



SUMMATIVE (FORMAL) ASSESSMENT: MODULE 2A

THE UNCITRAL MODEL LAWS RELATING TO INSOLVENCY

Commented [BB1]: TOTAL = 38.5 MARKS

77%

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

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

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

INSTRUCTIONS FOR COMPLETION AND SUBMISSION OF ASSESSMENT

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

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

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

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

ANSWER ALL THE QUESTIONS

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

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

Commented [SL2]: SUBTOTAL = 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

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

For a debtor with its COMI in South Africa and an establishment in Argentina, foreign main proceedings are opened in South Africa and foreign non-main proceedings are opened in Argentina. Both the South African foreign representative and the Argentinian foreign representative have applied for recognition before the relevant court in the UK. Please note that South Africa has implemented the Model Law subject to the so-called principle of reciprocity (based on country designation), Argentina has not implemented the Model Law and the UK has implemented the Model Law without any so-called principle of reciprocity. In this scenario, which of the following statements is the most correct one?

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

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

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

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

Question 1.6

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

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

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

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

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

Question 1.7

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

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

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

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

(d) All of the above.

Question 1.8

Which of the statements below regarding the Centre of Main Interest (COMI) and the Model Law is correct?

(a) COMI is not a defined term in the Model Law.

(b) For a corporate debtor, the Model Law does contain a rebuttable presumption that the debtor's registered office is its COMI.

(c) For an individual debtor, the Model Law does contain a rebuttable presumption that the debtor's habitual residence is its COMI.

(d) All of the above.

Question 1.9

An automatic stay of execution according to article 20 in the Model Law covers:

(a) Court proceedings.

(b) Arbitral Tribunals.

(c) Both (a) and (b).

(d) Neither (a) nor (b).

Question 1.10

Article 13 grants access to the creditors in a foreign proceeding. Which of the following statements correctly describes the protection granted in Article 13?

(a) A foreign creditor has the same rights regarding the commencement of, and participation in, a proceeding as creditors in this State.

(b) A foreign creditor has the same rights as it has in its home state.

(c) All foreign creditors' claims are, as a minimum, considered to be unsecured claims.

(d) Article 13 contains a uniform ranking system to avoid discrimination.

QUESTION 2 (direct questions) [10 marks in total]

Commented [SL5]: SUBTOTAL = 9.5 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?

Much like the interpretation of COMI which, despite being fundamental to the operation of the Model Law, is not strictly defined, there is not a bright line rule for determining the appropriate date for COMI purposes. A debtor's COMI will, in general, be determined on the date of commencement of the foreign proceeding. However, there is conflicting case law regarding whether the applicable date should be the commencement of the foreign proceeding or in fact the commencement of the local recognition proceeding. The latter was considered and applied in the US judgment of Morning Mist Holdings Ltd v Kryss (Matter of Fairfield Sentry Ltd) (2nd Cir Appeals Apr. 16, 2013) and followed by the English Court in Re Toisa Limited (Unreported, 29 March 2019). The more recent decision of Trustees in bankruptcy of Li Shu Chung v Li Shu Chung [2021] EWHC 3346 (Ch) appeared to revert to the former "Commencement Approach" instead of the "Filing Approach" which was followed in Re Toisa Limited. Accordingly, it appears that this will generally be considered as the correct determining factor.

Choosing the correct date can be less than straightforward where the debtor's COMI has shifted in close proximity to the commencement of the foreign proceedings. In such circumstances the Court will want to ensure that any change in location is scrutinised so that they can ensure it was done in good faith and is not an attempt at 'forum shopping'. The Court will focus on the actions and operation of the debtor and how / where they are perceived by third parties and creditors.

Question 2.2 [maximum 3 marks]

Commented [SL7]: 3 marks

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

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

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

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

Statement 1: Article 14 provides for the 'equal treatment principle' and requires that foreign creditors should also be notified any time that notification is required for local creditors in the enacting State. Paragraph 3 of Article 14 provides guidance on what a notification to a foreign creditor of commencement of a proceeding in the enacting

State should include and seeks to ensure timely notice without reliance on the cumbersome and formulaic rules which might otherwise apply.

Statement 2: Article 10 seeks to ensure that the court in the enacting State does not assume jurisdiction over all the assets of the debtor on basis that the foreign representative has made an application for the recognition of a foreign proceeding. The rationale for this rule comes from the potential for a 'universal' jurisdiction which could arise where an application under the Model Law has been submitted but not yet determined and the potential adverse consequences for other foreign representatives and creditors.

Statement 3: The undefined key concept referred to is COMI and the relevant provision from the MLCBI is article 16(3) which provides for a rebuttable presumption regarding the debtors' COMI in the following terms - "*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*".

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 English Court of Appeal upheld the decision of Mr. Justice Hildyard at first instance in the IBA case but focussed predominantly on the jurisdictional issues, asking whether it should exercise its power to grant the indefinite Moratorium Continuation where doing so would (1) have the effect of preventing English creditors from enforcing their English law rights pursuant to the Gibbs rule (in circumstances where they had not recognised the Azeri based foreign insolvency proceeding) and (2) prolong the moratorium in spite of the fact that the Azeri restructuring had concluded (and so there should be no logical reason to continue to stay proceedings).

The Court found for the English based creditors on points (1) and (2) and concluded that the IBA creditors no longer needed the moratorium in place as the purpose of the foreign proceeding had achieved its predominant purpose already. IBA could have chosen to pursue an alternative means of restructuring such as a scheme of arrangement involving 'cross class cram down' and avoided the opposition of the dissenting English creditors but, having sought discretionary relief under article 21 of the MLCBI Court of Appeal, held that they could they could not supersede the rights of the English creditors under their English law governed contracts. On point (2) the Court of Appeal held that MLCBI did not countenance ongoing relief even after the foreign proceeding in issue had concluded.

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.

Commented [SL8]: 1.5 marks

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.

Commented [SL9]: 2 marks

Where the domestic proceeding is ongoing and an application for recognition of the foreign main proceeding is subsequently granted, pursuant to article 29(a) of the MLCBI, the Court should ensure that any reliefs granted either on an interim basis under article 19 or, post recognition under article 21 of the MLCBI, are consistent with the domestic proceeding.

Article 18 of the MLCBI imposes an obligation on the foreign representative to promptly inform the court in the enacting state of any material change in the status of recognised foreign proceeding their own appointment as a foreign representative as well as any other foreign proceeding involving the same debtor of which they are aware of subsequently become aware.

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

Commented [BB10]: SUB TOTAL = 6 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] [0 mark out of 4]

The foreign representative is considering his options to secure the value of the debtor's assets located in State A. With reference to the Model Law's provisions on access and co-operation, explain how these rights in State A can benefit the foreign representative.

In the first instance, article 9 of the MLCBI ensures that the foreign representative will have locus standi in State A **see suggested answer below** and will be entitled to apply directly to a court in that jurisdiction. Provided the application for recognition and the foreign representative fall within articles 2(a) and 2(d) of the MLCBI and the application is accompanied by the required documentation prescribed by article 15 of the MLCBI, there will be a presumption, in the absence of proof to the contrary, that the documents are authentic and the debtor's registered office is the same as its COMI. Article 17 also provides that the application for recognition should be determined in the shortest possible timeframe.

As regards the possible options to ensure the value of the debtors assets are preserved, the foreign representative has a number of avenues open to them. Pursuant to article 20 of the MLCBI, once the foreign proceeding is recognised in State A, it will automatically result in a moratorium on any proceedings involving the debtor or their assets and prohibit any transfer, encumbrance or disposal of their assets. However, in addition, under article 21(1) of the MLCBI, the court in State A will be able to exercise discretionary powers where necessary to protect the assets of the debtor and the creditors' interests. Such powers include those automatically granted under article 20 as well as ordering the examination of witnesses, entrusting the administration of the assets of the debtor in State A to the foreign representative or another person, or

granting any other relief available to domestic office holder. The latter would allow the foreign representative to benefit from any rights or reliefs available in State A.

Furthermore, if the foreign representative is concerned that there is a real and immediate risk of the debtor's assets being dissipated, they could seek interim relief pursuant to article 19 of the MLCBI pending the determination of their recognition application. This would also result in a moratorium on any actions relating to the debtor's assets but would also allow the court to apply any of the discretionary reliefs available under article 21(1).

- ***Legal standing (Article 9 MLCBI): The key access for the foreign representative is set forth in Article 9 MLCBI. In the capacity of foreign representative, the foreign representative has automatic standing before the courts in State A without having to meet any formal requirements such as a license or any consular action. In other words, the "status" in State B of the foreign representative is automatically recognised in State A for the purpose of granting the foreign representative standing before the courts in State A. This allows the foreign representative to safeguard and pursue assets of the debtor estate in State A before its courts.***
- ***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] [2.5 out of 5]

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.

Once the court in State A is satisfied that the application complies with the requirements of articles 2(a) and 2(d), they will then need to determine if the foreign proceedings are 'foreign main proceedings' (if the foreign proceeding is taking place in the debtor's COMI) or 'foreign non-main proceedings' (articles 2(c) and 2(d)). This adjudication will affect the relief available to the foreign representative (for example, under articles 20 and 21 of the MLCBI) and also the priority afforded to proceedings commenced in other states. If a foreign proceeding is not opened in the debtor's COMI and the debtor does not have at least an 'establishment' in State A, it will not be capable of recognition as a foreign proceeding under the MLCBI. Accordingly, given its importance, the debtor's COMI it is likely to be subject to scrutiny by the Court if their registered office is not in State B as well as whether the debtor has an establishment in State A. [½] **you must make reference to the Article (in this instance it is Article 17)** If the debtor has moved its COMI the Court may also seek to determine if such a move was done in bad faith with a view to 'forum shopping' of it was a legitimate move.

Article 6 of the MLCBI includes a public policy exception which permits "the court from refusing to take an action governed by this Law if the action would be manifestly contrary to the public policy of this State". [1] This allows the court of State A some discretion to refuse the recognition application but use of the word "manifestly" has the effect of narrowing the exception and raising the threshold for this exception to be applied (see the In the matter of Agrokor DD [2017] EWHC 2791). Although English courts have found that a breach of the foreign representative's duty to provide full and frank disclosure could fall within this public policy exception (see for example Nordic Trustee A.S.A & anr v OGX Petroleo e Gas SA [2016] EWHC 25 (Ch)).

In terms of the application itself, as noted above, article 9 of the MLCBI ensures that the foreign representative will have locus standi in State A and there will be a presumption, in the absence of proof to the contrary, that the documents accompanying the recognition application under article 15 are authentic and the debtor's registered office is the same as its COMI. [1]

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

- 1. Exclusions: If the debtor is an entity that is subject to a special insolvency regime in State B, the foreign representative should first check if the foreign proceedings regarding that type of a debtor are excluded in State A based on Article 1(2) of the implemented Model Law in State A.**
- 2. Restrictions: Existing international obligations of State A: Based on Article 3 of the Model Law, the court in State A should also check if there are no existing international obligations of State A (under a treaty or otherwise) that may conflict with granting the recognition application under the implemented Model Law in State A.**
- 3. Judicial scrutiny: While the court in State A is able to rely on the rebuttable presumptions set forth in Article 16 of the Model Law, in the context of Article 17 of the Model Law the court will have to assess whether either the COMI or at least an establishment of the debtor is located in State B where the foreign proceedings were opened. If the COMI of the debtor is in State B the foreign proceedings should be recognised as foreign main proceedings and if only an establishment of the**

debtor is in State B the foreign proceedings should be recognised as foreign non-main proceedings. Without a COMI or at least an establishment of the debtor in State B, recognition cannot be granted by the court in State A.

Question 3.3 [maximum 5 marks] [2.5 out of 5 marks]

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

Pursuant to article 20 of the MLCBI, once the foreign proceeding is recognised in State A, it will automatically result in a moratorium on any proceedings involving the debtor or their assets (this includes arbitral tribunals) and prohibit any transfer, encumbrance or disposal of their assets. In spite of the moratorium under article 20(1)(a), article 20.3 does not permit an individual action to be brought where necessary to preserve a claim against the debtor. In addition, under article 21(1) of the MLCBI, the court in State A will be able to exercise discretionary post-recognition powers to protect the assets of the debtor and the creditors' interests. These include those granted under article 20 as well as ordering the examination of witnesses, entrusting the administration of the assets of the debtor in State A to the foreign representative or another person, or granting any other relief available to domestic office holder. In deciding whether to entrust the administration of the debtor's assets to the foreign representative or any other person, the court in State A must be satisfied that the interests of creditors in State A are adequately protected (article 21.2). In addition, if granting relief in respect of a foreign non-main proceeding, the court must be satisfied, pursuant to article 21.3 of the MLCBI, that the relief relates to assets under the law of State A which should be administered as part of the foreign non-main proceeding.

In terms of pre-recognition relief, if the foreign representative is concerned that there is a real and immediate risk of the debtor's assets being dissipated, they could seek interim relief pursuant to article 19 of the MLCBI pending the determination of their recognition application. This could also result in a moratorium on any actions relating to the debtor's assets but would also allow the court to apply any of the discretionary reliefs available under article 21(1). However, unless extended under article 21.1(f), such interim relief will be terminated once the application for relief is determined (article 19(2)). Furthermore, the Court in State A could refuse to grant interim relief if it would interfere with the administration of a foreign main proceeding.

Although article 21 of the MLCBI is drafted widely to allow the enacting court discretion as to which relief should apply, their discretion is not unlimited and will be subject to the public policy exception, as well other considerations (such as jurisdiction) which can be seen from cases such as *Protasov v Derev* [2021] EWHC 392 (CH), *Fibria Celulose S/A v Pan Ocean Co Ltd* [2014] EWHC 2124 (Ch) and the IBA case which dealt with competing between the Model Law and domestic law under Gibbs Rule.

Your answer should also include a discussion along the following lines:

- 1. Adequate protection: Pursuant to Article 22 of the Model Law any interim relief under Article 19 of the Model Law or any post-recognition relief under Article 21**

of the Model Law require the court in State A to be satisfied that the interests of the creditors and the other interested persons, including the debtor, are adequately protected and any relief may be subject to conditions as the court considers appropriate.

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

Question 3.4 [maximum 1 mark] [1 mark]

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

This situation occurred in *Protasov v Derev* [2021] EWHC 392 (CH) where the English court held that there were restrictions and limitations on its ability to continue with the freezing order post recognition. It determined that the protections offered by the English bankruptcy regime meant the requested relief (being the extension of the freezing order) were not justified. The court held that the MLCBI was intended to put the foreign representative in the same position as a domestic office holder and, accordingly, a continuance of the freezing order, without exceptional reasons, was not justified.

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

Commented [BB11]: SUB TOTAL = 15 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] [15 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 [10 out of 10]

It is not clear to me whether the Bank would qualify as a third party credit institution within the meaning of regulation 36 of the Credit Institutions (Reorganisation and Winding Up) Regulations 2004 – in which case, the CBIR would not apply. I will however proceed on the basis that it is not and there are no other exclusions regarding the Bank and the applicability of the CBIR [The facts stipulate that you can assume that the Bank is not excluded on the basis of article 1(2) of the MLCBI].

Article 2(a) of the MLCBI describes "foreign proceeding" as a "collective [element 1] judicial or administrative [element 2] proceeding [element 3] in a foreign State [element 4], including an interim proceeding, pursuant to a law relating to insolvency [element 5] in which proceeding 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]" Further guidance and discussion is provided in the Judicial Perspective. Before we can deal with DGF's application for recognition of the Bank's liquidation, it is necessary to establish if said liquidation process qualifies as a 'foreign proceeding' with regard to the provisions of the MLCBI and the evidence available.

Taking each of these points in turn, the first thing to establish is if the liquidation of the Bank constitutes a 'proceeding' and is either judicial or administrative in nature. From the evidence provided, the liquidation of the Bank does not appear to be subject to judicial oversight and appears instead to be a statutory process governed by Country A's laws, namely the LBBA and DGF Law. This does not mean that the domestic liquidation is not capable of constituting a foreign proceeding, but does mean that close attention needs to be paid to the domestic legislation and the procedures employed to liquidate the Bank and to realise value for the Bank's creditors. Having considered the relevant legislation, including the criteria set out in art. 76 of the LBBA permitting the Bank to be classified as insolvent, and arts 3(3) and 3(7) of the DGF Law which confirm the independence of the DGF, as well as the ordered and structured mechanism for winding down the affairs of the Bank, it appears that the liquidation would be capable of passing the first limb of this test.

The next point to be established is that the process is 'collective' in nature. This is addressed in more detail in the UNCITRAL Guide to Enactment and much will depend on whether or not all of the assets (or the vast majority – subject to applicable national rules and exceptions) form part of the proceedings. This appears to be the case here given that the DGF Law (articles 35(5) and 36(1)) provides that during the provisional

administration the DGF have full and exclusive rights to manage the Bank's affairs and that, if liquidation is implemented following provisional administration, the DGF will automatically become liquidator and have the necessary powers available to them to collect all of the Bank's assets and liabilities. Accordingly, as all of the Bank's assets and liabilities appear to be caught by the proceedings, this part of the test also appears to be satisfied.

The next test to be satisfied is that the proceeding is in a foreign state which, although I am not familiar with Country A, it appears to be, and, more importantly, that the proceeding is authorised or conducted under a law related to insolvency. This test has been considered several times in cases such as Stanford International Bank, Betcorp and Sturgeon. The Guide to Enactment have also sought to clarify what is meant by the word 'insolvency' and refers to "*various types of collective proceedings commenced with respect to debtors that are in severe financial distress or insolvent*". In light of this, and based on the summary of the DGF Law and LBBA which are provided in the affidavit, these laws clearly govern the process and rules of Country A in circumstances where one of its financial institutions is deemed 'troubled' and dictates the procedure by which the insolvency process must be conducted. Accordingly, I am satisfied that the laws of country A under which the foreign proceeding are being governed (namely the LBBA and DGF Law) satisfy this limb of the test also and constitute an insolvency law.

The next point which needs to be established is whether the Bank's assets and affairs are subject to control or supervision by a foreign court in the 'foreign proceeding'. Article 2(e) does not distinguish between proceedings controlled or supervised by a judicial body or by an administrative body. That is relevant here because clearly, as noted above, the liquidation does not appear to be subject to judicial oversight and appears instead to be a statutory process governed by the LBBA and DGF Law. Such administrative proceedings have been recognised as satisfying the this test in cases such as Tradex Swiss AG (384 BR 34 at 42 (2008)) and Ashapura Minechem. The MLCBI also does not specify the level of control or supervision required to satisfy this test. The Guide to Enactment notes that the 'control or supervision' should be formal in nature but does not require actual control and debtor-in-possession cases have been deemed to satisfy this test. In those circumstances, given the level of control which the liquidator has over the Bank and the wide reaching powers afforded him under the LBBA and DGF Law which put them in a position of 'control and supervision over the assets and affairs of the debtor, I am also satisfied that the 'foreign proceeding' passes this test.

The final test to be satisfied to determine whether the Bank's liquidation comprises a 'foreign proceeding' within the meaning of article 2(a) of the MLCBI, is whether or not the proceeding is for the purpose of reorganisation or liquidation. Even from a cursory glance at the LBBA and DGF Law under which the 'foreign proceeding' is governed, it is clear that the purpose of this legislation is to withdraw insolvent banks from the market and to prescribe how the bank's operations should be wound down via a managed liquidation process. Accordingly, it appears that the 'foreign proceedings' in Country A also satisfy this limb of the test and, as they do not appear to be contrary to public policy, there appears no reason not to allow them.

I conclude that the liquidation of the Bank under the laws of Country A does comprise a 'foreign proceeding' within the meaning of article 2(a) of the MLCBI.

Excellent response.

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

Having determined that the liquidation comprises a 'foreign proceeding' within the meaning of article 2(a) of the MLCBI, we must now determine whether the applicants fall within the definition of 'foreign representatives' as defined in article 2(d) of the MLCBI. This section states that a 'foreign representative' means "a person or body, including one appointed on an interim basis, authorized in a foreign proceeding to administer the reorganization or the liquidation of the debtor's assets or affairs or to act as a representative of the foreign proceeding".

The Judicial Perspective correctly points out that the definitions of “foreign representative” and “foreign proceeding” are linked given that in order to fall within the definition of a “foreign representative”, a person must be administering a 'foreign proceeding' (which we have already established above). However, the MLCBI does not require that the foreign representative be authorised by the foreign court and acknowledges that some States have administrative rather than judicial bodies. Hence, the definition of “foreign court” includes both judicial and other authorities so long as they can control or supervise a foreign proceeding.

Whether or not the “foreign representative” is authorised to act as a representative of the Bank will be determined by the applicable laws of Country A – namely LBBA and DGF Law. If there is doubt, I could request expert evidence regarding these laws in order to determine whether the liquidation of the Bank falls within the scope of the definitions. However, I feel that the information provided in the affidavit and the detailed overview of Country A's laws and the robust process under which the liquidator is appointed and chosen under articles 48(3), 2(1)(17) and 35(1) of the DGF Law, satisfy me that Ms G and the DGF would qualify as 'foreign representatives' under article 2(d) of the MLCBI and that I am entitled to rely on the presumption established by article 16 (1) of the MLCBI.

Another 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 *