the DGF. We are satisfied that subject to the express limitations on Ms G's powers, they are both authorised to administer the liquidation and as such both meet the definition of "foreign representative". In our judgment they both had the necessary standing to apply in that capacity, for recognition of the Bank's liquidation.

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

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

* End of Assessment *