



SUMMATIVE (FORMAL) ASSESSMENT: MODULE 2A

THE UNCITRAL MODEL LAWS RELATING TO INSOLVENCY

Commented [BB1]: TOTAL = 35 MARKS

70%

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

Which of the following challenges to a recognition application under the Model Law is most likely to be successful?

- (a) The registered office of the debtor is not in the jurisdiction where the foreign proceedings were opened, but the debtor has an establishment in the jurisdiction of the enacting State.**
- (b) The registered office of the debtor is in the jurisdiction of the enacting State, but the debtor has an establishment in the jurisdiction where the foreign proceedings were opened.**

(c) The debtor has neither its COMI nor an establishment in the jurisdiction where the foreign proceedings were opened.

(d) The debtor has neither its COMI nor an establishment in the jurisdiction of the enacting State.

Question 1.4

Which of the following rules or concepts set forth in the Model Law ensures that fundamental principles of law are upheld?

(a) The *locus standi*/access rules.

(b) The public policy exception.

(c) The safe conduct rule.

(d) The "hotchpot" rule.

Question 1.5

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

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

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

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

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

Question 1.6

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

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

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

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

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

Question 1.7

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

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

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

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

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

(d) All of the above.

Question 1.8

Commented [SL4]: 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 [SL5]: SUBTOTAL = 5.5 MARKS

Question 2.1 [maximum 3 marks]

Commented [SL6]: 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 Model Law uses the concept of COMI (meaning the *centre of interest*) to determine the degree to which the Courts of one jurisdiction are obliged to recognise and assist a debtor's insolvency proceeding commenced in a different jurisdiction. The Court will assess whether the location of the foreign proceeding in fact corresponds to the debtor's actual COMI. The prevailing approach to establishing the appropriate date for determining the COMI is the 'Commencement Approach' (see *The Trustees in the Bankruptcy of Li Shu Chung, Re Stanford International Bank Ltd* and *Re Videology Ltd*). The Commencement Approach provides that the commencement date of the foreign proceedings is the appropriate date for determining a debtor's COMI, in reference to the debtor's relevant activities at or around the time of the commencement of foreign proceedings.

It should be noted that in both the US and England, the 'Filing Approach' has also been adopted on occasion. This approach considers the appropriate date for determining the debtor's COMI is in reference to its activities at or around the time the proceeding was filed. Therefore, a Court may adopt a holistic approach and determine the debtor's COMI in reference to the period *between* commencement of the foreign proceeding and the filing of the proceeding. This ensures that the debtor has not manipulated its COMI in bad faith.

Question 2.2 [maximum 3 marks]

Commented [SL7]: 1 mark

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.

1: art 14
3: art 16(3)

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

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

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

Statement 1 - As detailed by Article 22 of the Model Law, the relief available to the foreign representative is subject to compliance with procedural and notification requirements that protect the interests of local creditors against undue prejudice.

Statement 2 - Article 10 of the Model Law, the so-called 'Safe Conduct Rule', ensures the Court in the enacting State does not assume jurisdiction over all the assets of the debtor on the sole ground of the fact that the foreign representative has made an application for the recognition of a foreign proceeding.

Statement 3 - Article 31 of the Model Law provides for a rebuttable presumption that the recognition of a foreign main proceeding is proof that the debtor is insolvent.

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.

A restructuring plan has been approved pursuant to Azeri law, thus binding on all creditors of the OSJC International Bank of Azerbaijan (IBA). The Moratorium Continuation Application sought to prevent challenging creditors from enforcing their English law claims whilst at the same time allowing the English court to recognise (pursuant to the 'Rule in Gibbs') that the English law claims of the challenging creditors still existed and were not discharged (as a matter of English law) by virtue of the Azeri law restructuring plan.

The 'Rule in Gibbs' confirmed English law governed debt obligations cannot be discharged by a foreign insolvency proceeding without a creditor's submission to such proceeding. The application for indefinite moratorium relief was denied as, in Mr Justice Hildyard's opinion, a permanent stay cannot be deployed as a way to circumvent the Rule in Gibbs.

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.

Article 29(b) states that after recognition of a foreign main proceeding, any automatic relief granted under Article 20(1) should be reviewed and modified and/or terminated pursuant to Article 20(2) by the court in the enacting State if inconsistent with the domestic insolvency proceeding.

Commented [SL8]: 1 mark

In respect of each issue, the English Court of Appeal held that:

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.

Commented [SL9]: 1 mark

Art 29(a) and art 18 (discussed)

Article 18 requires the foreign representative in the foreign main proceeding to promptly inform the court in the enacting State of (a) any substantial change in the status of the recognised foreign proceeding or the status of the foreign representative's appoint; and (b) any other foreign proceeding regarding the same debtor that becomes known to the foreign representative.

This obligation is ongoing and applies from the time of filing the recognition application for the foreign proceeding.

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

Commented [BB10]: SUB TOTAL = 7.5 MARKS

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

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

Question 3.1 [maximum 4 marks] [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.

Article 9 of the Model Law (as enacted by State A) expresses a principle of direct access by a foreign representative to the courts of the enacting State (i.e. State A). State A need not be recognise the foreign proceeding opened in State B to provide the foreign representative with standing in the courts of State A. [½] The foreign representative therefore does not need to meet the formal requirements such as licences or consular action to appear before the courts of State A. [½]

Notwithstanding the Model Law, as enacted by State A, does not contain any reciprocity provision, the principles of cooperation under the Model Law are not dependent upon whether foreign proceedings would qualify for recognition under Article 17 of the Model Law. Therefore, cooperation may occur at an early stage, prior to any application for recognition, and is available to proceedings that are neither foreign main nor non-main proceedings on the basis of presence of assets.

Where the foreign representative of the foreign proceeding in State B seeks assistance under Article 1, Article 25(1) provides that the courts in State A must co-operate to the maximum extent possible with the courts of State B and the foreign representative. Article 25(2) also notes that the courts of State A are entitled to communicate directly with, or to request information or assistance directly from, the courts of State B or the foreign representative. [½]

Article 27 provides a non-exhaustive indicative list of the appropriate means and types of co-operation of proceedings that are authorised by the Model Law, including, for example, the co-ordination of the administration and supervision of the debtor's assets and affairs. Article 27, however, stops short of intending that proceedings in one country (e.g. State B) should be treated as proceedings in another (e.g. State A). [½]

Your answer should include 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?
- **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 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.

Whether State A has excluded certain proceedings from the application of the implementation of the Model Law, pursuant to Article 1(2), should be considered (for example, public utilities, insurance, banks or companies that are subject to special insolvency regimes).

The following evidential requirements for recognition of a foreign proceedings, as set out in Article 15 of the Model Law, should be met:

- a certified copy of the decision of the court in State B commencing the foreign proceeding and appointing the foreign representative; *or* a certificate from the court of State B affirming the existence of the foreign proceeding and of the appointment of the foreign representative; *or* any other evidence acceptable to the courts in State A of the existence of the foreign proceeding and appointment of the foreign representative in State B;

- a statement identifying all foreign proceedings in respect of the debtor that are known to the foreign representative, and
- any translation of documents supplied in support of the application for recognition into an official language of State A. [1]

Pursuant to Article 16(1), if the evidence delivered under Article 15 indicated that the foreign proceeding is a proceeding within Article 2(a) and that the foreign representative is a person within the meaning of Article 2(d), the courts of State A are entitled to presume so. The courts of State A are also entitled to presume that (i) the documents submitted in support of the application for recognition are authentic and (ii) in the absence of proof to the contrary, that the debtor's registered office is presumed to be the debtor's COMI.

The Model Law, as enacted by State A, does not contain a reciprocity provision in respect to recognition. Therefore, recognition of the foreign proceeding in State B should not be denied solely on the grounds that a court in State B would not provide equivalent relief to an insolvency representative from State A.

The courts in State A would apply any domestic law or procedural rules of State A to determine any abuse of process, notwithstanding the foreign representative's obligation to provide full and frank disclosure to the courts of State A. If the courts considered there to be an abuse of process, this could affect the recognition application.

Finally, whilst the public policy exception pursuant to Article 6 of the Model Law should rarely be the basis of a court to refuse an application for recognition, it should be considered given it may be a basis for limiting the nature of the relief granted. [1]

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

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] [3 out of 5 marks]

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

Under Article 19, from the time of filing an application for recognition until the application is decided upon, the courts of State A may, at the request of the foreign representative, where relief is urgently needed to protect the assets of the debtor or the interests of the creditors, grant relief of a provisional nature, including;

- a. a stay on the execution against the debtor's assets;
- b. entrusting the administration or realisation of all or part of the debtor's assets located in State A to the foreign representative in order to protect and preserve asset value;
- c. suspending the right to transfer, encumber or otherwise dispose of any assets of the debtor;
- d. providing for the examination of witnesses or the taking of evidence or delivery of information concerning the debtor's assets, rights, obligations or liabilities; and/or
- e. granting any additional relief that may be available.

Pursuant to Article 19(4), the court may refuse to grant relief under Article 19 if such relief would interfere with the administration of the foreign main proceeding in State B.

Under Article 21(1), upon recognition of the foreign proceeding, the courts of State A, where necessary to protect the assets of the debtor or the interests of the creditors, may, at the request of the foreign representative, grant any appropriate relief; including

- a. a stay on the commencement or continuation of individual actions or proceedings concerning the debtor's assets, rights, obligations or liabilities;
- b. a stay against the debtor's assets;
- c. suspending the right to transfer, encumber or otherwise dispose of any assets of the debtor;
- d. providing for the examination of witnesses or the taking of evidence or delivery of information concerning the debtor's assets and affairs, rights and obligations;
- e. entrusting the administration or realisation of all or part of the debtor's assets located in State A to the foreign representative in order to protect and preserve asset value;
- f. extending any provisional relief granted under Article 19; and/or

g. grant any additional relief that may be available.

If the foreign proceeding in State B is a foreign main proceeding, the relief detailed in (a) to (c) above is automatically pursuant to Article 20.

The types of relief detailed in Article 21(1) are those most frequently granted but are not intended to be exhaustive. The court is not restricted in its ability to grant any type of relief that is available under the law of State A, which must therefore be considered.

In granting any relief pursuant to Article 19 or Article 21, Article 22 provides that the court must be satisfied that the interests of the creditors and other interested persons, including the debtor, are adequately protected. In doing so, the court has the power under Article 22(2) to subject relief granted to conditions it considers appropriate, or may, at the request of the foreign representative or person affected by relief granted, or at its own motion, modify or terminate such relief pursuant to Article 22(3).

The following limitations to relief under the Model Law have also been established by case law, but the foreign representative would have to consider how these cases would be considered by the laws of State A specifically:

- *the enforcement of an insolvency-related in personam default judgment is not covered;*
- *applying foreign insolvency law to the law of an enacting State is outside the scope of appropriate relief that State A, as enacting State, could grant; and*
- *the court of State A would not have jurisdiction to grant a foreign representative with an indefinite continuation of the automatic moratorium resulting from an earlier recognition order.*

Your answer must also contain a brief discussion on the following:

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

Question 3.4 [maximum 1 mark] [½ 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 intention of the Model Law is to put the foreign representative in the same position, as far as practicable, as an insolvency office holder appointed under domestic law. Further, the Model law does not attempt a substantive unification of insolvency

law. Rather, the effect of recognition of a foreign main proceeding, is to give effect to the framework of domestic insolvency legislation in order to facilitate cooperation between jurisdictions.

Article 19(2) provides that unless extended under paragraph 1(f) of Article 21, the relief granted under Article 19 terminated when the application for recognition is granted upon. Whilst Article (1)(f) contemplates that some forms of relief may be continued after recognition, it is not the intention to apply the extension of a provisional order which has been overridden by the automatic effects of a later recognition order.

Further, where domestic law offers other forms of protection, relief in the form of a freezing order is not warranted. Absent an exception reason, a worldwide freezing order or other similar order with effect cannot be justifiable.

Your answer did not refer to case law as required in the question. Suggested answer: **A recent English case between Igor Vitalievich Protasov and Khadzhi-Murat Derev [Order of 24 February 2021 by Mr Justice Adam Johnson, [2021] EWHC 392 (CH)] exactly addressed the question.**

While the English court held to have jurisdiction in the strict sense to grant such post-recognition discretionary relief, it found that relevant restrictions and limitations existed which served to inhibit the proper exercise of that jurisdiction. The English court found that the English bankruptcy regime offers other forms of protection which mean that relief in the form of a freezing order or similar injunction is simply not warranted. According to the court, "(...) the scheme of the Model Law is intended to put the foreign trustee or bankruptcy manager in the same position, as far as practicable, as an officeholder appointed under domestic law, and consistent with that, the effect of recognition of a foreign main proceeding is to bring into play the same wide infrastructure of the insolvency legislation. Absent some exceptional reason, a freezing order or other similar order will not in my view be required or justified.

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

Commented [BB11]: SUB TOTAL = 14.5 MARKS

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

(1) Background

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

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

Proceedings were commenced in the High Court of England and Wales (Chancery Division) against various defendants on 11 February 2021 (the English Proceedings).

An affidavit (the Affidavit) sets out a detailed summary of the legislation of Country A's specific insolvency procedure for Banks. The procedure involves initial input from the National Bank (the NB) and at the time that the Bank entered liquidation, followed by a number of stages:

Classification of the bank as troubled

The NB may classify a bank as "troubled" if it meets at least one of the criteria set down by article 75 of the Law of Country A on Banks and Banking Activity (LBBA) or for any of the reasons specified in its regulations.

Once declared "troubled", the relevant bank has 180 days within which to bring its activities in line with the NB's requirements. At the end of that period, the NB must either recognise the Bank as compliant, or must classify it as insolvent.

Classification of the bank as insolvent

The NB is obliged to classify a bank as insolvent if it meets the criteria set out in article 76 of the LBBA, which includes:

- (i) the bank's regulatory capital amount or standard capital ratios have reduced to one-third of the minimum level specified by law;**
- (ii) within five consecutive working days, the bank has failed to meet 2% or more of its obligations to depositors or creditors; and**
- (iii) the bank, having been declared as troubled, then fails to comply with an order or decision of the NB and / or a request by the NB to remedy violations of the banking law.**

The NB has the ability to classify a bank as insolvent without necessarily needing to first go through the troubled stage. Article 77 of the LBBA accordingly provides that a bank can be liquidated by the NB directly, revoking its licence.

Provisional administration

The Deposit Guarantee Fund (DGF) is a governmental body of Country A tasked principally with providing deposit insurance to bank depositors in Country A. However, the Affidavit explained that the DGF is also responsible for the process of withdrawing insolvent banks from the market and winding down their operations via liquidation. Its powers include those related to early detection and intervention, and the power to act in a bank's interim or provisional administration and its ultimate liquidation.

Pursuant to article 34 of the DGF Law, once a bank has been classified as insolvent, the DGF will begin the process of removing it from the market. This is often achieved with an initial period of provisional administration. During this period:

- (i) the DGF (acting via an authorised officer) begins the process of directly administering the bank's affairs. Articles 35(5) and 36(1) of the DGF Law provide that during provisional administration, the DGF shall have full and exclusive rights to manage the bank and all powers of the bank's management.**
- (ii) Article 36(5) establishes a moratorium which prevents, *inter alia*: the claims of depositors or creditors being satisfied; execution or enforcement against the bank's assets; encumbrances and restrictions being created over the bank's property; and interest being charged.**

Liquidation

Liquidation follows provisional administration. The DGF is obliged to commence liquidation proceedings against a bank on or before the next working day after the NB's decision to revoke the bank's licence.

Article 77 of the LBBA provides that the DGF automatically becomes liquidator of a bank on the date it receives confirmation of the NB's decision to revoke the bank's licence. At that point, the DGF acquires the full powers of a liquidator under the law of Country A.

When the bank enters liquidation, all powers of the bank's management and control bodies are terminated (as are the provisional administrators' powers if the bank is first in provisional administration); all banking activities are terminated; all money liabilities due to the bank are deemed to become due; and, among other things, the DGF alienates the bank's property and funds. Public encumbrances and restrictions on disposal of bank property are terminated and offsetting of counter-claims is prohibited.

As liquidator, the DGF has extensive powers, including the power to investigate the bank's history and bring claims against parties believed to have caused its downfall. Those powers include:

- (i) the power to exercise management powers and take over management of the property (including the money) of the bank;**
- (ii) the power to compile a register of creditor claims and to seek to satisfy those claims;**
- (iii) the power to take steps to find, identify and recover property belonging to the bank;**
- (iv) the power to dismiss employees and withdraw from/terminate contracts;**
- (v) the power to dispose of the bank's assets; and**
- (vi) the power to exercise "such other powers as are necessary to complete the liquidation of a bank".**

The DGF also has powers of sale, distribution and the power to bring claims for compensation against persons for harm inflicted on the insolvent bank.

However, article 48(3) of the DGF Law empowers the DGF to delegate its powers to an "authorised officer" or "authorised person". The "Fund's authorised person" is defined by article 2(1)(17) of the DGF Law as: "an employee of the Fund, who on behalf of the Fund and within the powers provided for by this Law and / or delegated by the Fund, performs actions to ensure the bank's withdrawal from the market during provisional administration of the insolvent bank and/or bank liquidation".

Article 35(1) of the DGF Law specifies that an authorised person, must have: "...high professional and moral qualities, impeccable business reputation, complete higher education in the field of economics, finance or law...and professional experience necessary." An authorised person may not be a creditor of the relevant bank, have a criminal record, have any obligations to the relevant bank, or have any conflict of interest with the bank. Once appointed, the authorised officer is accountable to the DGF for their actions and may exercise the powers delegated to them by the DGF in pursuance of the bank's liquidation.

The DGF's independence is addressed at articles 3(3) and 3(7) of the DGF Law which confirm that it is an economically independent institution with separate balance sheet and accounts from the NB and that neither public authorities nor the NB have any right to interfere in the exercise of its functions and powers.

Article 37 establishes that the DGF (or its authorised person, insofar as such powers are delegated) has extensive powers, including powers to exercise managerial and supervisory powers, to enter into contracts, to restrict or terminate the bank's transactions, and to file property and non-property claims with a court.

(2) The Bank's liquidation

The Bank was formally classified by the NB as “troubled” on 19 January 2015. The translated NB resolution records:

“The statistical reports-based analysis of the Bank’s compliance with the banking law requirements has found that the Bank has been engaged in risky operations.”

Those operations included:

- (i) a breach, for eight consecutive reporting periods, of the NB’s minimum capital requirements;**
- (ii) 10 months of loss-making activities;**
- (iii) a reduction in its holding of highly liquid assets;**
- (iv) a critically low balance of funds held with the NB; and**
- (v) 48% of the Bank’s liabilities being dependent on individuals and a significant increase in “adversely classified assets” which are understood to be loans, whose full repayment has become questionable.**

Despite initially appearing to improve, by September 2015 the Bank’s financial position had deteriorated further with increased losses, a further reduction in regulatory capital and numerous complaints to the NB. On 17 September 2015, the NB classified the Bank as insolvent pursuant to article 76 of the LBBA. On the same day, the DGF passed a resolution commencing the process of withdrawing the Bank from the market and appointing Ms C as interim administrator.

Three months later, on 17 December 2015, the NB formally revoked the Bank’s banking licence and resolved that it be liquidated. The following day, the DGF initiated the liquidation procedure and appointed Ms C as the first of the DGF’s authorised persons to whom powers of the liquidator were delegated. Ms C was replaced as authorised officer with effect from 17 August 2020 by Ms G.

Ms G’s appointment was pursuant to a Decision of the Executive Board of the Directors of the DGF, No 1513 (Resolution 1513). Resolution 1513 notes that Ms G is a “leading bank liquidation professional”. It delegates to her all liquidation powers in respect of the Bank set out in the DGF Law and in particular articles 37, 38, 47-52, 521 and 53 of the DGF Law, including the authority to sign all agreements related to the sale of the bank’s assets in the manner prescribed by the DGF Law. Resolution 1513 expressly excludes from Ms G’s authority the power to claim damages from a related party of the Bank, the power to make a claim against a non-banking financial institution that raised money as loans or deposits from individuals, and the power to arrange for the sale of

the Bank's assets. Each of the excluded powers remains vested in the DGF as the Bank's formally appointed liquidator.

On 14 December 2020, the Bank's liquidation was extended to an indefinite date, described as arising when circumstances rendered the sale of the Bank's assets and satisfaction of creditor's claims, no longer possible.

On 7 September 2020, the DGF resolved to approve an amended list of creditors' claims totalling approximately USD 1.113 billion. The Affidavit states that the Bank's current, estimated deficiency exceeds USD 823 million.

QUESTION 4.1 [maximum 15 marks] [14.5 out of 15]

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

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

4.1.1 whether the Bank's liquidation comprises a "foreign proceeding" within the meaning of article 2(a) of the MLCBI [maximum 10 marks]; and [10 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]. [4.5 out of 5]

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

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

When considering a recognition application, to determine whether the Bank's liquidation comprises a 'foreign proceeding', the English court would look to the definition provided in article 2(a) of the MLCBI (as implemented by the Cross-Border Insolvency Regulations 2006). This definition has the following key elements:

- a) a proceeding (including an interim proceeding);
- b) that is either judicial or administrative;
- c) and collective nature;
- d) in a foreign State;
- e) pursuant to a law relating to insolvency;

- f) *in which the assets and affairs of the debtor are subject to control or supervision by a foreign court;*
- g) *and which is for the purpose of reorganisation or liquidation.*

In order for a foreign proceeding to be eligible for recognition under the MLCBI, all of the above elements must be satisfied. This answer will address each of the above elements in turn.

- a) *Few courts have considered what constitutes a 'proceeding' but it has been suggested that the hallmark of a 'proceeding' is 'a statutory framework that constrains a company's actions and that regulates the final distribution of a company's assets' (Irish Bank Resolution Corporation (IBRC) Limited). The Bank entered provisional administration on 17 September 2015 (the "Interim Proceeding") and liquidation on 17 December 2015 (the "Proceeding"). Under the Proceeding, the DGF has power to dispose and/or distribute the Bank's assets. The Proceeding therefore satisfies element (a) of the definition.*
- b) *Jurisprudence suggests that only one of the characteristics - either 'judicial' or 'administrative' - is required, even if some proceedings have both judicial and administrative elements. The Proceeding is administrative in nature as it does not involve a court but is supervised by the Deposit Guarantee Fund (DGF), a governmental body responsible for the process of withdrawing insolvent banks from the market and winding down their operations via liquidation. The Proceeding therefore satisfies element (b) of the definition.*
- c) *The UNCITRAL Guide to Enactment and Interpretation indicates that the notion of 'collective' insolvency proceeding is based on the desirability of achieving a coordinated, global solution for all stakeholders of an insolvency proceeding. It is not intended as a device for a particular creditor or group of creditors who may have initiated proceedings in another State. However, a proceeding should not be considered not 'collective' purely because a particular class of creditors' rights is unaffected by it. Another key consideration is whether substantially all of the assets and liabilities of the debtor are dealt with in the proceeding. Pursuant to Article 36(5) of the GDF Law, a moratorium is established that prevents 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. Furthermore, when the bank entered liquidation, public encumbrances and restrictions on disposal of bank property were terminated and offsetting of counter-claims became prohibited. This affects the rights of all the Bank's creditors. The Proceeding therefore satisfies limb (c) of the definition.*
- d) *The Proceedings were commenced in Country A, being a foreign State for the purposes of the English Proceedings. Therefore limb (d) of the definition is satisfied.*

e) *The UNCITRAL Guide to Enactment and Interpretation explains the intention of the MLCBI was to find a description sufficiently broad to encompass a range of insolvency rules irrespective of the type of statute or law in which they might be contained and irrespective of whether the law that contained the rules related exclusively to insolvency. In the present fact pattern, the Law of Country A on Banks and Banking Activity (LLBA) gives NB the power to classify a bank as troubled and/or insolvent. The NB classified the Bank as troubled in January 2015 noting: "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." The operations detailed in the fact pattern are all indicators of potential insolvency. Further, by September 2015, the Bank's financial position has deteriorated, with increases losses, a further reduction in regulatory capital and numerous complaints to the NB so that the NB classified the Bank as insolvent pursuant to article 76 of the LBBA. This commenced an 'interim proceeding', being the provisional administration. Three months later, the NB formally revoked the Bank's banking licence and resolved that the Bank be liquidated. Therefore, the provisions detailed in the LBBA relating to insolvency were 'activated' by the NB and DGF such that the Proceedings commenced were pursuant to a law relating to insolvency law. This satisfies limb (e) of the definition.*

f) *The UNCITRAL Guide to Enactment and Interpretation also notes that the MLCBI does not specify the level of control or supervision required to satisfy this element of the definition, nor the time at which that control or supervision should arise. Control need not be formal in nature and may be potential rather than actual. Further, jurisprudence indicates that control or supervision may be exercised directly by the court or indirectly through an insolvency representative, whom may themselves be subject to the control or supervision of the court or other regulatory authority (*Betcorp Limited*). Further, article 2(e) defines 'foreign court' as a judicial or other authority competent to control or supervise a foreign proceeding. 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, 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. Ms G, as authorised officer, is accountable to the DGF for her actions and may exercise the powers delegated to her by the DGF in pursuance of the bank's liquidation. In other words, the Proceeding is supervised by a governmental body which satisfies limb (f) of the definition.*

g) *Finally, in interpreting the MLCBI, the courts have confirmed that proceedings designed purely to prevent dissipation or value destruction, rather than to liquidate or reorganise the insolvency estate, do not satisfy limb (g) of the definition. Ms G's appointment was pursuant to a Decision of the Executive Board of the Directors of the DGF, No 1513. 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. Other powers include the power to compile a register of creditor claims and to seek to satisfy those claims; the power to take steps to find, identify and recover property belonging to the bank; and the power to exercise "such other powers as are necessary to complete the liquidation of a bank". This satisfies limb (g) of the definition.

For the reasons listed above, the English Courts would therefore find the Proceeding to be a 'foreign proceedings' for the purposes of considering the recognition application.

Excellent response!

Article 2(b) defines a 'foreign representative'. This definition has the following key elements:

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

This answer will address each of the above elements in turn.

- a) The MLCBI does not define the words 'person' or 'body' but the courts have confirmed that a firm could constitute a 'person'. A 'body' has been interpreted to mean 'an artificial person created by legal authority'. Pursuant to 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. Limb (a) of the definition is satisfied on the basis DGF could constitute a body with powers conferred on it by virtue of statute.
- b) The Judicial Perspective also discusses that the definition does not include a requirement for the foreign representative to be authorised by a foreign court. It is sufficient for the foreign representative to be appointed by a special agency other than a court. 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". Resolution 1513 notes that Ms G is a "leading bank liquidation professional". Ms G therefore satisfies the requirements of article 2(17) of the DGF Law. Limb (b) of the definition is satisfied on the basis that Ms G's was appointed by DGF, who has such powers to do so.

c) *A foreign representative must have the power to administer the reorganisation or liquidation of the debtor's assets or affairs at the time of the application for recognition. It is therefore not relevant to consider whether Ms C was a 'foreign representative' for the purposes of this question, as Ms G was the applicant to the English Proceeding. Ms G was appointed pursuant to a Decision of the Executive Board of the Directors of the DGF, No 1513 (Resolution 1513). Under Resolution 1513, the DGF delegated 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. However, 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. Therefore, the appropriate applicant to the recognition application is the DGF, rather than Ms G.*

Another well-reasoned response. 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. For full marks, your response should also address the assumption of article 16(1) of the MLCBI.

* End of Assessment *