



FORMATIVE ASSESSMENT: MODULE 1

INTRODUCTION TO INTERNATIONAL INSOLVENCY LAW

This is a **formative assessment** relating to **Module 1** and is designed to provide candidates on the Foundation Certificate course with some direction and guidance as to the form and content of assessments on the course as a whole. The submission of this assessment is **not compulsory** and the mark awarded will not count towards the final mark for Module 1 or the course as a whole. However, students are encouraged to submit this assessment as part of their orientation for the submission of the formal (summative) assessments for all the modules on the course.

The Marking Guide for this assessment will be made available on the Course Administration page of the course web pages after the submission date on 15 October 2021.

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: **[studentID.assessment1formative.]**. An example would be something along the following lines: 202122-514.assessment1formative. **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.**
5. Before you will be allowed to upload / submit your assessment via the portal on the Foundation Certificate web pages, you will be required to confirm / certify that you are the person who completed the assessment and that the work submitted is your own, original work. Please see the part of the Course Handbook that deals with plagiarism and dishonesty in the submission of assessments. **Please note that copying and pasting from the Guidance Text into your answer is prohibited and constitutes plagiarism. You must write the answers to the questions in your own words.**
6. The final submission date for this assessment is **15 October 2021**. The assessment submission portal will close at **23:00 (11 pm) BST (GMT +1) on 15 October 2021**. 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

It should be relatively easy to develop a single system to deal with cross-border insolvency since all jurisdictions have more or less the same local insolvency law rules.

- (a) This statement is true since all countries have implemented the UNCITRAL Model Law on Cross-Border Insolvency.
- (b) This statement is untrue since there are huge differences in both the approach and insolvency legislation of various jurisdictions.
- (c) This statement is true since all systems have at least the same general insolvency concepts.
- (d) The statement is true since the historical roots of all insolvency systems are the same.

Question 1.2

The Statute of Ann, 1705 was a very important piece of legislation for the development of English insolvency law.

- (a) This statement is true since this Act introduced imprisonment of debt.
- (b) This statement is untrue because it dealt with the distributions of the proceeds derived from the proceeds of selling the assets of the estate.
- (c) This statement is true since it introduced the notion of discharge.
- (d) This statement is true since it introduced fraudulent conveyances into English law.

Question 1.3

The purpose of the UNCITRAL Legislative Guide (2004) has direct application in all the member States of the UN.

- (a) This statement is true because UNCITRAL's model legislative guidelines apply automatically to all member States.
- (b) This statement is true because all member States supported its automatic implementation in their respective jurisdictions.

- (c) This statement is untrue because the Legislative Guide serves merely as soft law and contains best practice to be considered when countries revise their own insolvency legislation.
- (d) This statement is untrue since the Legislative Guide is only available for use by developing countries when reforming their own insolvency laws.

Question 1.4

Modern rescue proceedings have replaced liquidation as an insolvency procedure in most systems.

- (a) This statement is true since business rescue is important for socio-economic reasons.
- (b) This statement is true because liquidation is viewed as a medieval and outdated process.
- (c) This statement is untrue since there is still a need for both liquidation and rescue procedures in insolvency systems.
- (d) This statement is untrue since some systems have no formal rescue procedure.

Question 1.5

The principles and requirements for avoidable dispositions and executory contracts are the same in all jurisdictions – hence these do not pose problems in a cross-border insolvency matter.

- (a) The statement is untrue, the requirements and principles do differ and pose problems in a cross-border case.
- (b) This statement is untrue because the insolvency laws of the State where the original insolvency order is issued will apply to all the other States involved in the matter.
- (c) This statement is untrue since avoidable dispositions and executory contracts do not pose any problems in a cross-border case.
- (d) The statement is untrue since avoidable dispositions and executory contracts may be disregarded in a cross-border case.

Question 1.6

The domestic corporate insolvency statute of a country makes no mention of the possibility of a foreign element in a liquidation commenced locally. The country has ratified a regional treaty on insolvency proceedings that contain provisions on concurrent insolvency proceedings over the same debtor in a neighbouring treaty state.

In a local liquidation commenced under the domestic corporate insolvency statute, to what law can the local court refer in order to resolve an international law issue that has arisen because of concurrent insolvency proceedings in the neighbouring state?

- (a) Public International Law.
- (b) UNCITRAL Legislative Guide on Insolvency Law.

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

(d) Private International Law.

Question 1.7

Which one of the following documents mandates co-operation or communication between courts in concurrent insolvency proceedings on the same debtor, which are being conducted in different nation states?

(a) ALI / III Global Guidelines Applicable to Court-to-Court Communication in Cross-Border Cases (2012).

(b) EU Cross-Border Insolvency Court-to-Court Communications Guidelines (2014).

(c) UNCITRAL Model Law on Cross-border Insolvency (1997).

(d) JIN Guidelines for Communication and Cooperation between Courts in Cross-Border Insolvency Matters (2016).

Question 1.8

Latin and Middle America states have ratified various multilateral conventions and treaties that address international insolvency issues. While they promote unity of proceedings in the treaty states where a debtor has a single commercial domicile, they acknowledge the possibility of concurrent proceedings.

Which of the following conventions and treaties does **not** provide for judicial co-operation where there are surplus funds remaining in a proceeding in one treaty state and there are concurrent insolvency proceedings over the same debtor in another treaty state?

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

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

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

(d) Havana Convention on Private International Law (1928).

Question 1.9

The Council Regulation on Insolvency Proceedings (European Insolvency Regulation) (2000), which applies in all European Union member states except Denmark, was reviewed after a decade's operation. An amended European Insolvency Regulation (EIR) Recast (2015) was adopted in 2015 and took effect in June 2017.

Which of the following aspects of international insolvency is **not** addressed in the EIR Recast?

(a) Proceedings to restructure a debtor that is facing the likelihood of insolvency.

(b) Definition of "centre of the debtor's main interests".

(c) A centralised insolvency register of insolvency proceedings opened in member states.

(d) Co-operation and co-ordination provisions applicable to corporate groups.

Question 1.10

An unsecured Creditor is owed monies by the Debtor for services it supplied locally. It has issued proceedings to recover the debt in the local Court. The Debtor has moved its registration and head office to the local country from its original place of incorporation in a foreign country. The Creditor is incorporated and has its head office in that foreign country. The contract to supply, which was created by exchange of emails sent between the head offices, denominates the debt in the currency of the foreign country. The Debtor is being wound-up in the foreign country and the foreign liquidator seeks recognition and a stay in the local Court proceedings. What aspect is an international insolvency issue?

(a) The local Court's jurisdiction over the Debtor.

(b) The standing of the foreign Creditor to sue for its debt in the local Court.

(c) The foreign liquidator's standing to request a stay of the local proceedings.

(d) The fact that the debt owed to the Creditor is in a foreign currency.

Marks awarded 6 out of 10

QUESTION 2 (direct questions) [10 marks]

Question 2.1 [maximum 2 marks]

Explain what the term "international insolvency law" means.

The term "international insolvency law" can be said to be the laws or rules regulating collective debt collection process in more than one States. It is also referred to as Cross-border insolvency law in some States like, the United Kingdom and the United States of America. It is a collective debt collecting procedure that involves creditors and assets of the debtor's estate spanning through two or more States.

According to Wessel, International insolvency law is that part of the law that "[i]s commonly described in international literature as a body of rules concerning certain insolvency proceedings or measures, which cannot be fully enforced, because the applicable law cannot be executed immediately and exclusively without consideration being given to the international aspect of a given case"¹.

Fletcher expressing his view on the term "international insolvency law" argued that "international insolvency" or "cross-border insolvency" should be considered as a situation"... in which an insolvency occurs in circumstances which in some way transcend the confines of a single legal system, so that the single set of domestic insolvency law provisions cannot be immediately and exclusively applied without regard to the issue raised by the foreign elements of the case".²

¹ INSOL INTERNATIONAL, *Foundation Certificate in International Insolvency Law: Module 1 Guidance Text 20212022*, p 33.

² *Idem*, p 34.

International insolvency law therefore is that part of the insolvency rules³, principles or standards that regulates the collective debt collecting process (insolvency proceeding) that involves foreign creditors of other States, assets in more than one jurisdiction, insolvent company with operations in and outside its Home State, shareholders cutting across Home State of the Insolvent debtor company and the insolvency proceedings being subject to courts of different States.

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Question 2.2 [maximum 5 marks]

Differentiate between the concepts of universality and territoriality in cross-border insolvency.

[Universality and territoriality in cross-border insolvency are the two major approaches and principles that have been adopted by different States in resolving issues relating to cross-border insolvencies in their States.

1. Universality approach in cross border insolvency permits more than one insolvency proceeding pending or originating in different States to be dealt with under the provisions of one insolvency law, for example, in the State where the debtor has its centre of main interest (COMI). This means that the law of the “Main Proceeding” will have worldwide effect, even outside the territorial jurisdiction of the State where the main proceeding has been opened. This is referred to as “unity of proceeding”, and it allows the law of the State where the “main proceeding” is opened (*the lex concursus*) to regulate the proceeding⁴.
2. Under the universality concept, the liquidation of an insolvent debtor with assets in multiple States/Countries is carried out in the State where the debtor has its centre of main interest (COMI)⁵ and the Court of COMI will have the global jurisdiction to cover the debtor’s assets worldwide.
3. The applicable law, under the universality concept, is the law of the State of the Centre of Main Interest⁶.
4. The universality concept is cost effective and has globalization approach. This is so due to the minimal proceedings involved in the concept when it is compared to the territoriality concept. The Model Law⁷ and the European Union Regulation 2000 have been said to subscribe partially to the universality concept⁸ which most States have now adopted in resolving their cross-border insolvency issues⁹.

³ These rules include Treaties and Conventions such as the UNCITRAL Model Law on Cross Border Insolvency, 1986; UNCITRAL Legislative Guide on Insolvency Law; European Insolvency Regulation (EIR) 2000 and other binding and non-binding rules.

⁴ See, INSOL Module 1 Guidance Text *supra* note 1, p 39.

⁵ Centre of Main Interest (COMI) could be the State of incorporation of the debtor company or place of main activities of the debtor or place of major assets location of the debtor, depending on the available facts.

⁶ Sandeep Gopalan and Michael Guihot, *Recognition and Enforcement in Cross-Border Insolvency Law; A Proposal for Judicial Gap-Filling*. *Vandebilt J. Int’l L.* 48 (2015) P 1267.

⁷ United Nations Commission on International Trade Law (UNCITRAL) Model Law on Cross-Border Insolvency, 1997.

⁸ See, Gopalan and Guihot *supra* note 6, p 1229.

⁹ The United Kingdom, USA etc, practice the universality concept in their cross-border insolvency matters through the adoption of the Model Law.

Conversely, territoriality concept which is said to be diametrically opposed to the principle of universality concept¹⁰, is based on the premise that insolvency proceedings may be commenced in every State or jurisdiction where the debtor holds assets, but that they should be territorially limited and restricted to property within the State where the proceedings are opened¹¹.

1. The territoriality concept gives room for multiple insolvency proceedings running or going on concurrently with respect to the same debtor.
2. The proceedings under the territoriality concept is also restricted in respect of which creditors may file their claims and the office holder would have a mandate restricted to the national borders of the State of the ongoing insolvency proceeding.
3. National interest, under this concept, i.e, interests of local creditors before any assets are transmitted outside the State, are preserved and protected.
4. The territoriality concept also addresses the local interests and local creditors who act within the domestic market, and where only an evaluation of local assets is usually made before credit is given
5. Under the territoriality concept, it is likely that the creditors as a whole receive less in the winding up when compared to the universality concept.
6. There is also the inconsistent application of multiple laws across the world resulting in excessive costs which may affect the willingness of creditors to extend credit to companies exposed to potential cross-border insolvency.

The major challenge however, to the territoriality concept when compared to the universality concept, is that the debtor maybe declared insolvent in one State (where the debts are) but not in another (where the assets are located). What this means, is that the debtor could be solvent in one but insolvent in another State.

It is sometimes said that civil law countries are more inclined to take a territoriality approach to jurisdiction and that common law countries are more closely aligned with universalism¹².]

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Question 2.3 [maximum 3 marks]

Describe **three** recent examples of developments in the Middle East region to reform domestic insolvency laws or to address international insolvency Issues.

[The three recent examples of developments in the Middle East region to reform domestic insolvency laws or to address international insolvency issues can be found in UAE, Bahrain and Saudi Arabia respectively.

The United Arab Emirate (UAE), in 2016 reformed it domestic insolvency laws by the promulgation of the Federal Bankruptcy Law N0.9 of 2016 which came into force on 29th December, 2016. The law repealed and replaced the commercial code under Book 5 of the Federal Law N0.18 of 1993. There also exists the Corporate Liquidation of Companies in the UAE regulated by the Federal Law N0.2 of 2015. Recent developments have also led to the further amendment of the Federal Bankruptcy Law

¹⁰ See, INSOL Module 1 Guidance Text *supra* note 1, p38.

¹¹ *Ibid.*

¹² *Ibid.*

N0.9 of 2016 by the Federal Bankruptcy Law N0. 21 of 2020. Similarly, In 2019, the Dubai International Financial Centre adopted the Model law on Cross-Border Insolvency.

Another recent example of developments in the Middle East region to reform domestic insolvency laws or address international insolvency issues can be found in Bahrain. Bahrain has promulgated the Bahrain Bankruptcy law in 2018. The Bahrain Bankruptcy law introduced an insolvency law system that resembles the restructuring laws concepts of the US Bankruptcy Code under Chapter 11 of the Code. The Reorganization and Bankruptcy Law (Bahrain Law N0.22/2018) is aimed at maximising the value of insolvent estate and promoting corporate rescue and restructuring instead of liquidation in the event of Corporate insolvency.

Saudi Arabia domestic insolvency law development can also be regarded as another recent example of development in the Middle East region to reform domestic insolvency laws or address international insolvency issues. The Saudi Arabia Bankruptcy law that regulates insolvency law in Saudi Arabia came into effect in August, 2018. The law drew inspiration from Chapter 11 procedure of the US Bankruptcy Code. Under the law, a specialist Bankruptcy committee which is an independent administrative and financial legal body is in charge of the responsibility to manage bankruptcy register and coordinate the relevant liquidation and bankruptcy procedures under the supervision of the Saudi Arabia Ministry of Commerce and Investment.]

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Marks awarded 10 out of 10

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

Question 3.1 [maximum 5 marks]

Write a brief note on the differences regarding the objectives of insolvency for individuals and corporations.

[The differences regarding the objectives of insolvency for individuals and corporations can be identified as follows:

The individual debtor is protected from harassment by his creditors.

One of the major objectives of insolvency for individuals is to protect the individual debtor who sometimes may not have contributed to the reason for the insolvency from harassment by his creditors. A situation where every creditor harasses the individual debtor will result to constant conflict in the society. The objective of insolvency in this regard is to freeze individual creditor pursuit of his debt against the individual debtor. This freezing action is referred to as automatic stay, signifying a moratorium against individual debt enforcement.

Individual insolvency enables the individual debtor to make a fresh start especially, where the individual debtor is less blameworthy in the insolvency. A fresh start is a form of a discharge accorded the individual debtor from his or her outstanding debts upon application for grant after surrendering his or her assets for distribution to his or her creditors upon the order of insolvency being issued. Corporations do not enjoy the principle of fresh start or discharge as they do not have life after being wound up by order of court in an insolvency proceeding¹³.

¹³ The US Congress opted to prohibit non-individual debtor from obtaining a discharge under Chapter 7 of the US Bankruptcy Code in order to prevent businesses from evading liability by liquidating debtor corporations

Individual insolvency helps the individual to reduce indebtedness by making contributions from present and future income to the estate while at the same time taking his personal circumstances into consideration.

Individual insolvency enables the individual to adopt an alternative process to liquidation. This is achieved through a formal repayment plan as alternative to the formal bankruptcy of the individual. Such a repayment plan may in some prescribed instances follow a majority vote of acceptance by the debtor's creditors or creditors may be bound by way of a court order.

Individual insolvency helps to limit the contractual capacity of the individual to obtain new credit by requiring the consent of their estate representatives to obtain credit. The insolvent individual is also not allowed to take up certain positions, such as being a member of a parliament or as a director of a company or to be appointed as an officeholder of an insolvent estate

Individual insolvency enables the individual to exempt or exclude certain assets from the estate, such as essential household goods for necessities, tools for trade, house hold furniture etc, while in corporate liquidation no assets in exempted or excluded.

In corporation insolvency, the insolvency, where possible is aimed at preserving the business, or viable parts of the business. This objective is usually by a business rescue mechanism through restructuring.

Corporate insolvency helps to maximise the value of the assets of the creditors. Here, individual creditor's collection of debt could frustrate the corporation's attempt to maximize the value of the remaining assets for distribution to creditors.

Corporation insolvency helps to initiate a room for statutory compromise where the insolvent company and its creditors can agree on a compromise to preserve the assessed loss of the company. If the company ceases trading, the assessed loss is lost, but this loss can be set off against future income if the company is resuscitated before such cessation¹⁴.

Corporate insolvency helps to minimise individual creditor's costs to recover it debts once liquidation order has been granted. The efforts of individual creditor's in monitoring the debtor's financial estate is eliminated in corporate insolvency proceedings.

Corporate Insolvency helps to protect public interest. Creditors of an insolvent company are not the only beneficiaries of the estate of the insolvent company upon liquidation. Other interests such as interests of employees, suppliers, government, customers come to attention once an order for liquidation is granted. Such interests are protected alongside the interest of the creditors in corporate insolvency.

Corporate insolvency helps to protect existing rights of creditors before the liquidation order. This is aimed at protecting the pre-existing creditors of the insolvent company. Any creditor emanating after the liquidation order is excluded from benefiting from the estate of the insolvent company during distribution of assets to discourage and prevent fraudulent transactions.

and resuming business free of debt. Corporation debt therefore "survives Chapter 7 proceedings" and is "charged against the corporation when it resumes operations". See, Kevin M. Lewis, *Bankruptcy Basics; A Primer*, Congressional Research Service, 22 March, [2018] p10.

¹⁴ Alastair Smith; Andre Boraine, *Crossing Borders into South African Insolvency Law: From the Roman-Dutch Jurist to the UNCITRAL Model Law*, 10 Am. Bankr. Inst. L. Rev. (2002) p157.

Corporate insolvency helps to promote efficient and effective mode of distribution of insolvent company estate. This achieved by equitable treatment of all creditors and preventing favouritism.]

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Question 3.2 [maximum 5 marks]

Write a brief note on the difficulties that may be encountered when dealing with insolvency law in a cross-border context relating to pertinent differences in the relevant systems.

[Some of the difficulties that may be encountered when dealing with insolvency law in a cross-border context relating to pertinent differences in the relevant systems include the following:

1. Difficulty of Common Language. Inability in the use of Common language in relevant systems when dealing with insolvency law in a cross-border context is one of the difficulties encountered when dealing with insolvency law in a cross-border context. The meanings attached to certain words such as “secured creditor”. “security interest”, “liquidation” and “reorganisation” may have fundamentally different meanings in different States of systems. The UNCITRAL Model law on cross-border Insolvency is an attempt of promoting uniform approach to cross-border insolvency and this is what the UNCITRAL Legislative Guide and other UNCITRAL insolvency related texts were set to achieve. This difficulty was also identified by Friman¹⁵ who observed that the difficulty has resulted in not having a common definition of the term “insolvency”. He opined that insolvency is normally quite clearly defined in a domestic context than international level.
2. Difficulty Relating to Conflict of Laws and Domestic norms. This difficulty has been identified as another difficulty in relevant systems when dealing with insolvency law in a cross-border context. According to Omar, “[a]part from the general situation in conflict of laws, differences in domestic norms have a particular impact on the position of creditors and the priorities they assert in insolvency. Where the debtor faces creditors pressing their claims in more than one State, this will inevitably raise issues of conflicts of laws. The conflict may itself be made more complex by the presence of qualifications, including the presence of security, set off and netting arrangement, retention of title clauses and other means of protecting title available to creditors in National laws”¹⁶.
3. Difficulties identified by West Brook¹⁷. West Brook has identified nine key issues in relevant systems when dealing with insolvency law in a cross-border context. The difficulties identified by West Brook include the following;
 1. Standing for (recognition of) the foreign representative;
 2. moratorium on creditors’ action;
 3. creditors’ participation;
 4. executory contracts;
 5. co-ordinated claims procedures;
 6. priority and preferences;
 7. avoidance provision powers;
 8. discharges; and

¹⁵ INSOL Module 1 Guidance Text *supra* note 1. P 41.

¹⁶ *Ibid.*

¹⁷ *Ibid.*

9. conflicts - of – law issues¹⁸

Gopalan and Guihot summed up these difficulties as follows:

“[t]he problems thrown up by cross-border insolvency include (1) lack of clarity as to applicable laws, (2) uncertainty about participation in proceedings in foreign courts, (3) language, (4) ensuring procedural fairness, (5) equal treatments of creditors, (6) uncertainty about the validity and enforcement of security, (7) protecting the interests of employees and other vulnerable groups (8) increased borrowing costs owing to uncertainty faced by creditors (9) delays in disbursement of assets, and (10) difficulty in protecting a diverse array of national public policy goals¹⁹.

The Model Law on cross-border insolvency respects the differences among national procedural laws and does not attempt a substantial unification of insolvency laws. Hence, it provides a framework for cooperation between jurisdictions, offering solutions that help in several modest but significant ways and facilitate and promote a uniform approach to cross-border insolvency.^{20]}

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Question 3.3 [maximum 5 marks]

What multilateral steps have been taken in the 21st century to promote harmonisation of domestic insolvency laws? In your opinion, how much impact are these likely to have in addressing international insolvency issues? Include reasons for your opinion.

[Various multilateral steps have been taken in the 21st Century to promote harmonisation of domestic insolvency laws. These steps include the following;

1. At the international level, United Nation Commission on International Trade Law (UNCITRAL) adopted the Model Law on Cross-Border insolvency with the objectives of promoting harmonization of domestic insolvency laws through the promotion of predictable and stable Model Law in international insolvency laws. The Model law was promulgated to provide a procedural structure for co-operation between States and to promote a uniform approach to cross-border insolvency.

However, following the adoption of the Model Law in 1997, subsequent publications have been produced to assist in interpreting and understanding the Model Law. These publications include; the UNCITRAL Guide to enactment first published in 1997 and has been amended; Legislative Guide on Insolvency 2005 – Parts One and Two, designed to foster and encourage the adoption of effective national insolvency regimes²¹, the Practice Guide on Cross-Border Insolvency Cooperation²² designed to make available information for Practitioners and Judges on the practice of cooperation in relation to Article 27 of the Model Law, the Legislative Guide – Part Three adopted on 1st July 2010 to deal with treatment of enterprise groups in insolvency and the Judicial Perspective adopted in December 2011 and which has been updated in 2013.

¹⁸ *Ibid.*

¹⁹ See, Gopalan and Guihot *supra* note 6, pp 1227 – 1228.

²⁰ Introduction to the Digest of Case Law on the UNCITRAL Model Law on Cross-Border Insolvency, p vii, para 2.

²¹ In the Legislative Guide, UNCITRAL makes several comments about the Model Law and how it should be interpreted and its interrelationship with the EIR. See, INSOL INTERNATIONAL, *Foundation Certificate in International Insolvency Law: Module 2A Guidance Text*, p 8.

²² This Guide was adopted on 1 July 2009. See, *Ibid.*

The Legislative Guide which is intended to be used as a reference by national authorities and legislative bodies when preparing new laws and regulations or reviewing the adequacy of existing laws and regulations recommended that “[t]he insolvency law should include a modern, harmonized and fair framework to address effectively instances of cross-border insolvency”²³.

However, prior to the promulgation of the UNCITRAL Legislative Guide on Insolvency Law 2004, an attempt to adopt a first draft of an EC Convention on Bankruptcy and Related Matters in 1970 failed. The said draft had required contracting States to enact a “Uniform Law” into domestic law, while it permitted States under Article 76 to make reservations on their incorporation. Its provisions covered issues such as “actions for fraud against Creditors; the doctrine of set-off; the extension of the bankruptcy of firms or legal entities to persons directing or managing them; proof of the spouse’s claim to property, which would otherwise be presumed to be acquired with the funds of the bankrupt; and the bankruptcy of the Vendor in the case of a contract of sale with retention of title”²⁴.

Similarly, the International Bar Association (IBA) in 1997 commenced drafting a Model Bankruptcy Code to be available for any State to consider when developing their domestic insolvency laws²⁵. However, that project could not continue and instead, the IBA participated in contributing to the development of the UNCITRAL project resulting to the Legislative Guide which was also endorsed by the IBA.

Also, the World Bank in early 2000 produced guidelines on the regulation of Insolvency, titled “Principles for Effective Insolvency and Creditor/Debtor Regimes”²⁶, which has been revised in 2005, 2011, 2015 and in April, 2021. These principles have gained some significance in the context that the International Monetary Funds (IMF) and the World Bank sometimes require bankruptcy reform in developing countries as a condition for loan support²⁷. These principles may refer countries to the Legislative Guide and the principles in order to promote convergence of Insolvency law²⁸. C15 of the principle states that “Insolvency proceedings may have international aspects and a country’s legal system should establish clear rules pertaining to jurisdiction, recognition of foreign judgments, cooperation among courts in different countries, and choice of law. Key factors to effective handling of cross-border matters typically include;

- i. A clear and speedy process for obtaining recognition of foreign insolvency proceedings;
- ii. Relief to be granted upon recognition of foreign insolvency proceedings;
- iii. Foreign insolvency representatives to have access to courts and other relevant authorities;
- iv. Courts and insolvency representations to cooperate in international insolvency proceeding and
- v. Non-discrimination between foreign and domestic creditors²⁹.

The European Union has also taken steps in the 21st Century to promote harmonization of the domestic insolvency laws. The EU has done this through the report on the Harmonization of Insolvency law at EU level 2010, published by the European parliament. The report outlined

²³ INSOL Module 1 Guidance Text *supra* note 1. p 52.

²⁴ *Ibid.*

²⁵ *Ibid.*

²⁶ *Ibid.*

²⁷ *Idem*, p 53.

²⁸ *Ibid.*

²⁹ *Ibid.*

differences between domestic insolvency laws within the European Union and identified a number of areas of insolvency law where harmonization at the EU level is believed to be important and achievable³⁰. The areas referred to include;

- (a) a possible common test of insolvency as a requirement of a formal insolvency process;
- (b) the formal aspects of lodging and dealing with claims in a formal insolvency;
- (c) certain aspects of the manner in which re-organization plans are adopted and their contents;
- (d) the rules regarding so called detrimental acts;
- (e) the interrelationship between contractual rights of termination and insolvency;
- (f) directors' responsibilities.³¹

There is also an Action Plan on building a Capacity Market Union (CMU) published on 30th September, 2015 by the European Commission. According to the commission, "convergence of insolvency and restructuring proceedings would facilitate greater legal certainty for cross-border investors and encourage the timely restructuring of viable companies in financial distress. The CMU plan has been reviewed and the High-Level Forum (HLF) published its final report on the CMU, 'A new Vision for Europe's capital markets' on 10 June, 2020³².

In my opinion, these are likely to have great impacts in addressing international insolvency issues based on the following reasons;

1. The moves can reduce the significance of an insolvency crossing a State boundary because there will now be adequate insolvency laws available to resolve such issues.
2. The moves will enhance the need for regulators or courts to collaborate to resolve international insolvency issues with minimal challenge due to the existence and available predictable insolvency laws.
3. These moves will also help to create certainty in insolvency proceedings of domestic States and
4. Reduce cost in developing insolvency laws in developing States since, there are existing prototypes of the laws that can be adopted with minimal modifications for the purpose of domestication by such States.]

It would also be beneficial to consider political pressures, foreign investor pressures and/or loan conditions

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Marks awarded 15 out of 15

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

Nadir Pty Ltd ("Nadir") is a company registered in Utopia. Originally it was incorporated in the neighbouring country of Erewhon before moving its registration and head office to Utopia one month ago. Apex Pty Ltd ("Apex") is incorporated and has its head office in Erewhon. Apex and Nadir enter into a contract by exchange of emails between their head offices for Apex to supply goods to Nadir in Utopia. Nadir has failed to pay for the goods which have been delivered in accordance with the contract. Apex issues court proceedings against Nadir in Utopia for monies owing for the goods sold and delivered.

³⁰ *Ibid.*

³¹ *Ibid.*

³² *Ibid.*

Meanwhile, Nadir also owes monies to creditors in Erewhon. One Erewhon creditor obtains a court winding-up order against Nadir in Erewhon and a liquidator is also appointed by that court.

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]

Assume the UNCITRAL Model Law on Cross-border Insolvency has been adopted by Utopia without modification, except as required to domesticate it. For example, the Cross-border Insolvency Act of Utopia names its local laws relating to insolvency and its competent court under the Act. The Erewhon liquidator's investigations detect that Apex is suing Nadir in Utopia. The liquidator would like to stop Apex court action against Nadir in Utopia. Advise the Erewhon liquidator on the potential relevance of the Cross-border Insolvency Act of Utopia.

[My advice to the Erewhon liquidator on the potential relevance of the Cross-Border Insolvency Act of Utopia is as follows:

Since the Cross-Border Insolvency Act of Utopia has adopted the UNCITRAL Model law, the Model Law will be the law to regulate the insolvency proceedings in Utopia. The relevance of the Cross-border Insolvency Act of Utopia is to the effect that by the said adoption of the Model Law, Erewhon Liquidator cannot stop Apex Court's action against Nadir in Utopia as the model law made provision to facilitate co-operation and co-ordination of concurrent proceedings with respect to the Nadir's assets located in Erewhon. Meaning that Apex court's action in Utopia can go on concurrently with the Erewhon Liquidation's action in Erewhon as the second proceeding while the proceeding in Utopia is the main proceeding³³.

By Chapter IV of the Model Law, as adopted by the Cross-border Insolvency Act of Utopia, and which recognises cooperation and direct communication between a local court and foreign courts or foreign representatives, the Erewhon Liquidator can cooperate and directly communicate with Apex representative and agree on the best approach to protect the creditors in both Erewhon and Utopia and maximise the value of the assets of Nadir. Once an agreement is reached the courts of Erewhon and that of Utopia can under Article 25 and 26 of the Model approve and Implement the agreement concerning the coordination of proceedings under Article 27 (d) of the Model Law.

The MLCBI is significant for its provisions on recognition and relief in 4.1. Its provisions on cooperation and coordination are secondarily important as the liquidator is primarily seeking advice about staying court proceedings in Utopia.

2.5

Question 4.2 [maximum 2 marks]

Would it make any difference to your answer in question 4.1 in the following two alternative scenarios to Apex suing for its debt?

- (a) Apex had filed proceedings to wind-up Nadir, but the matter had not yet been heard.
- (b) Apex had obtained a court order to wind-up Nadir in Utopia prior to the Erewhon winding-up order.

³³See generally, INSOL Module 2A Guidance Text *supra* note 21, pp 43-44.

[(a) Yes, it will make a difference to my answer in question 4:1 in the two alternative scenarios with Apex suing for its debt as follows:

Where Apex had filed proceedings to wind-up Nadir but the matter had not yet been heard, the UNCITRAL Legislative Guide, a component of the Model Law will apply to discourage and discontinue the continuation of the Apex proceedings to wind-up Nadir even if, already filed, but yet to be heard. The assumption is that since insolvency law establishes a collective debt collection process. It is essential under the Legislative Guide to discourage individual creditors from continuing with individual debt enforcement measures as from the commencement of an insolvency proceeding.

Therefore, upon the commencement of the insolvency proceeding by the issuance of the winding-up order by the Erewhon Court and the appointment of the Erewhon Liquidator, the Apex filed proceedings to wind-up Nadir, yet to be heard, which is an individual creditor debt enforcement, will be abate under the UNCITRAL Legislative Guide.

- (b) Where Apex had obtained a court order to wind-up Nadir in Utopia prior to the Erewhon winding-up order, that proceedings under the Legislative Guide will be made subject to investigation to prevent fraud, favouritism, loss of value of Nadir's assets etc., and where it is revealed upon investigation that there is evidence of fraud in the proceedings leading to the court order, or favouritism etc., the Erewhon liquidator can apply to set aside the proceedings and recover any benefit received by the beneficiary and pay same to Nadir's estate. The power of the Erewhon liquidator to set aside the proceedings for certain fraudulent transactions is also recognised under the UNCITRAL Legislative Guide.]

Apply the MLCBI provisions on concurrent insolvency proceedings (see Article 29)
.5

Question 4.3 [maximum 8 marks]

NB: This question is not related to Questions 4.1 and 4.2

A court has ordered the commencement of an insolvency proceeding against a corporate debtor in the State of its incorporation and head office. The company has operated business in a number of States and has assets (real property or interest in land, other tangible assets and intangible assets); creditors (including taxation / revenue authorities) and directors in several States.

Select a country for the company's incorporation and, based on the insolvency laws of the country you select and the brief facts provided, describe four key international insolvency issues facing the insolvency representative in this scenario. For each issue, what domestic laws or international instruments apply to assist the insolvency representative address these four issues?

[My choice of country for the company's incorporation is the United Kingdom, and based on the insolvency laws of the United Kingdom and the brief facts provided, the four key international insolvency issues facing the insolvency representative in this scenario are:

- (1) The issue of access of foreign insolvency representative to local courts of other States where the insolvent debtor company also have assets. Under this issue, prior to "Brexit" the European Union Regulation on Insolvency EC 1346/2000 which later became a recast EU 2015/848, regulated Cross-border insolvency proceedings in the

United Kingdom being an EU member State. Under the regulation, where a company has its centre of main interest in the United Kingdom, any appointment made prior to “Brexit” will be recognised automatically in all EU member States and the insolvency representative will be able to exercise all powers, subject to certain exceptions. Where the company has an establishment in another member State, it is permissible for secondary proceedings to be commenced in that member State and assets belonging to the company in that other member State can be protected for the benefit of creditors in that other member State as in this scenario.

However after “Brexit”, that is, from 11pm UK time on 31 December, 2020, where a company has its centre of main interest in the UK, as in this scenario, only the United Kingdom will have the jurisdiction to open main insolvency proceedings. The EU Regulation is no longer applicable to the UK insolvencies after the “Brexit”.

The applicable law after “Brexit” in respect of Cross-Border insolvency in the United Kingdom is now the Model Law which has been adopted with only minor amendments by the UK Cross-Border Insolvency Regulation 2006 SI 2006/1030 (CBIR). Under the law, the UK Insolvency Representative can facilitate cooperation and coordinated insolvency proceedings in other States’ local courts by direct communication to the court or insolvency representative of the other States.

- (2) The second issue, is the issue of recognition of foreign insolvency proceeding in the States where the debtor company has assets. The United Kingdom has been said to have six potential legal regimes that operate in cross-border insolvency situations:

“The first is the common law, which enables courts to provide assistance to foreign insolvency proceedings. English courts are authorised to act as they would in domestic insolvency proceedings. The second regime is provided by ... Section 426 of the insolvency Act 1986, which authorised the courts to provide assistance to designated Countries in respect of proceedings commenced in those jurisdiction... The third regime is offered by the Cross-Border Insolvency Regulation, 2006 (UK). This legislation enacted the UNCITRAL Model Law which enables the recognition of foreign proceedings. Fourth, is the Foreign Judgements (Reciprocal Enforcement) Act, 1933 (UK) which applies to the Enforcement of foreign money judgements from seventeen designated Countries. Fifth, the European Council Regulation (EC) 1346/2000 on insolvency proceedings (Insolvency Regulation) applies when the debtor’s centre of main interest is in the European Union and trumps other regimes when its scope of application is triggered. Finally, there is the European Economic Area Directives on the winding-up and reorganization of Credit Institution and Insurers”³⁴

- (3) The third issue, is the issue of local relief or order for the protection of the assets of the debtor company in other States. The relief principle applies to three distinct situations. Interim relief may be granted to protect assets within the jurisdiction of the receiving court where an application for recognition is pending. Automatic relief applies if a receiving court recognises the foreign proceedings as a main proceeding. Finally, discretionary relief is available, in addition to automatic relief, in respect of main proceedings as well as recognised non-main proceeding³⁵. Under Article 19 of the Model Law which has been adopted in the United Kingdom, from the time of filing an application for recognition until the application is decided upon, the court may, at the request of the insolvency representative, where relief is required to protect the assets

³⁴ See, Gopalan and Guihot *supra* note 6, pp 1259-1260; As at 1st January, 2020 EC Regulation 1346/2000 no longer apply in the UK due to the effect of “Brexit”.

³⁵ Deane, Felicity and Mason, Rosalind, *The UNCITRAL Model Law on Cross-border Insolvency and the Rule of Law*, International Insolvency Review, (2016) 25(2), p. 13.

of the debtor or the value of the assets of the debtor for the interest of the creditors, stay execution against the debtor's assets or entrust the administration or realization of all or parts of the debtor's assets located in the foreign State to the insolvency representative or another person designated by the court³⁶.

Prior to 'Brexit', the issue on reliefs automatically apply to the European Union States, and United Kingdom being a member of the European Union, can apply under the European Council Regulation 2000 to stay execution against the assets of the debtor in several States of the European Union.

Post "Brexit" insolvency regulations in the United Kingdom no longer supports the automatic relief for stay of execution of the debtor's assets in other member States of the European Union. Any relief may now be granted under the United Kingdom "post Brexit" insolvency regulations pending the recognition of the insolvency proceedings by direct application to the local court of the States where the assets are located and recognition is sought.

- (4) The fourth issue, is the issue of seeking cooperation with the local courts of other States for a fair and efficient administration of the debtor company's assets in the various States with a view of maximising benefits to creditors. This issue of cooperation between the Home State and the foreign court in international insolvency proceedings is relevant to protect creditors interest in the administration of debtor's assets in other State. Under Article 25 of the Model Law an obligation is placed on the courts of the United Kingdom and the foreign representatives in different jurisdictions to communicate and cooperate to ensure that a debtor's insolvent estate is administered fairly and efficiently to maximise value of the assets for the benefit of the creditors in the various States where the assets are located.]

This is a satisfactory response. For an approach more closely applied to the facts, and other key issues, see the 'Model' Answer for four key international insolvency issues raised by the facts and facing the insolvency representative in this scenario.

5.5
Marks awarded 8.5 out of 15
MARKS AWARDED 39.5/50

*** End of Assessment ***

³⁶ See, UNCITRAL Model Law on Cross-Border Insolvency Law, Art. 15 (1) (a) and (b).