SUMMATIVE (FORMAL) ASSESSMENT: MODULE 1

(INTRODUCTION TO INTERNATIONAL INSOLVENCY LAW)

This is the **summative (or formal) assessment** for **Module 1** of this course and is compulsory for all registered candidates on the Foundation Certificate. The mark awarded for this assessment will determine your final mark for Module 1. 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 number.assessment1summative]**. An example would be something along the following lines: 202021IFU-314.assessment1summative. **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 "studentnumber" 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. The final submission date for this assessment is **15 November 2020**. The assessment submission portal will close at **23:00 (11 pm) GMT on 15 November 2020**. No submissions can be made after the portal has closed and no further uploading of documents will be allowed, no matter the circumstances.

7. Prior to being populated with your answers, this assessment consists of **9 pages**.

ANSWER ALL THE QUESTIONS

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

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

In early times insolvency law developed in England and was transplanted to continental Europe by means of the *Lex Mercatoria*.

(a) This statement is correct because continental Europe had no rules pertaining to debt collection and insolvency.

(b) The statement is correct because English Law played a significant role in the development of mercantile law in continental Europe.

(c) The statement is not correct because mercantile law, including insolvency law, developed in continental Europe based on principles of Roman and Germanic laws.

(d) The statement is not correct because the laws of the merchants in continental Europe were transplanted in England.

Question 1.2

The insolvency (bankruptcy) legislation of the USA and England are the same since they share the same layout and structures.

(a) The statement is not correct because although both systems have so called unified legislation, the US Bankruptcy Code of 1978 applies the same provisions to a large extent to both individual and corporate debtors, whereas the English Insolvency Act of 1986 contains quite separate provisions for individuals and companies.

(b) The statement is not correct because England has separate legislation for individual and corporate debtors.

(c) The statement is not correct because of the two systems, only the USA has unified or harmonised insolvency legislation.

(d) The statement is correct because the US legal system has adopted English law, including its insolvency legislation.

Question 1.3

The term "insolvency" differs from "bankruptcy" in that insolvency refers to cash flow (commercial insolvency) and bankruptcy to balance sheet insolvency (factual insolvency, that is, a situation where the debtor's liabilities exceed its assets).

(a) The statement is correct because this is how these terms developed in both England as well as civil law countries.

(b) The statement is not correct because English law uses the term "bankruptcy" and the USA uses the term "insolvency" to describe the same factual situations concerning over-indebtedness.

(c) The statement is not correct because at some point in time "insolvency" used to describe the debt situation of the insolvent, either balance sheet or cash flow insolvency, whilst "bankruptcy" described the formal legal position of an insolvent debtor who is subject to a formal insolvency procedure; however, they are now used interchangeably.

(d) The statement is not correct because "bankruptcy" refers to the situation where a corporate debtor is liquidated or subject to a formal debt rehabilitation, whilst "insolvency" relates to individual debtors only.

Question 1.4

"International insolvency law" is a fixed and accepted term recognised by all the Member States of the United Nations (UN), since all such Member States have the same cross-border insolvency enforcement dispensations to deal with cross-border insolvency matters arising from other Member States.

(a) The statement is correct because all the UN Member States have adopted the UNCITRAL Model Law on Cross-Border Insolvency.

(b) The statement is correct because all the UN Member States follow English common law.

(c) The statement is correct because international insolvency law is applied private international law and all UN Member States have the same principles regulating private international law.

(d) The statement is incorrect because the term is largely used by commentators on cross-border insolvency law and it refers to a body of legal rules concerning certain insolvency procedures that cannot be fully enforced across borders because insolvency dispensations differ from Member State to Member State.

Question 1.5

Universalism and territorialism are two main approaches or theories followed by States in order to regulate their cross-border insolvency law dispensations. However, it is clear that universality is not yet fully embraced by all States and, at best, a kind of modified territorialism is followed by some States.

(a) The statement is correct because very few States allow insolvent estate representatives to deal with assets of a foreign debtor situated in their own jurisdiction without a prior local procedure to recognise the foreign insolvency proceeding.

(b) The statement is not correct because universality is the norm in the majority of States in cross-border insolvency matters.

(c) The statement is correct because there is no recognition of the universality approach in any State.

(d) The statement is not correct because important international policy-making bodies such as the International Monetary Fund (IMF), the World Bank Group and the United Nations have rejected the approach of territoriality.

Question 1.6

The domestic corporate insolvency laws of a country make no mention of the possibility of a foreign element in a liquidation that is commenced locally. There is also no locally applicable treaty or convention on insolvency proceedings.

In a local liquidation commenced in that country, to what other area of domestic law can the local court refer in order to resolve an international law issue that has arisen because of concurrent insolvency proceedings over the same debtor in a different country?

(a) UNCITRAL Legislative Guide on Insolvency Law.

(b) Private International Law.

(c) World Bank Principles for Effective Insolvency and Creditor Rights Systems.

(d) JIN Guidelines for Communication and Cooperation between Courts in Cross-Border Insolvency Matters.

Question 1.7

In international insolvency law, questions of jurisdiction are important (that is, whether a court can and will hear and determine a matter).

A company has been wound up in its place of incorporation, which is not in the United Kingdom. A creditor applies to an English court for a court order to wind up the foreign company in England.

Which of the following statements, concerning the facts surrounding such a winding-up application in England, is **false**?

(a) It is relevant whether the English court can exercise jurisdiction over one or more parties who have an interest in the distribution of the company's assets.

(b) It is relevant whether the applicant creditor is reasonably likely to benefit if the English court makes the winding-up order.

(c) It is essential that the foreign company has assets in England.

(d) It is relevant whether the foreign company has a sufficient connection with England.

Question 1.8

Which of the following conventions or treaties may be described as adopting a comprehensive universalist approach to resolving international insolvency issues arising in concurrent insolvency proceedings in the member States?

(a) Montevideo Treaty on International Commercial Law (1889).

(b) Nordic Convention (1933).

(c) Montevideo Treaty on International Commercial Terrestrial Law (1940).

(d) Montevideo Treaty on International Procedural Law (1940).

Question 1.9

Which of the following **does not** address choice of law issues in its approach to addressing international insolvencies?

(a) UNCITRAL Model Law on Cross-Border Insolvency (1997).

(b) Section 426(5) Insolvency Act 1986 (UK).

(c) UNCITRAL Legislative Guide on Insolvency Law (2004).

(d) European Insolvency Regulation (EIR) Recast (2015).

Question 1.10

Which of the following statements **best describes** the international insolvency issues addressed by the UNCITRAL Model Law on Recognition and Enforcement of Insolvency-Related Judgments (2018)?

(a) "It permits recognition and enforcement of a detailed list of types of judgment that are defined as insolvency-related foreign judgments."

(b) "It permits recognition and enforcement of a *sui generis* category of foreign insolvency orders or judgments that have otherwise only been recognised and enforced under the principle of comity."

(c) "It permits recognition and enforcement of foreign judgments that arise as a consequence of or is materially associated with an insolvency proceeding, regardless of whether that insolvency proceeding has closed and that were issued on or after the commencement of that insolvency proceeding."

(d) "It permits recognition and enforcement of all foreign insolvency judgments except those that commence a foreign insolvency proceeding."

Marks awarded 8 out of 10

QUESTION 2 (direct questions) [10 marks]

Question 2.1 [maximum 3 marks]

Briefly discuss the various models that a State / jurisdiction may follow to base their cross-border insolvency laws on and / or to deal with cross-border issues in practice.

[There are several models that a state / jurisdiction can follow to base its international insolvency laws and / or to deal with cross-border issues in practice. Among them is the UNCITRAL Model Law on Cross-Border Insolvency, that has provisions that facilitate cooperation and co-ordination of current procedures. There is also the American Law Institute / International Insolvency Institute, which provide a non-statutory basis for cooperation in international insolvency cases. Another model is the Judicial Insolvency Network, which is a network of insolvency judges that develops best practices in cross-border insolvency and restructuring matters]

A variety of methods exist for dealing with the assets of a debtors' insolvent estates that are situated in foreign States where no insolvency proceeding have yet commenced. This question required you to consider the use of statutory provisions or local courts or supra-national regional structure / treaty / convention to regulate how these situations should be dealt with.

1.5

Question 2.2 [maximum 3 marks]

A range of multilateral approaches have been developed in recent decades to address international insolvency issues. These initiatives have been undertaken by regional groupings of nation states or inter-governmental bodies and by multilateral commercial or professional bodies.

They have adopted a range of strategies including:

(a) uniform choice of law principles; and

(b) co-operation and co-ordination to promote recognition and enforcement.

Provide **one** example **of each strategy** listed in (a) and (b) above. In addition, briefly explain (in 1-2 sentences) why each initiative fits within its relevant category.

[An example of the strategy listed in (a) is the Nordic Convention on Bankruptcy. This convention recognizes the law as a "home State", in which the effects are applied in all Member States without the need for many formalities. An example of the strategy listed in (b) is the IBA Cross-Border Insolvency Concordat, which has a co-ordination proposal subject to a governance protocol]

This answer displays a satisfactory understanding. To improve your responses, ensure they are commensurate with the mark allocation – Q 2.2 is for 3 marks.

2.5

Question 2.3 [maximum 4 marks]

In 1997, UNCITRAL adopted the Model Law on Cross-Border Insolvency (MLCBI) and encouraged its adoption by member States. In recent years, UNCITRAL has developed two more Model Laws relating to insolvency.

Describe the key issues that the latest two insolvency Model Laws address and how they complement the MLCBI.

[In addition to the Model Law on Cross-Border Insolvency (MLCBI), UNCITRAL has developed two more Model Laws related to insolvency, which are: (i) The UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation, which provides information for insolvency judges and practitionioners; (ii) The UNCITRAL Legislative Guide on Secured Transactions, that ensure co-ordination of the treatment of security interest.]

It would be beneficial to elaborate on how these two insolvency Model Laws complement the MLCBI, with reference to aspects not addressed by the MLCBI.

Have you considered the UNCITRAL Model Law on Recognition and Enforcement of Insolvency- Related Judgments with Guide to Enactment (2018) (MLIJ)? Or the UNCITRAL Model Law on Enterprise Group Insolvency with Guide to Enactment (2019) (MLEGI)?

0.5

Marks awarded 4.5 out of 10

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

Question 3.1 [maximum 5 marks]

It is said that it is currently difficult to develop a single cross-border insolvency dispensation and it seems that it will still take some time before a truly unified single cross-border insolvency dispensation will be introduced amongst the various jurisdictions of the world. You are required to write an essay on this aspect, explaining some of the difficulties involved in developing a single cross-border insolvency dispensation.

[There are huge differences in both the approach and the insolvency law of various jurisdictions. Universality and territoriality are two theoretical concepts that seek solutions to problems related to cross-border insolvency. The first concept - universalism - as its name implies, defends the existence of a single way of dealing with insolvency proceedings in all states. Therefore, there would be only one way to execute the debtor's assets. Supporters of this concept argue that this format is less expensive. On the other hand, this concept is also widely criticized, given the difficulty of establishing the only state of “residence” for the debtor, in addition to the difficulty of establishing a single insolvency system that fits into multiple jurisdictions. As the global consensus that universalism will never be achieved, the figure of Modified Universalism was created.

In addition, it is worth commenting that, according to Friman, one of the difficulties that arise in a cross-border context is finding a common insolvency language. At an international level, it is difficult to define what characterizes insolvency and insolvency proceedings.

Omar, in turn, points out that a major difficulty is the differences in domestic norms and the impacts on the position of creditors and the priorities they assert in insolvency.

Not only that, but it is also important to highlight the difficulties pointed out by Westbrook: "(i) standing for (recognition of) the foreign representative; (ii) moratorium on creditor actions; (iii) creditor participation; (iv) executory contracts; (v) co-ordinated claims procedures; (vi) priorities and preferences; (vii) avoidance provision powers; (viii) discharges and (ix) conflict-of-law issues." (J L Westbrook. “Developments in Transnational Bankruptcy”, 1995, St Louis University Law Journal 753, pp. 753-757)]

There are a number of issues due to differences between local insolvency laws and legal culture in different States / jurisdictions. Please refer to relevant discussions in your guide in 5.3.

1

Question 3.2 [maximum 5 marks]

UNCITRAL Working Group VI on Security Interests has developed a number of texts on secured transactions, such as the Legislative Guide on Secured Transactions (2007) and a Model Law on Secured Transactions (2016) applicable to movable assets. The Legislative Guide has a whole chapter (XII) on the impact of insolvency on a security right because insolvency law "is one field of law … where as a practical matter the regime of secured transactions deeply interacts with [insolvency law] and thus needs to be directly addressed in the Guide".

When a collective insolvency proceeding has commenced, what is the significance of being a secured creditor with a secured claim (a security interest being a right in an asset to secure payment)?

What important issues can arise where the debtor has assets in a number of States and has granted security interests in those assets to creditors in those States?

[Most systems make a distinction between secured and unsecured creditors, although the distribution rules regarding payments to creditors may vary from state to state. That said, it is important to clarify that secured creditors are those who have a valid form of guarantee for their credits, while unsecured creditors do not have such a guarantee. In addition, a secured credit is that assisted by a security interest held as collateral for an executable debt in the event of default by the debtor.

Therefore, when a collective insolvency proceeding has commenced, the importance of being a secured creditor with a secured credit is relevant, considering that if the creditor is unsecured, he will have no priority and is only considered for payment with the remaining funds after the payment of the secured and preferred creditors. These are creditors that may receive a dividend payment or receive no payment at all.

Wood even points out that Creditors are paid proportionally to the assets available based on their credits. The author calls this ideology "which is not honored anywhere", since priority creditors and secured creditors are exceptions to this rule in most, if not all, states (PR Wood, "Principles of International Insolvency". Sweet and Maxwell Ltd, 2007, p. 3).

Consequently, if the debtor has assets in several states and has provided guarantees on those assets to creditors in those states, this is likely to be one of the most difficult aspects to deal with in a cross-border context. This happens because there are several differences between the types of real security found in various states. For example, not all countries share the notion of a floating charge, which is very common in states based on English law. For this reason, UNCITRAL drafted a Model Law on Guaranteed Transactions (2016), which is a way of harmonizing the rules on securities rights between States.]

The correct full answer was:

Distribution Rules: In most systems the distribution rules draw a distinction between secured and unsecured creditors. Secured creditors are those creditors who hold a valid form of security for their claims, while unsecured creditors do not. The creditor can seek to enforce payment through realisation of the security interest and if they thereby recover payment, they do not need to participate as concurrent (unsecured) creditors. They are more likely to receive some payment than if part of the common pool.

What important issues can arise in an international insolvency where the debtor has assets in a number of States and has granted security interests in those assets to creditors in those States?

- The distribution rules often differ from State to State.
- Terms such as “secured creditor” and “security interest” may have fundamentally different meanings in different States.
- There are also a number of important differences between the types of security found in various States and differences in how to protect these interests as well as the priority of interests in the assets.
- Security over real property is often given special treatment by States
- Security over movable assets e.g. aeroplanes, ships, raise peculiar issues in enforcing security interests in an insolvency
- Many multilateral instruments are based on the principle that pre-acquired rights in terms of the general law of a particular State, such as the law relating to security, must be acknowledged during bankruptcy or insolvency.

UNCITRAL Legislative Guide on Secured Transactions (2007). At page 423, it states: “there is one field of law, insolvency law, where, as a practical matter, the regime of secured transactions deeply interacts with other law and thus needs to be directly addressed in the Guide.” It goes on to state:

> “2. **Secured transactions laws and insolvency laws have different concerns and objectives,** some of which may overlap where the rights regulated by a secured transactions law are affected by the commencement of insolvency proceedings.
>
> **A secured transactions law** seeks to promote secured credit, because security for an obligation reduces the risk of non-payment of the obligation (“default”). It allows debtors to use the full value of their assets to obtain credit and develop their enterprises. In the case of default by a debtor, a secured transactions law seeks to ensure that the value of the encumbered assets protects the secured creditor. It focuses on effective enforcement of the rights of individual creditors to maximize the likelihood that, if the secured obligations owed are not performed, the economic value of the encumbered assets can be realized to satisfy the secured obligations.

3. **An insolvency law**, on the other hand, is principally concerned with collective business and economic issues. It seeks, among other objectives, to preserve and maximize the value of the debtor’s assets for the collective benefit of creditors and to facilitate equitable distribution to creditors. The achievement of these objectives will be assisted by preventing a race among creditors to enforce individually their rights against a common debtor, and by facilitating the reorganization of viable business enterprises and the liquidation of businesses that are not viable. For these reasons, an insolvency law may affect the rights of a secured creditor in different ways once insolvency proceedings commence.”

I have awarded 3 out of 5

Question 3.3 [maximum 5 marks]

The UNCITRAL Model Law on Cross-Border Insolvency (1997) (MLCBI) contains provisions on co-operation and co-ordination in an international insolvency. Article 27 refers to the “[a]pproval or implementation by courts of agreements concerning the coordination of proceedings” as an example of co-operation under the MLCBI. One way in which this may occur is through the use of Protocols or Cross-Border Insolvency Agreements.

In the context of an international insolvency, how are Protocols or Cross-Border Insolvency Agreements developed and implemented? What guidelines have been developed by UNCITRAL and the Judicial Insolvency Network (JIN) for practitioners considering the use of such Protocols or Cross-Border Insolvency Agreements?

[One of the key principles of UNCITRAL MLCBI is also cooperation and coordination. The Model Law requires a local court or insolvency representative to cooperate with foreign courts or representatives. In addition, it provides examples of appropriate means of cooperation, including "[a] court approval or implementation of process coordination agreements".

This notion has been used with increasing frequency and has been implemented through the use of protocols or cross-border insolvency agreements. These Protocols or Agreements must be approved by the competent courts.

An important example for these cooperation purposes is allowed under articles 25 and 26 on "the approval or implementation by courts of agreements relating to the coordination of processes".

Article 27 further presents the forms of cooperation as follows: "Cooperation referred to in articles 25 and 26 may be implemented by any appropriate means, including: (a) Appointment of a person or body to act at the direction of the (b) Communication of information by any means considered appropriate by the court; (c) Coordination of the administration and supervision of the debtor's assets and affairs; (d) Approval or implementation by courts of agreements concerning the coordination of proceedings; (e) Coordination of concurrent proceedings regarding the same debtor; (f) The enacting State may wish to list additional forms or examples of cooperation. "

It is also important to note that, although the court's approval of such agreements is encouraged by the MLCBI, they are actually prior to the Model Law - an example of this is the case of Maxwell Communications Corporation plc's cross-border insolvency (1991).

In addition, it is important to note that the Judicial Insolvency Network (JIN) is "a network of insolvency judges from around the world with the aim of providing judicial thought leadership, developing best practices and facilitating communication and cooperation between national courts on issues cross-border insolvency and restructuring." (https://www.supremecourt.gov.sg/news/media-releases/judges-of-the-worldwide-judicial-insolvency-network-to-meet-in-new-york-city-this-september)

The JIN Guidelines address the fundamental principles on the recognition of foreign insolvency proceedings, as well as the modalities of court-to-court communication. Therefore, these guidelines improve the efficiency of processes and coordination and cooperation between courts in an international insolvency.

Then, JIN developed the JIN Modalities, which are Court-to-Court Communication Modalities, which focuses on the mechanics to initiate, receive, and engage in such communication.

The development of these instruments together with the adoption of the UNCITRAL Model Law on Cross-Border Insolvency, demonstrate the importance of cooperation and coordination in this context.]

What about the UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation? You covered quite a few of the points, so I have **awarded 3.5 out of 5**.

7.5 out of 15 awarded for Question 3.

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

H Co Ltd (HCO) is a company incorporated with its head office and significant operations in Thule as well as being registered as a foreign company in Camelot, where it also carries on business. Lender Ltd (Lender) is incorporated and has its head office in Camelot. HCO has

been expanding its business into Camelot more rapidly than its internal systems can handle at the same time as there is an unexpected downturn in this market. This has caused it to fall behind with payments to Lender. HCO's CEO approaches Lender, which is actively considering its debt recovery options against HCO, to seek an informal workout arrangement. HCO is managing to meet its debts as they fall due in Thule; however, it is not trading well enough there to overcome the issues in Camelot.

If you require additional information to answer the questions that follow, briefly state what information it is you require and why it is relevant.

Question 4.1 [maximum 5 marks]

What key advantages and disadvantages should Lender consider regarding an informal out-of-court workout? What is the potential impact on these considerations that HCO is carrying on business in more than one State?

[Regarding an informal out-of-court workout, Lender must consider that corporate rescue can either be on (i) an informal basis, where an out-of-court workout can be agreed between the parties, or (ii) by way of a formal, statutory corporate rescue mechanism.

The advantages of an informal negotiation of creditors are that the costs are much lower than in the formal procedure, considering that there is no involvement of the Courts, and there is no publicity about the fact that the debtor company is experiencing financial difficulties.

On the other hand, the disadvantages of informal exercises for creditors are that there is no way to bind dissenting creditors to any agreement reached, and there is no moratorium that prevents other creditors from going to court and initiating insolvency proceedings.

Therefore, given that HCO is doing business in more than one state, it is possible for other creditors to go to court and initiate insolvency proceedings, just as there is no way to bind dissenting creditors - including from other states - to any agreement reached.]

Good answer – 5 marks

Question 4.2 [maximum 5 marks]

In the scenario above, Thule has adopted the Model Law on Cross-Border Insolvency (MLCBI). In Camelot, where HCO has also been carrying on business as an unregistered foreign company, there are domestic insolvency laws; however, these laws do not address international aspects should they arise in an insolvency.

Lender obtains a liquidation order against HCO in Camelot. (Lender has only recently learned when initiating this litigation that HCO is in fact incorporated in Thule.) The Camelot liquidator learns that HCO has significant assets situated in Thule, as well as key directors residing there.

Advise the liquidator on the potential relevance that Thule has adopted the MLCBI for administering the Camelot insolvency proceeding. What key additional information is required to advise the liquidator on the relevance of the adoption of the MLCBI to any litigation in Thule and why?

[Thule adopted the Model Law on Cross-Border Insolvency (MLCBI). In Camelot, where HCO also operates as an unregistered foreign company, there are national insolvency laws; however, these laws do not deal with international aspects.

Therefore, the liquidator needs to know that MLCBI, as developed by UNCITRAL, does not require reciprocity, so it does not matter whether Camelot adopted MLCBI or not. The liquidator of Camelot can go to court to recognize the order of liquidation of HCO and its appointment as insolvency representative.

If the requirements are met, the court can recognize the foreign settlement order and the appointment of the liquidator. In addition, the liquidator can also ask for relief through a local stay of HCO legal proceedings to recover his debt.

Finally, it is important to note that one of the key principles of the UNCITRAL MLCBI is co-operation and co-ordination. This places obligations on both courts and insolvency representatives in different States to communicate and co-operate to the maximum extent possible.]

You misread the second part of the question, the answer to which is:

What key additional information is required to advise the liquidator on the relevance of the adoption of the Model Law to any litigation in Thule and why?

- What is the connection between the company and Thule? Does the company have a COMI or an establishment in Thule?
- This will affect whether the liquidation will be recognised and if so, what relief is granted.
- If it has neither a COMI nor establishment, then it cannot be recognised under the MLCBI and it will be necessary to see whether there are any other grounds for recognition under the laws in Thule.

I have awarded 2 out of 5

Question 4.3 [maximum 5 marks]

Assume that instead of the scenario above, HCO is the holding company of a group of companies (H group) operating a business enterprise. HCO and three group members are incorporated in one State; two group members are incorporated in second State; and two more group members are incorporated in a third State. HCO is subject to an insolvency proceeding in its State of incorporation; the group members in the second State are also insolvent; whereas the group members in the third State are solvent.

What difference does it make whether the domestic company laws of each State adopt an entity approach or enterprise approach to H group and the local members of H group?

What instrument and guidance texts have been developed by UNCITRAL to address the insolvency of an enterprise group?

[Insolvency involving groups of companies poses specific difficulties. Despite the reality of groups of companies, in many legal systems, legislation treats companies or companies as single entities. Insolvency laws generally respect the separate legal status of each member of the business group. In this way, orders are analysed separately.

In 2004, UNCITRAL promulgated the Legislative Guide on Insolvency Law, which addresses in Part Three the insolvency of business groups and in Part Four the obligations of directors in the period approaching insolvency, including for directors of companies in the group.

In 2019, UNCITRAL developed the Model Law on Enterprise Group Insolvency with Guide to Enactment (MLEGI), which treats corporations or companies as single entities. This creates complexities for insolvency laws, where a company comprises several corporations or companies.

The MLEGI Draft Guide to Enactment (2019) states at [26] “the [MLEGI] is intended to provide a legislative framework to address the insolvency of an enterprise group, including both domestic and cross-border aspects of that insolvency. Part A is a set of core provisions, dealing with matters that are considered as key to facilitating the conduct of enterprise group insolvencies. Part B, comprising articles 30–32, includes several supplemental provisions that go further than the measures provided in the core provisions".

In July 2019, the Commission approved an additional section for Part Four that addresses the obligations of corporate directors of companies in the period approaching insolvency.

Finally, it is important to comment on the IBA Insolvency Section, which encourages judicial and administrative cooperation and coordination in cross-border insolvency cases, including cases of groups of companies.]

Good answer – I have awarded full marks. **5 out of 5**

Question 4 – 12 out of 15

32 out of 50 = 64%

*** End of Assessment ***