



SUMMATIVE (FORMAL) ASSESSMENT: MODULE 2A

THE UNCITRAL MODEL LAWS RELATING TO INSOLVENCY

Commented [BB1]: TOTAL = 42 MARKS

84% - 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 = 10 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.

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

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

(d) All of the above.

Question 1.8

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

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

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

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

(d) All of the above.

Question 1.9

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

(a) Court proceedings.

(b) Arbitral Tribunals.

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

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

Question 1.10

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

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

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

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

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

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

Commented [SL3]: SUBTOTAL = 9 MARKS

Question 2.1 [maximum 3 marks]

Commented [SL4]: 3 marks

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

Under the MLCBI, the appropriate date for determining the COMI of a debtor is the date of commencement of the foreign proceeding.

However, since the COMI can move, if the move is close in time to the commencement of the foreign proceeding, it would be harder to establish the COMI, especially since the COMI must be readily ascertainable by third parties, such as creditors of the debtor.

*It should also be noted that the US and the UK appear to have taken slightly different approaches. In the US, the Second Circuit of Appeals has held in *Morning Mist Holdings Ltd v Kryz (Matter of Fairfield Sentry Ltd)* (2nd Cir Appeal Apr. 16, 2013) that a debtor's COMI should be determined based on its activities at or around the time the Chapter 15 petition is filed. Therefore, as the activities of a foreign representative may be considered in determining the location of a foreign debtor's COMI, even where, prior to insolvency, the debtor performed no business in that jurisdiction. However, given the other international interpretations emphasising the regularity and ascertainability of the debtor's COMI, a court may consider the period between the commencement of the foreign insolvency proceeding and the filing of the Chapter 15 petition when determining whether the debtor has manipulated its COMI in bad faith. This position was followed in the UK in 2019 in the *Re Toisa Limited* judgment.*

Question 2.2 [maximum 3 marks]

Commented [SL5]: 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 addresses Article 14 of the MLCBI "Notification to foreign creditors of a proceeding under [the relevant law of the enacting State relating to insolvency]". Article 14 expresses the equal treatment principle requiring that foreign creditors should be notified whenever notification is required for local creditors in the enacting State, and lays down requirements to ensure timely notice by expeditious means, such as providing that "no letters rogatory or other, similar formality [is] required". Article 14 also specifies what a notification to a foreign creditor of commencement of a proceeding in the enacting State should include.

Statement 2 addresses Article 10 of the MLCBI "Limited jurisdiction". Article 10 provides for the "Safe Conduct Rule", which ensures that the court in the enacting State does not assume jurisdiction over all the assets of the debtor on the sole basis that the foreign representative has made an application for the recognition of the foreign proceeding. Article 10 therefore responds to concerns by foreign representatives and creditors of exposure to an all-embracing jurisdiction triggered by an application under the Model Law.

Statement 3 addresses Article 16 of the MLCBI "Presumptions concerning recognition", in particular Article 16(3) of the MLCBI. The centre of main interests ("COMI") is an undefined key concept in the MLCBI. Article 16(3) of the MLCBI provides for a rebuttable presumption that a corporate debtor's registered office or an individual debtor's habitual residence is presumed to be the debtor's COMI. Apart from the Article 16(3) presumption, the following presumptions are also provided for in Article 16 of the MLCBI:

1. Article 16(1) of the MLCBI: If the decision or certificate referred to in Article 15(2) indicates that a foreign proceeding is a proceeding within Article 2(a) of the MLCBI and that a foreign representative is a person or body within the meaning of Article 2(d) of the MLCBI, the court is entitled to presume so.
2. Article 16(2) of the MLCBI: The court is entitled to presume that documents submitted in the application for recognition are authentic, whether or not they have been legalised.

Question 2.3 [2 marks]

Commented [SL6]: 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 primary question for determination in the IBA case was the applicability of the Gibbs Rule in English insolvency law and its compatibility with the principles of

modified universalism, which are also part of the English common law. The Gibbs Rule stands for the proposition that a debt governed by English law cannot be discharged or compromised by a foreign insolvency proceeding. Discharge of a debt under the insolvency law of a foreign country is only treated as a discharge therefrom in England if it is a discharge under the law applicable to the contract.

In the IBA case, a foreign representative requested appropriate relief under Article 21 of the MLCBI in the form of an indefinite continuation of the automatic moratorium that resulted from an earlier recognition order, i.e, the indefinite Moratorium Continuation. The indefinite Moratorium Continuation was disputed by two creditors with unpaid claims against IBA under debt instruments governed by English law and who had not submitted to the foreign insolvency proceedings in Azerbaijan to which IBA was subject. Mr Justice Hildyard denied the indefinite Moratorium Continuation on the basis that a permanent stay could not be deployed as a workaround the Gibbs Rule. The MLCBI and the CBIR do not empower the English court to vary or discharge substantive contractual rights conferred under English law through procedural law - the procedural law in this case being the indefinite Moratorium Continuation. Even if the English court had jurisdiction to grant the indefinite Moratorium Continuation, the court would not have exercised this discretion due to the balancing of interests exercise under Article 22 of the MLCBI.

On appeal, the English Court of Appeal upheld Mr Justice Hildyard's decision. The English Court of Appeal considered the real issue to be whether the court should not exercise its power to grant the indefinite Moratorium Continuation where doing so would (a) in substance prevent the challenging creditors from enforcing their English law rights under debt instruments in accordance with the Gibbs Rule; and (b) prolong the stay after the Azeri reconstruction had come to an end. The Court of Appeal answered both (a) and (b) in favour of the challenging creditors. The Court of Appeal held that an English court may only properly grant the indefinite Moratorium Continuation if it were satisfied that the stay was necessary and appropriate to protect the interests of IBA's creditors. In the court's view, neither of these conditions had been satisfied.

In respect of (a), the Court of Appeal concluded that the IBA creditors needed no further protection in order for the foreign proceeding to achieve its purpose. Furthermore, it was material that IBA could in principle have promoted a parallel scheme of arrangement in the UK but chose not to do so.

In respect of (b), the Court of Appeal considered that the information obligation of the foreign representative contained in Article 18 of the MLCBI required the foreign proceeding to still be in existence and the foreign representative to still be in office. The strong implication from this was that once the foreign proceeding has come to an end, there was no scope for further orders in respect of the foreign proceeding made.

Therefore, the Court of Appeal upheld the decision that the court should not grant the indefinite Moratorium Continuation.

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.

Under Article 20 of the MLCBI, upon recognition of a foreign main proceeding, the court in the enacting State should automatically grant: (a) a stay of the commencement or continuation of individual actions or individual proceedings concerning the debtor's assets, rights, obligations or liabilities; (b) a stay of execution against the debtor's assets; and (c) a suspension of the right to transfer, encumber or otherwise dispose of any assets of the debtor.

Article 18 requires the foreign representative, from the time of filing the recognition application for the foreign proceeding, to promptly inform the court of the enacting State of (a) any substantial change in the status of the recognised foreign proceeding or the foreign representative's appointment; and (b) any other foreign proceeding regarding the same debtor that becomes known to the foreign representative.

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

A foreign representative of a foreign proceeding opened in State B in respect of a corporate debtor (the Debtor) is considering whether or not to make a recognition 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 out of 4 marks]

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.

Commented [SL7]: 1 mark

Art 29(a) and art 18 (discussed)

Commented [BB8]: SUB TOTAL = 8.5 MARKS

The foreign representative's access to the courts in State A is addressed by Articles 9, 11 and 12, which provide for the foreign representative's standing in the courts of State A without the need to meet formal requirements such as licenses or consular action. First, Article 9 expresses the principle of direct access by a foreign representative in the courts of the enacting State [1]. Accordingly, recognition of the foreign proceeding opened in State B by the court in State A is not required to provide the foreign representative with standing in the courts of State A. Second, Article 11 provides standing to the foreign representative in the courts of State A to request the commencement of a domestic insolvency proceeding in State A without otherwise modifying any of the conditions for the opening of such a proceeding. [1] Third, Article 12 provides that when a domestic insolvency proceeding in the enacting State (State A) is opened in respect of the debtor, and following recognition of the foreign proceeding in the enacting State, the foreign representative will have standing to make petitions, requests or submissions concerning issues such as co-operation.

The above articles benefit the foreign representative in that the foreign representative has standing to appear before the courts of State A in order to apply for the recognition of the foreign proceedings opened in State B and to request co-operation.

As for co-operation, Article 27 of the MLCBI provides for a non-exhaustive list of the types of co-operation the court in State A can order: [1]

- The appointment of a person or body to act at the direction of the court;*
- Communication of information by any means considered appropriate by the court;*
- Co-ordination of the administration and supervision of the debtor's assets and affairs;*
- Approval or implementation by courts of agreements concerning the co-ordination of proceedings;*
- Co-ordination of concurrent proceedings regarding the same debtor; and*
- Any additional forms of examples the enacting State may wish to list.*

The foreign representative can rely on Article 27 of the MLCBI to ask for, for example, an order requiring the Debtor to communicate to the foreign representative the value and location of its assets located in State A so as to facilitate the foreign representative's securing of those assets.

For full marks you must include a discussion on the key benefits of both the access provisions and the cooperation provisions and that they save time and therefore also costs, as a result of which value destruction can be avoided and value enhancement promoted.

Question 3.2 [maximum 5 marks] [2.5 out of 5 marks]

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

The evidential requirements for recognition of the foreign proceeding opened in State B are set out in Article 15 of the MLCBI, which requires that the application for recognition be accompanied by: (a) a certified copy of the decision commencing the foreign proceeding and appointing the foreign representative; and (b) a certificate from the court of State B affirming the existence of the foreign proceeding and of the appointment of the foreign representative; or (c) in the absence of either, any other evidence acceptable to the court of the existence of the foreign proceeding and of the appointment of the foreign representative. Any application for recognition shall also be accompanied by a statement identifying all foreign proceedings in respect of the Debtor that are known to the foreign representative. [1] If these requirements are met, recognition will be granted pursuant to Article 17 of the MLCBI. In determining whether the foreign proceeding opened in State B should be recognised, the court of State A is further limited to the jurisdictional pre-conditions set out in the definition of “foreign proceeding” in Article 2(a) of the Model Law, and is not to consider or determine whether the foreign proceeding in State B was correctly commenced under the applicable law of State B. [½]

Some restrictions and limitations to take note of are as follows. First, the foreign representative must make full and frank disclosure to the court in State A for the recognition application to be successful. Otherwise, the court may consider the non-disclosure to be an abuse of process based on State A’s domestic laws and procedural rules which could affect the recognition application. Second, though the public policy exception in Article 6 of the MLCBI would rarely be the basis for refusing an application for recognition, it may be a basis for limiting the nature of relief accorded. [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] [2 out of 5 marks]

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

The foreign representative can consider pre-recognition interim relief under Article 19 of the MLCBI. Such interim relief is granted where it is urgently needed to protect the assets of the Debtor or the interests of the creditors, and can include: (a) a stay of 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 or another person designated by the court; and (c) any of the post-recognition relief provided for in Article 21 of the MLCBI, such as suspending the right to transfer, encumber or otherwise dispose of the Debtor's assets and providing for the examination of witnesses, taking of evidence or delivery of information concerning the Debtor's assets.

Post-recognition relief depends on whether the foreign proceeding opened in State B is recognised as a foreign main or non-main proceeding. The former would be the case if State B is the Debtor's centre of main interests ("COMI"), while the latter would be the case if the Debtor only has an establishment in State B within the meaning of Article 2(f) of the MLCBI. If the foreign proceeding in State B is recognised as a foreign main proceeding, the court in State A may grant automatic relief under Article 20 of the MLCBI in the form of: (a) a stay of the commencement or continuation of individual actions or proceedings concerning the Debtor's assets, rights, obligations or liabilities; (b) a stay of execution against the Debtor's assets; and (c) a suspension of the right to transfer, encumber or otherwise dispose of the Debtor's assets. If the foreign proceeding in State B is recognised as a foreign non-main proceeding, then the court in State A may grant discretionary relief under Article 21 of the MLCBI. The appropriate relief granted under Article 21 is not unlimited. For example, if State A is the UK, then the English court has determined certain limits to the

appropriate relief it is able to grant under Article 21, such as that the enforcement of an insolvency-related *in personam* default judgment is not covered by the MLCBI.

Your answer should have also included 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?

This question was considered in the recent English case of *Igor Vitalievich Protasov v Khadzhi-Murat Derev* [2021] EWHC 392 (CH). The English court held that while it had strictly speaking jurisdiction to grant such post-recognition discretionary relief under Article 21 MLCBI, there were restrictions and limitations 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 meant that relief in the form of a freezing order or similar injunction was not warranted absent any special or exceptional reasons. Accordingly, a worldwide freezing order is unlikely to continue post-recognition ex Article 21 MLCBI.

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

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]

Commented [BB9]: SUB TOTAL = 14.5 MARKS

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 10]

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.

Preliminarily, Article 16(1) of the MLCBI provides that if the decision or certificate referred to in paragraph 2 of article 15 indicates that the foreign proceeding is a

proceeding within the meaning of subparagraph (i) of article 2 and that the foreign representative is a body or person within the meaning of sub-paragraph (j) of article 2, the court is entitled to so presume. In any case, it is clear that both definitions are satisfied.

1. Whether the Bank's liquidation comprises a "foreign proceeding" within the meaning of article 2(a) of the MLCBI

A foreign proceeding is defined in article 2(a) of the MLCBI / article 2(i) of Schedule 1 of the CBIR as:

- *A proceeding (including an interim proceeding);*
- *That is either judicial or administrative;*
- *That is collective in nature;*
- *That is in a foreign State;*
- *That is authorised or conducted under a law relating to insolvency;*
- *In which the assets and affairs of the debtor are subject to control or supervision by a foreign court; and*
- *Which proceeding is for the purpose of reorganisation or liquidation.*

Preliminarily, I should point out that there is no reciprocity provision in the CBIR. Therefore, the fact that Country A has not updated the MLCBI does not pose a barrier to the recognition application.

- (a) An administrative proceeding in a foreign State

First, the Bank's liquidation is an administrative proceeding in a foreign State. 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 the government or the NB. 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. The DGF, which is a government body of Country A, is obliged under law to commence liquidation against the Bank following the decision by the NB to revoke the Bank's banking licence on 17 December 2015. The DGF has acquired the full powers of a liquidator under the laws of Country A, and has extensive powers as liquidator, including investigative powers. Taking all these factors into account, the Bank's liquidation is an administrative proceeding.

- (b) Control or supervision by a foreign court

Second, the assets and affairs of the Bank are subject to control or supervision by a foreign court. The term "foreign court" is defined in Article 2(e) of the MLCBI / Article 2(f) of Schedule 1 of the CBIR to mean "a judicial or other authority competent to control or supervise a foreign proceeding". The Guide to Enactment and Interpretation of the UNCITRAL Model Law (2014) notes that the definition of a "foreign court"

includes non-judicial authorities. Further, 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.

In *In the matter of Agrokor DD* [2017] EWHC 2791 (Ch) ("*Agrokor*"), the English court held that the level of court supervision required by the MLCBI is relatively low. Thus, under the CBIR, "court supervision" can be potential rather than actual and indirect rather than direct court supervision. The fact that the relevant Croatian legislation also gave some control to the Croatian government did not negate the supervision of the court.

Applying the above authorities to the present case, the Bank's liquidation satisfies the requirement that there be control or supervision by a foreign court. I have already canvassed the extensive powers exercised by the DGF above when explaining how the Bank's liquidation is an administrative proceeding. These include the DGF's powers of management, investigation, disposal, sale and distribution, along with a catch-all provision granting the DGF the power to exercise "such other powers as are necessary to complete the liquidation of a bank". Therefore, the DGF is considered as a "foreign court" under Article 2(e) of the MLCBI / Article 2(f) of Schedule 1 of the CBIR. The assets and affairs of the Bank are therefore subject to the control of the DGF as a "foreign court".

(c) Laws relating to insolvency

Third, the Bank's liquidation is being conducted under laws relating to insolvency. The MLCBI does not require "insolvency law" as a label, and it is sufficient for the law to deal with or address insolvency or severe financial distress. In *Agrokor*, the English court held that the "law relating to insolvency" requirement is satisfied if insolvency is one of the grounds on which the proceeding could be commenced, even if insolvency could not actually be demonstrated and there was another basis for commencing the proceedings.

Thus, while the LBBA and the DGF Law do not appear to be insolvency-specific legislation, they clearly *relate* to insolvency given the extensive provisions therein relating to insolvency. Both pieces of legislation also provide that the Bank's insolvency is the basis for commencing proceedings against the Bank. For example, article 75 of the LBBA lays down the criteria for the NB's classification of a bank as "troubled", article 76 of the LBBA lays out when a bank is classified as insolvent, while article 77 of the LBBA provides that upon a bank's insolvency, the bank can be liquidated by the NB directly and have its licence revoked. Similarly, the DGF Law provides for the procedure by which an insolvent bank is removed from the market (Article 34 DGF Law), providing for measures commonly seen in insolvency legislation such as a moratorium (Article 36(5) DGF Law) and vesting of the bank's management powers in DGF (Articles 35(5) and 36(1) DGF Law).

(d) Collective proceeding

Fourth, the Bank's liquidation is collective in nature. According to the UNCITRAL Digest of Case Law on the UNCITRAL Model Law on Cross-Border Insolvency (2021), courts have identified "collective" proceedings as having various characteristics, including, among others: (a) imposition of an orderly regime that affects the rights and obligations of all creditors and all of the debtor's assets; and (b) creditor participation, including the right to receive adequate notice. The UNCITRAL's Guide for Judiciary, "The Model Law on Insolvency: The Judicial Perspective" (2013) and the Guide to Enactment and Interpretation of the UNCITRAL Model Law (2014) further indicate that the notion of a "collective" insolvency proceeding is based on the desirability of achieving a coordinated, global solution for all stakeholders of an insolvency proceeding. When evaluating whether a given proceeding is collective for the purpose of the MLCBI, a key consideration is whether substantially all of the assets and liabilities of the debtor are dealt with in the proceeding, subject to local priorities and exclusions relating to the rights of secured creditors. A proceeding should not be considered to fail the test of collectivity purely because a class of creditors' rights is unaffected by it.

*Thus, in **Agrokor**, the English court found that the consolidated nature of the Extraordinary Administration Proceeding in Croatia, which **Agrokor** and 50 of its affiliates were subjected to, made the proceedings more collective than not collective enough. The court further held that none of the MLCBI materials state that it is impossible to recognise a single group proceeding, such as the **Agrokor** Extraordinary Administration Proceeding (EAP) as a foreign proceeding in respect of a single debtor.*

*The Bank's liquidation in this case can be likened to the EAP in **Agrokor**. In a similar vein, the Bank's liquidation is also of a consolidated nature which would render it a collective proceeding. I would also highlight that the Bank's liquidation is clearly intended to achieve a coordinated, global solution for all stakeholders. Under the LBBA, the DGF as liquidator has extensive powers, including the power to compile a register of creditor claims and to seek to satisfy those claims. It is evident that *all* of the Bank's creditors are entitled to claim in the liquidation. Indeed, the consolidated nature of the proceedings is clear from how the DGF has resolved to approve an amended list of creditors' claims totalling approximately USD 1.113 billion.*

(e) For the purpose of liquidation

Fifth, the Bank's liquidation is clearly for the purpose of liquidation. The liquidation procedure under Article 77 of the LBBA was initiated by DGF on 18 December 2015. Following that, all powers of the Bank's management and control bodies and the Bank's banking activities have been terminated, all money liabilities due to the bank are deemed to become due, and, among other things, the DGF has alienated the bank's property and funds. Public encumbrances and restrictions on disposal of bank property are terminated and offsetting of counter-claims are also prohibited. The DGF as liquidator and Ms G as the DGF's authorised person under Article 48(3) of the DGF

Law also have extensive powers, including the power to investigate the bank's history and bring claims against parties believed to have caused its downfall. Based on all the effects of the liquidation procedure, it is clear that the Bank's liquidation is for the purpose of liquidating the Bank.

Therefore, the Bank's liquidation comprises a "foreign proceeding" within the meaning of Article 1(2) of the MLCBI.

Excellent response!

2. Whether the Applicants fall within the description of "foreign representatives" as defined by article 2(d) of the MLCBI

The definition of a "foreign representative" comprises the following elements:

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

The Applicants, namely DGF and Ms G as DGF's authorised representative, fall within the description of "foreign representatives" as defined by Article 2(d) of the MLCBI / Article 2(j) of Schedule 1 of the CBIR.

First, DGF automatically became the Bank's liquidator under Article 77 of the LBBA upon NB's decision to revoke the Bank's licence on 17 December 2015. In this way, DGF is clearly authorised to act as the Bank's liquidator under the law of Country A, thereby satisfying the first two elements. It is also evident that DGF's appointment as liquidator is to administer the liquidation of the Bank's assets and affairs. As liquidator, the DGF has extensive powers, including broad managerial and investigative powers, alongside the power to bring claims against parties believed to have caused the Bank's downfall. Article 37 of the DGF Law also establishes that DGF and its authorised person, *ie* Ms G, have the power to enter into contracts, to restrict or terminate the bank's transactions, and to file property and non-property claims with a court. That DGF was appointed to administer the liquidation of the Bank's assets and affairs is also patent from the actions it took following NB's revocation of the Bank's licence on 17 December 2015. While DGF did appoint Ms G as its authorised person and delegate some of its powers of liquidation to Ms G, DGF still reserved for itself various powers vested in DGF as the Bank's formally appointed liquidator by way of Resolution 1513. These powers include 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. Indeed, that DGF is administering the Bank's liquidation is clear from how it has resolved to approve an amended list of creditors' claims totalling approximately USD 1.113 billion on 7 September 2020. Therefore, DGF still continues to act as the Bank's liquidator with powers of liquidation and reorganisation vested in it, thereby falling within the definition of a "foreign representative" in Article 2(d) of the MLCBI / Article 2(j) of Schedule 1 of the CBIR.

Second, Ms G is also a “foreign representative” as defined by Article 2(d) of the MLCBI / Article 2(j) of Schedule 1 of the CBIR. As previously mentioned, Ms G’s authority stems from that of DGF as the Bank’s formally appointed liquidator under Article 77 of the LBBA. Her appointment is also in full accordance with the laws of Country A, thus satisfying the requirement that she be “authorised in a foreign proceeding”. Article 48(3) of the DGF Law empowers the DGF to delegate its powers to Ms G as its “authorised officer”, which is defined by article 2(1)(17) of the DGF Law as an employee of DGF, who on behalf of DGF and within the powers provided for by the DGF Law and / or delegated by DGF, performs actions to ensure the Bank’s withdrawal from the market during provisional administration of the insolvent bank and/or bank liquidation. From this definition, it is also clear that Ms G’s appointment is intended for the liquidation of the Bank’s assets and affairs. Resolution 1513 further noted Ms G to be a “leading bank liquidation professional”, which appears to satisfy the requirement in Article 35(1) of the DGF Law 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 the necessary professional experience necessary. The fact that Ms G was not the *first* appointed authorised officer is immaterial under the definition in Article 2(j) of Schedule 1 of the CBIR, which does not impose any requirement that the foreign representative must be the first appointed representative in the liquidation. Similarly, the fact that the DGF has reserved some of its powers as the Bank’s liquidator does not *ipso facto* take away from Ms G’s appointment and authority to administer the Bank’s liquidation. Resolution 1513 has delegated to Ms G 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. These are extensive liquidation powers, and further go to show that Ms G has authority to administer the Bank’s liquidation.

Therefore, both the Applicants - DGF and Ms G - are foreign representatives under Article 2(d) of the MLCBI / Article 2(j) of Schedule 1 of the CBIR.

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

* End of Assessment *