



SUMMATIVE (FORMAL) ASSESSMENT: MODULE 2A

THE UNCITRAL MODEL LAWS RELATING TO INSOLVENCY

Commented [BB1]: TOTAL = 40 MARKS

80% - Very well done!

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 = 7 MARKS

Questions 1.1 - 1.10. are multiple-choice questions designed to assess your ability to think critically about the subject. Please read each question carefully before reading the answer options. Be aware that some questions may seem to have more than one right answer, but you are to look for the one that makes the most sense and is the most correct. When you have a clear idea of the question, find your answer and **mark your selection on the answer sheet by highlighting the relevant paragraph in yellow**. Select only ONE answer. Candidates who select more than one answer will receive no mark for that specific question.

Question 1.1

Which of the following statements does not reflect the purpose of the Model Law?

- (a) The purpose of the Model Law is to provide greater legal certainty for trade and investment.
- (b) The purpose of the Model Law is to provide protection and maximization of the value of the debtor's assets.
- (c) **The purpose of the Model Law is to facilitate the rescue of a financially troubled business, by providing a substantive unification of insolvency law.**
- (d) The purpose of the Model Law is to provide a fair and efficient administration of cross-border insolvencies that protects all creditors and the debtor

Question 1.2

Which of the following statements are reasons for the development of the Model Law?

- (a) The increased risk of fraud due to the interconnected world.
- (b) The difficulty of agreeing multilateral treaties dealing with insolvency law.
- (c) The practical problems caused by the disharmony among national laws governing cross-border insolvencies, despite the success of protocols in practice.

(d) All of the above.

Question 1.3

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

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

- (a) The registered office of the debtor is not in the jurisdiction where the foreign proceedings were opened, but the debtor has an establishment in the jurisdiction of the enacting State.**
- (b) The registered office of the debtor is in the jurisdiction of the enacting State, but the debtor has an establishment in the jurisdiction where the foreign proceedings were opened.**
- (c) The debtor has neither its COMI nor an establishment in the jurisdiction where the foreign proceedings were opened.**
- (d) The debtor has neither its COMI nor an establishment in the jurisdiction of the enacting State.**

Question 1.4

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

- (a) The *locus standi*/access rules.**
- (b) The public policy exception.**
- (c) The safe conduct rule.**
- (d) The "hotchpot" rule.**

Question 1.5

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

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

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

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

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

Question 1.6

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

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

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

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

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

Question 1.7

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

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

(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

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

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]

Question 2.1 [maximum 3 marks]

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

Generally, the appropriate date for determining the COMI is the date of commencement of the foreign proceeding (see Guide to Enactment and Interpretation ("GEI") at paras 31 and 159); though it is further noted that the MLCBI does not expressly indicate the relevant date for determining the COMI (see also GEI at para 157). The GEI arrives at this view with "regard to the evidence required to accompany an application for recognition under article 15 and the relevance accorded the decision commencing the foreign proceeding and appointing the foreign representative" (at para 159). This is known as the "Commencement approach", ie, assessment of the COMI at the time of the commencement of foreign proceedings.

That said, the correctness of this position appears to be in flux and dependent on the jurisdiction in which the COMI is being assessed. For instance, in the US, the Court of Appeal (Second Circuit) has held that a debtor's COMI is determined based on "its activities at or around the time the Chapter 15 petition is filed" [emphasis added] (*Morning Mist Holdings Ltd v Krys (Matter of Fairfield Sentry Ltd)*). This, in other words, involves the assessment of the debtor's COMI during the application for recognition of the foreign proceeding rather than at the time of the foreign proceeding. The Court in *Morning Mist*, however, also observed that "a court may consider the period between the commencement of the foreign insolvency proceeding and the filing of the [petition] to ensure the debtor has not manipulated its COMI in bad faith". This has been deemed the "Filing Approach", ie, assessment at the time of filing the recognition application.

In the UK, Leech J in the case of *Trustees in bankruptcy of Li Shu Chung v Li Shu Chung* [2021] EWHC 3346 (Ch) expressed preference for the "Commencement Approach" at [38]. While the judgment of ICC Judge Burton in *Re Toisa Ltd* was brought to the court's attention (in *Re Toisa*, the ICC was reportedly in favour of the Filing Approach), Leech J observed that the decision was unreported at the time, and that he, in any event, was bound by *Re Stanford International Bank Ltd* [2011] Ch 33.

Commented [SL6]: SUBTOTAL = 10 MARKS

Commented [SL7]: 3 marks

*In my view, the reasoning of Leech J in [38] is persuasive: "A recognition application may be made at any time after the commencement of the foreign proceedings and the critical question is what information would have been available to creditors at that date. It would make no sense for the question whether the court had jurisdiction to depend on the timing of the recognition application or what the creditors knew at that date." This also speaks to the similar concern highlighted in *Morning Mist* regarding the arbitrariness of the date of the recognition application and the potential for the debtor to take certain steps in bad faith to defeat the recognition application.*

Question 2.2 [maximum 3 marks]

Commented [SL8]: 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: Art 14.

Statement 2: Art 10. The 'Safe Conduct Rule' ensures that the court in the enacting state does not assume jurisdiction over all the assets of the debtor solely because the foreign representative has made an application for the recognition of a foreign proceeding.

Statement 3: Art 16(3). This article provides that the debtor's registered office or habitual residence is presumed to be the debtor's "centre of main interest" or COMI, a concept undefined though mentioned in Art 2(b) in relation to foreign main proceedings.

Question 2.3 [2 marks]

Commented [SL9]: 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 *IBA* case involved an application by an Azeri foreign representative (following an earlier recognition order under the CBIR in respect of restructuring proceedings in Azerbaijan) for 'appropriate relief' under Art 21 of the MLCBI in the form of*

said indefinite Moratorium Continuation. To understand why this indefinite moratorium was sought, it is necessary to understand the *Gibbs* rule in the UK: that a debt governed by English law cannot be discharged by a foreign insolvency proceeding; discharge of a debt under the insolvency law of a foreign country is only treated as a discharge in England if it is a discharge under the law applicable to the contract. The indefinite Moratorium was sought due to concerns that certain creditors (defined at p 37 of the guidance text as the “Challenging Creditors”) would seek to enforce their English law claims against the International Bank of Azerbaijan (IBA) notwithstanding the Azeri restructuring plan. This is premised on the argument that the *Gibbs* rule prevents discharge of IBA’s obligations under English law by virtue of the Azeri restructuring. The indefinite moratorium was therefore a procedural means to a substantive end: preventing such a claim by the Challenging Creditors.

The appellate court did not grant the moratorium. This turned on two issues; namely whether the court should not exercise its power where (1) it would in substance prevent the Challenging Creditors from enforcing their rights under English law; and (2) prolong the stay after the Azeri reconstruction had come to an end.

On issue (1), it was held that such moratorium could only be granted where the court was satisfied that the stay was necessary to protect the interest of IBA’s creditors, and that the stay was an appropriate means of doing so. The Court held in the negative for both these criterion, and that it was not necessary for IBA creditors to receive further protection for the foreign proceeding to achieve its interest. The Court also considered that it was open for IBA to engage in a parallel scheme of arrangement in the UK. It could in that context, engage in a ‘cross-class cram-down’ and plausibly pursue its restructuring plan notwithstanding the objections of the Challenging Creditors.

On issue (2), the court found that the information obligation on the foreign representative contained in Art 18 requires the foreign proceeding to still be in existence, and the foreign representative to still be in the office.

Question 2.4 [2 marks]

Commented [SL10]: 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.

There are two parts to the question.

To part one: the most relevant article is Art 29(a). The court must consider both sub-limbs under Art 29(a), namely that (i) any relief granted under Art 19 or 21 must be consistent with the domestic proceeding; and (ii) that Art 20 does not apply (since the proceeding is a foreign main proceeding).

To part two: Under Art 18, the foreign representative must inform the court of any substantial change in the status of the recognized foreign proceeding or the status of the foreign representative's appointment and any other foreign proceedings regarding the same debtor that becomes known to the foreign representative.

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

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

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

Question 3.1 [maximum 4 marks] [3 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.

I refer to the Model Law enacted in State A as the "ML", and assume it mirrors the MLCBI entirely.

Chapter II of the MLCBI provides rights of access to foreign representatives to the courts in State A. Beginning with Art 9, the foreign representative may apply "directly" to a court in State A and, in other words, may have standing in the courts of State A without any prior recognition of foreign proceedings. [1] Closely related is Article 11, which provides that the foreign representative may apply to commence a proceeding where the conditions for commencing such a proceeding is met. No prior recognition of the foreign proceeding is required for such access. [1]

The foreign representative also benefits from Article 10, also known as the 'safe conduct rule', ensuring that the courts in State A do not assume jurisdiction over all assets of the debtor on the sole ground that the foreign representative has made an application for recognition.

Article 12 provides that upon recognition of the foreign proceeding, the foreign representative may participate in a proceeding regarding the debtor under the laws of State A - this is necessary for the foreign representative to apply or make petitions regarding the protection, realisation or distribution of assets amongst other things.

Finally, Article 13 embodies the anti-discrimination principle; under this provision foreign creditors have the same rights as creditors domiciled in the enacting State regarding the commencement of and participation in local proceedings regarding the debtor under the insolvency laws of State A. The ranking of claims is not affected by Art 13 (see Art 13(2)), except that claims of foreign creditors shall not be ranked lower than general unsecured claims solely on the basis of their foreign status.

Chapter IV of the ML facilitates direct and efficient communication between State A and/or its courts with that of State B or the foreign representative him/herself. In brief:

- The courts of State A are to cooperate to the "maximum extent possible" with the foreign representative and to that end may "communicate directly" with them (Art 25). The "person or body administering the reorganisation or liquidation under the laws of State A" is entitled to the same (Art 26);
- Art 27 provides that broad contours to which such expedient communication may be implemented, including factors set out from Art 27(a) - (e) and any additional means under Art 27 (f) (and onward). [1]

For full marks, your answer should have included a discussion on the key benefits of both the access provision and cooperation provisions, which is to save time and costs and, as a result of which value destruction can be avoided and value enhancement promoted.

Question 3.2 [maximum 5 marks] [3 out of 5 marks]

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

The relevant considerations are:

- Evidence of existence of proceedings and appointment of representative (Art 17(c) read with Art 15 & 16): Art 17(c) sets out that the requirements of Art 15(2)

must be satisfied before a foreign proceeding may be recognised. Art 15(2)(a)-(c), in turn, sets out the requirement that the application for recognition shall be accompanied by evidence of the existence of the foreign proceedings and the appointment of the foreign representative. Reference may be made to the presumptions in Art 16(1) and Art 16(2) in this endeavour as regards the accuracy and authenticity of documents adduced to satisfy Art 15(2). [1]

- **Whether foreign main or foreign non-main (Art 17(2)):** It is also necessary to consider evidence regarding the nature of the debtors' business/affairs in terms of where its "centre of main interests" is (to qualify as a foreign main proceeding), or whether it minimally has an "establishment" (see definition in Art 2(f)) to qualify as a foreign non-main proceeding. The former is not defined in the ML, though a myriad of factors may be taken into account in the determination such as where the main decision/management body or headquarters of the debtor is located, where its principal assets or operations are, and where its books and records are located, etc (the list is non-exhaustive). [1] Under the UNCITRAL Guide to Enactment (p44 para 82), the two central factors are the location where the central administration of the debtor is and that which is readily ascertainable as such by the creditors of the debtor. Regard can also be had to Art 16(3), which provides that the COMI is presumed in absence of proof to the contrary to be the debtor's registered office or habitual residence in the case of an individual.
- **Public policy (Art 6):** Art 6 provides that recognition (or any action) should not be granted/taken where to do so would be contrary to the public policy of State A. [1] This could be However, it has been observed that the expression "manifestly" indicates that the public policy exception is to be interpreted restrictively and only applied in exceptional circumstances (see UNCITRAL Guide to Enactment at p 52 and *Agrokor*).
- **Whether abuse of process:** There is nothing in the ML that prevents the Courts of State A from responding to an abuse of process. This could arise, for instance, where the continuing obligation to keep the court informed of the matters set out in Art 18 is breached, or where false representations regarding the debtors' COMI is made. (see *Nordic Trustee A.S.A & anor v OGX Petroleo e Gas SA* [2016] EWHC 25 (Ch))

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.

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.

Pre-recognition relief: Art 19 provides for relief that may be granted upon the application for recognition of a foreign proceeding (and thus constitutes pre-recognition relief). Such interim relief may include:

- Staying execution against the debtor's assets (Art 19(a))
- Entrusting the administration or realisation of all or part of the debtor's assets located in State A to the foreign representative or another person designated by the court so as to protect the value of assets that are perishable, susceptible to devaluation or otherwise in jeopardy; and
- Relief under Art 21(c), (d) and (g) (such as the suspension of the right to transfer, encumber or dispose of any assets of the debtor, or for the examination of witnesses).

It should be noted that such relief can only be granted where it is shown that it is "urgently needed to protect the assets of the debtor". Further, such relief is of a "provisional nature" such that, pursuant to Art 19(3), the relief terminates upon recognition unless extended under Art 21(f).

Further, the court may refuse to grant relief if it interferes with a foreign main proceeding (Art 19(4)).

Post-recognition relief may be discussed in relation to foreign main proceedings ("FMP"), and both foreign main and non-main proceedings (the latter referred to as "FNMP").

- Under Art 20(1), the recognition of an FMP automatically confers a stay against the commencement or continuation of individual actions or proceedings concerning the debtor's assets, rights, obligations and liabilities (Art 20(1)(a); execution against the debtor's assets (Art 20(1)(b)), and also suspends the right to transfer, encumber or dispose of any assets of the debtor (Art 20(1)(c)). This may be subject to any provisions in domestic law relating to insolvency law (Art 20(2)). Further, it should be noted that nothing in Art 20(1)(a) affects the right to commence individual actions to the extent necessary to preserve a debtor's claim (Art 20(3)), nor the right to request the commencement of a proceeding or file claims under domestic insolvency law (Art 20(4)).
- Under Art 21, the recognition of an FNMP avails the foreign representative the opportunity to seek a broad range of relief (non-exhaustively listed under Art 21(10(a)-(g)), though whether such relief is granted is entirely discretionary ("the court may..."). The Court may also entrust the distribution of all or part of

the debtor's assets located in the state to the foreign representative or another appointed person provided the interest of the creditors in the state are adequately protected (Art 21(2)).

In applications for relief under Art 19 and Art 21, the court must also be satisfied that the interests of the creditor and other interest persons (which includes the debtor) are adequately protected (Art 22(1)), and may subject relief granted under said Articles to conditions it considers appropriate (Art 22(2)) and/or modify and terminate it (Art 22(3)).

Your answer should also include a brief discussion on the following:

- 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?

The case of Igor Vitalievich Protasov v Khadzhi-Murat Derev [2021] EWHC 392 (Ch) involved the consideration of this question. The court declined to extend the worldwide freezing order as it noted that when the recognition order was made, the provisional suspension under the freezing order was superseded by the permanent suspension of the bankrupt's rights pursuant to Arts 20(1) & 20(2) of the MLCBI. These provisions effectively protect and preserve the status quo in relation to the debtor's assets, which therefore led the court to conclude that there was no reason to order the worldwide freezing order.

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

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

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(1) Background

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

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

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

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

Classification of the bank as troubled

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

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

Classification of the bank as insolvent

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

- (i) the bank's regulatory capital amount or standard capital ratios have reduced to one-third of the minimum level specified by law;**
- (ii) within five consecutive working days, the bank has failed to meet 2% or more of its obligations to depositors or creditors; and**

(iii) the bank, having been declared as troubled, then fails to comply with an order or decision of the NB and / or a request by the NB to remedy violations of the banking law.

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

Provisional administration

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

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

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

Liquidation

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

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

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

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

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

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

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

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

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

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

(2) The Bank's liquidation

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

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

Those operations included:

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

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

Three months later, on 17 December 2015, the NB formally revoked the Bank's banking licence and resolved that it be liquidated. The following day, the DGF initiated the liquidation procedure and appointed Ms C as the first of the DGF's authorised

persons to whom powers of the liquidator were delegated. Ms C was replaced as authorised officer with effect from 17 August 2020 by Ms G.

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

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

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

QUESTION 4.1 [maximum 15 marks] [14 out of 15]

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

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

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

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

Question 4.1.1:

It is submitted that the bank's liquidation comprises a "foreign proceeding" within the meaning of Art 2(a) of the MLCBI.

The starting point is to consider the wording employed in Art 2(a). Art 2(a) of the MLCBI provides that a "foreign proceeding" means "a collective judicial or administrative proceeding in a foreign state, including an interim proceeding, pursuant to a law relating to insolvency in which proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganisation of liquidation". The following issues arise in determining whether the bank's liquidation comprises a "foreign proceeding":

- (1) Whether the bank's liquidation is a "proceeding";*
- (2) Whether the proceeding is judicial or administrative;*
- (3) Whether it is collective in nature;*
- (4) Whether it is in a foreign state;*
- (5) Whether the proceeding is one authorised or conducted under a law relating to insolvency;*
- (6) Whether the proceeding is one where the assets of the debtor are subject to the control or supervision by a foreign court; and*
- (7) Whether the proceeding is for the purpose of reorganisation or liquidation.*

*These issues will be discussed in turn, though it is noted that the inquiry is ultimately not a box ticking exercise but to be considered as a whole (*Stanford International Bank Limited* [2010] EWCA Civ 137 at [23]).*

Issue (1):

It is likely that the bank's liquidation is a "proceeding" under the MLCBI. First, it is noted that the language employed in Art 2(a) "avoid[s] the use of expressions that may have different technical meaning in different legal systems and instead describe their purpose or function." (Guide to Enactment and Interpretation ("GEI") at para 65). This is to facilitate a broader range of possible foreign proceedings that might obtain recognition, and to this end, the phrase "insolvency proceeding" generally refers to "proceedings involving debtors that are in severe financial distress or insolvent" (GEI at para 65).

Turning to the facts, this definition is likely met - the commencement of provisional administration against the Bank under Art 34 of the DGF Law, which, in turn, is initiated upon the classification of the Bank as "insolvent" under Art 76 of the LBBA, falls within the definition of "insolvency proceeding" set out in the preceding paragraph.

Issue (2):

There will be little doubt that the bank's liquidation is a "judicial or administrative" one. The DGF, as a governmental body of Country A charged with the task of

withdrawing insolvency banks from the market and winding down their operations via liquidation can be said to be a process of an “administrative” nature.

Issue (3):

The requirement for “collectivity” arises from one of the chief aims of the MLCBI in the achievement of a coordinated and global solution for all stakeholders of an insolvency proceeding. In this regard, a key consideration to satisfy the element of collectivity is whether substantially all the assets and liabilities of the debtor are dealt with in the proceeding, subject to local priorities and statutory exceptions, and to local exclusions relating to the rights of secured creditors (GEI at para 70). A proceeding should not fail the test of collectivity simply because a particular class of creditors’ rights are unaffected by it.

*The case of *Re Agrokor DD and in the matter of the Cross-Border Insolvency Regulations 2006 [2017] EWHC 2791 (Ch)* (“the Agrokor case”) involved a consideration of the collectivity element. Beyond the paragraphs of the GEI relied on above, the court also cited the views of Lewinson J in *Standford International Bank [2009] EWHC 1441 (Ch)*, where he in turn relied on the US Bankruptcy Court’s (Nevada) view that “A collective proceeding is one that considers the *rights and obligations of all creditors*. This is in contrast to a receivership remedy instigated at the request and for the benefit of a *single secured creditor*”. It was held in the *Agrokor* case, interestingly, that the proceeding in question was *too* collective (as it allowed creditors to also object to claims against *another affiliated company* in the same proceedings).*

On the present facts, it is likely that the Bank will meet this requirement. The proceedings appear to be fairly all-encompassing and wide-ranging in relation to the assets and also in terms of the creditors involved. DGF has a list of creditors’ claims amounting to about USD 1.113 billion. Regard may also be had to the powers accorded to DGF as the liquidator, such as to “compile a register of creditor claims and to seek to satisfy those claims”, as well as the alienation of the bank’s property and funds and the prohibition against offsetting of counter-claims. These may be viewed as provision that protect and ‘freeze’ the ‘estate’ of the bank at the time the liquidation proceedings commence, which in turn serve the end of an orderly distribution of assets amongst the creditors. It thus appears that the collectivity requirement is met.

Issue (4): This criterion is met. The proceeding commenced in Country A.

Issue (5):

*It is likely that the proceedings are conducted pursuant to a law relating to insolvency, *ie* the LBBA Law and DGF Law. This inquiry is less concerned about labels (GEI at para 73) as it is about whether the law “deals with or addresses insolvency or severe financial distress”. Notably, “[t]he purpose was to find a description that was sufficiently broad to encompass a range of insolvency rules irrespective of the type of statute or law in which they might be contained and *irrespective of whether the law that contained the rules related exclusively to insolvency.*” (GEI at para 73).*

The LBBA Law appears to deal with “insolvency or severe financial distress” to the extent that it deals with the classification of insolvency under Article 76. It is not clear whether the LBBA Law relates exclusively to insolvency, but that has already been expressed to be an irrelevant consideration.

The provisions of Art 34, 35, 36 and 77 of the DGF Law, to which the proceedings are commenced under, are also likely to relate to insolvency. For instance, Article 36(5) establishes a moratorium which 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, and Arts 35(5) and 36(1) 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. These are ‘hallmarks’ of insolvency proceedings insofar as they envision a freezing of the status quo for the efficient, fair and orderly distribution of the bank’s assets.

Issue (6):

The following guidance under the GEI is noted:

- *“The Model Law specifies neither the level of control or supervision required to satisfy this aspect of the definition nor the time at which that control or supervision should arise. Although it is intended that the control or supervision required under subparagraph (a) should be formal in nature, it may be potential rather than actual. As noted in paragraph 71, a proceeding in which the debtor retains some measure of control over its assets, albeit under court supervision, such as a debtor-in-possession would satisfy this requirement. (at para 74)*
- *Control or supervision may be exercised not only directly by the court but also by an insolvency representative where, for example, the insolvency representative is subject to control or supervision by the court. Mere supervision of an insolvency representative by a licensing authority would not be sufficient. (at para 74)*
- *Subparagraph (a) of article 2 makes it clear that both assets and affairs of the debtor should be subject to control or supervision; it is not sufficient if only one or the other are covered by the foreign proceeding. ” (at para 76)*

*It was noted in the *Agrokor* case the observations of the US District Court in *Re Ashapura Minechem Ltd* 480 BR 129 (2012) that “Supervision or control of the company’s affairs is not a demanding standard. The foreign court need not control the day to day operations of the debtor. It is sufficient, for instance, that the body monitor compliance with the repayment plan negotiated between the debtor and creditors. One court has held that the mere fact that a commission was granted authority from a Spanish court to recover a set off from an arbitration proceeding for distribution to creditors ‘plainly demonstrate[d] that the [court] maintains control of [both the debtor’s] assets and affairs’. By contrast, the fact that actions in a foreign court related to the proceeding are typically initiated by interested parties and that liquidators*

proceed with most of their duties without court involvement was found 'not [to] undermine the ... court's supervisory role'

There is little in the present fact scenario to indicate the level of court supervision in the proceedings, though it is noted that this is a low burden (Ashapura at p 144) and that it need only be a potential form of control or supervision. Some concerns may arise in relation to the level of control the National Bank (presumably an administrative body) has in the process (which is natural given the wide ranging societal implications in the event of bank fraud or default), though it must be noted that this is not determinative of the analysis. In Agrokor, the court had to deal with the "Extraordinary Administration Law". Despite the fact that the law gave "significant powers to the government of Croatia", this was ultimately an irrelevant consideration

Issue (7):

The bank's liquidation likely meets this requirement of being for the purpose of reorganisation or liquidation (in this case, the latter). Here it is noted in the GEI at para 77 that:

"Some types of proceeding that may satisfy certain elements of the definition of foreign proceeding in article 2, subparagraph (a) may nevertheless be ineligible for recognition because they are not for the stated purpose of reorganization or liquidation. They may take various forms, including proceedings that are designed to prevent dissipation and waste, rather than to liquidate or reorganize the insolvency estate; proceedings designed to prevent detriment to investors rather than to all creditors (in which case the proceeding is also likely not to be a collective proceeding); or proceedings in which the powers conferred and the duties imposed upon the foreign representative are more limited than the powers or duties typically associated with liquidation or reorganization, for example, the power to do no more than preserve assets.

Turning to the facts, one issue that may arise is whether the restrictions of certain powers of Ms G under Resolution 1513 may be such that the "purpose" of the proceedings may be construed as to preserve assets rather than for the liquidation of the bank. One notable restriction is that against "the power to arrange for the sale of the Bank's assets". However, it is unlikely that this will be a considerable issue as such powers remain under the remit of DGF as the formally appointed liquidator; and on the face of the provisions and powers accorded to DGF it appears that the purpose of the proceedings is ultimately for the liquidation of the Bank. In this regard, it is noted that a list of creditor's claims has been drawn up, plausibly for the distribution of the Bank's assets in the course of the liquidation.

In conclusion, while it is likely that the proceeding meets the definition of a foreign proceeding, there may be some doubt as to whether the criterion of "control or supervision by a foreign court is met". More evidence will have to be adduced in this regard.

Excellent response! Very well-reasoned.

For element 6, based on the following reasons we believe it can be argued that this element is met as well.

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

Question 4.1.2:

Art 2(d) defines a “foreign representative” as a “person or body, including one appointed on an interim basis, authorised in a foreign proceeding to administer the reorganisation or the liquidation of the debtor’s assets or affairs or to act as a representative of the foreign proceeding”.

The MLCBI does not specify that the foreign representative must be authorised by the court, but may include appointments that might be made by a special agency other than the court (see GEI at para 86). The fact of appointment of the foreign

representative in the foreign proceeding to act in either or both of those capacities is sufficient for the purposes of the Model Law.

Turning first to DGF, it is clear that it falls under the definition of a foreign representative. DGF's authority to act derives from Art 77 of the LBBA, which 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". DGF acquires full powers of a liquidator under Country A's laws - which therefore meets the definition in Art 2(d) (i.e, authority to administer the liquidation of the debtors assets...).

Ms G also meets the definition of a foreign representative. Under Art 48(3) of the DGF Law, Ms G may be delegated powers by the DGF as "the Fund's authorised person". Art 2(1)(17) of the DGF Law, in turn, outlines that such a representative ensures the bank's withdrawal during its liquidation. She is duly appointed under Resolution 1513 and accorded "all liquidation powers in respect of the Bank set out in the DGF Law...". Reso 1513 may be adduced in the English proceedings to meet the requirements in Art 15 as evidence of her authority. The fact that she is excluded from certain actions such as the power to make a claim against a non-banking financial institution is unlikely to detract from her recognition as a foreign representative.

For full marks your response should also address the assumption of article 16(1) of the MLCBI.

*** End of Assessment ***