INSOL INTERNATIONAL
FOUNDATION CERTIFICATE
IN INTERNATIONAL INSOLVENCY LAW

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).

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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.

Mark awarded 5 out of 10

QUESTION 2 (direct questions) [10 marks]

Question 2.1 [maximum 2 marks]

Explain what the term "international insolvency law" means.

International insolvency is founded upon the occurrence of an issue bearing a distinctly foreign aspect, which in turn has a bearing on the domestic insolvency proceeding.

More detail would have improved the mark awarded for this sub-question.

1

Question 2.2 [maximum 5 marks]

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

Universalism is a single unified system of insolvency based on a singular proceeding to solving transnational insolvencies. It has been described as a "unitary bankruptcy proceeding in a bankrupt's 'home' jurisdiction that applies universally to all the bankrupt's assets and which receives worldwide recognition."[1] Thus applying this principle, a single insolvency proceeding would collect, administer and distribute the debtor's assets wherever in world they may be situated.

Universalism bears the following characteristics:

[1] G McCormack, "Universalism in Insolvency Proceedings and the common law" *Oxford Journal of Legal Studies*, Summer 2012, Vol. 32, No. 2 (Summer 2012) pp. 325 – 347 available online at https://www.jstor.org/stable/41682781. Accessed 14th September 2021.

- There is a single geographical locus meaning only one court has jurisdiction.
- Jurisdiction is founded upon the debtor's/liquidated company's centre of main interests ("COMI").
- The applicable law governing the proceedings in the said jurisdiction will be where the insolvent has his/it's COMI.
- There is therefore a single unified proceeding involving all creditors who are in different countries under one law.
- The application of a single system of law defined by the law applicable to where COMI is situated therefore applies to international creditors i.e the law has extra-territorial application.
- All the assets of the insolvent/liquidated company are therefore dealt with by one court in the same single proceeding.
- One office-holder is appointed to deal with all the assets.

Territorialism on the other hand is a restrictive approach which favours the protection of local creditors over foreign ones and by implication the subversion of international creditors over the national interests of local creditors.

The characteristics of Territorialism are:

- Separate local proceedings in each country where the insolvent's/liquidated company's assets are located.
- In turn, a multiplicity of concurrent proceedings against the insolvent in each country where proceedings are opened.
- In turn, a multiplicity of office-holders in each separate country.
- The multiplicity of proceedings in which assets may be present in one country and not in another can mean that the insolvent/liquidated company is declared insolvent in one country but not the other.

Both Universalism and Territorialism have been diluted to some extent by Modified Universalism and Co-operative Territorialism.

5

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 Kingdom of Saudi Arabia, the UAE and Bahrain have introduced legislation creating the framework for formal insolvency processes, which laws were previously "outdated and unworkable."[2] The legislation draws upon widely accepted principles of global restructuring.

For example, international instruments such as the UNCITRAL legislative guide, and the restructuring procedures in Chapter 11 of the US Bankruptcy Code have been heavily imported in debtor-led and court-supervised preventative compositions (adopted to compromise claims with creditors prior to insolvency). The laws also make room for the evolving post-insolvency rehabilitation processes such as 'restructuring in bankruptcy' in the UAE and 'financial reorganisation' in the KSA.

[2] R Hall *et al* "United Arab Emirates: Shifting Sands: Insolvency And Restructuring Law Reform In The Middle East" *Mondaq* available online at https://www.mondaq.com/insolvencybankruptcy/179356/shifting-sands-insolvency-and-restructuring-law-reform-in-the-middle-east. Accessed 4th October 2021. See also: S K, G. (2018). Bankrupting financial stress: New bankruptcy law of saudi arabia. Court Uncourt, 5(7), 36-37.

UAE has in 2016 passed the UAE Bankruptcy Law 9 of 2016 which is applicable to corporate entities, excluding financial institutions and those enacted under the economic free zones specifically, the Dubai International Financial Centre ("DIFC").

The DIFC passed the DIFC Insolvency Law 1 of 2019. The Act is based on UK law and allows States with no nexus to the UAE to opt-in to its jurisdiction. It further offers the benefit of enforcement of the US District Court for the Southern District of NY. However, the DIFC has no laws providing for administration.

The Abu Dhabi Global Markets "ADGC" was formed in 2015 and also allows opt-in jurisdiction. Unlike the DIFC, the ADGC provides for administration; and it explicitly endorses the UNCITRAL legislative guide, making it easily adaptable as the springboard for transnational insolvencies.

Arising from the Covid-19 pandemic, the UAE enacted further changes to the bankruptcy law in November 2020 to introduce specific protections in 'emergency situations.' To qualify for exemption from the immediate commencement of bankruptcy proceedings, the debtor must meet the threshold requirement of proving quantifiable damage to its operations, caused by the emergency.[3]

Bahrain passed the Reorganizing and Bankruptcy Law (Bahrain No 22/2018) which replaced the Bankruptcy and Composition Law 11 of 1987 and the Commercial Company Law 21 of 2001.

3

Marks awarded 9 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 commencement of insolvency proceedings has the effect of imposing a moratorium on legal proceedings both for natural persons and corporations.

The principle of *pari pasu* remain the same for both categories, as well as investigative procedures concerning voidable transactions.

For natural persons, this prevents harassment of the insolvent by debtors, and allows the insolvent to make a fresh start. The insolvent can reduce his indebtedness by making structured repayments thereafter with due regard to his personal circumstances. It is a specific requirement of the EU JudgeCo Guidelines of 2015 under para Principle 3.2 that the debtor's interests be considered (along with the parties) in accordance with the national laws in place, within the matrix of the international character of the matter at hand.

For companies, the commencement of insolvency creates a breathing space for the company to examine whether the business or parts of it can be preserved.

[3] HM Hanif and T Faqir, "Restructuring in the Middle East: Developments in the UAE and KSA" available online at https://www.lexology.com/library/detail.aspx?g=e582c45e-80d0-44f7-b6a2-d18b0a33d358. Accessed 4th October 2021.

This answer displays a satisfactory understanding of the issues. To improve your responses, ensure they are commensurate with the mark allocation – while Q 3.1 asks for a brief note, it is for 5 marks.

3.5

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.

There are three main issues[4] which arise when dealing with differences in legal systems:
Which forum to commence proceedings in?
Under which laws? And,
The position of the recognition of the office holder, and effect accorded to foreign proceedings.

Where parties can agree on the law governing their contract and dispute resolution, they are restricted in the applicable law governing insolvency where the insolvency laws of the insolvent and creditor are different, for example, where one of the parties is not a party to the UNCIRAL *Model Law on Cross-Border Insolvency*.
An insolvent may have creditors in more than one jurisdiction which allow each creditor of that jurisdiction to open separate proceedings. Each jurisdiction may have different laws which can unpredictably change the contractual agreement or its intended effect.
So,where an insolvency proceeding arises in more than one nation State, the fundamental issue arising is in which nation state to proceed in – the choice of forum.

To some extent, the "rules on insolvency in most jurisdictions are in fact inextricably interwoven with the rules in many other areas of law, particularly property law, but also status, employment, remedies, and so on. Any major changes to insolvency law, including the rules on the treatment of insolvencies with an international element, have repercussions for other such areas of the law.."[5]
This is because insolvency law concerns "key interests at stake, which have been described as practicalities like "the price paid for credit, who gets what; whether local priorities should be respected, the emphasis given to restructuring and debtor rehabilitation over liquidation, and how to achieve the most efficient economic use of asset.[6]
National interests differ, depending on whether one adopts a pro-creditor or pro-debtor approach to insolvency. For example, national interests in a socialist system dictate that employee rights are considered paramount over the rights of secured creditors, such as occurs in France. National interests can therefore play a part in determining the distribution of assets and their order of preference. By way of another example, the UK legal system adopts a floating charge mechanism, which is generally not applied in other legal systems.

In considering an appropriate forum, the recognition and effect accorded to foreign proceedings in the same matter, and the choice of law cannot be divorced from the site of the forum. The application of foreign law to contractual obligations affect the choice of forum, as well as the law applicable to contract.
Property interests in different nation States attract different financial implications.

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[4] For insolvency issues as they relate to public international law see A Rajput (2018). Cross-Border Insolvency and Public International Law. Romanian Journal of International Law, 19, [7]-[32].
[5] D McKenzie, (1996) "International Solutions to International Insolvency: An Insoluble Problem?" *University of Baltimore Law Review:* Vol. 26: Iss. 3, Article 4. Available at: http://scholarworks.law.ubalt.edu/ublr/vol26/iss3/4.
[6] McCormack note 1 above at p 3.

Further detail would be beneficial. For example, consideration of Westbrook's 9 key issues.
4

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.

Multinational bodies such as regional groupings of nations and inter-governmental bodies have contributed to a sense of standardization of legal processes across the region from as far back as the Nordic Convention on Bankruptcy in 1933. In 1970, the Council of Europe, then comprising 47 member states created the EC Convention on Bankruptcy and Related Matters.
Through the assistance of the IBA, an early attempt to procure a multinational treaty in the furtherance of the harmonization of laws resulted in the Model International Insolvency Cooperation Act (1989)). In 1997 it further drafted a Model Bankruptcy Code in 1997 but this project did not come to fruition and was later usurped by the UNCITRAL project.

In the early 1990s UNCITRAL developed a Model Law on cross-border insolvency. The UNCITRAL Legislative Guide on Insolvency Law came later in 2004 and together with the Word Bank Principles for effective insolvency and debtor/creditor regulations of 2000, have set the foundation as the best 'soft law' guide to be followed in transnational insolvencies and has fast grown momentum across nation States.

In 2000 the EU Insolvency Regulator (EIR) came into effect and has recently been amended in 2017 (the EIR Recast). In 2010 by the EU produced a report on the harmonization of insolvency laws across the EU so as to create legislation belonging to a supra-national body.

(The attempts to harmonize legislation through regional and multinational instruments produced a parallel process in which practical issues such as communication guidelines and rules as between transnational courts came to the forefront.
The IBA attempted to coordinate rules for practitioners and to this end it developed the Cross-border Insolvency Concordat in 1996.
In 2000, the American Law Institute produced the ALI NAFTA guidelines applicable to Court-to-Court Communication in cross-border cases.
INSOL has consistently strived to progress the harmonization of its regional laws, first creating non-binding rules and a Draft Protocol for international insolvencies in 2007, and thereafter in 207, has partnered to create a Joint Working Group to review these guidelines.
In 2015 the EU JudgeCo guidelines reflecting communication guidelines between courts in EU member states came into being.
Arising out of the Judicial Insolvency Network (JIN) conference of 2016, the JIN Guidelines and JIN Modalities were produced and are fast being adopted around the world.
The American Law Institute has produced the ALI-III Guidelines applicable to Court-to-Court Communication in Cross-border cases and UNCITRAL, a practice guide on Cross-Border Insolvency Agreements).

Review and redrafting is a consistent process globally, as a result of trying to keep up with the rapid-moving exchange of commercial activity and it is expected that a refinement of the guidelines and rules will be an ongoing process.

REFERENCES:

1. L Tuleasca (2011). The Harmonization of the European Laws on Insolvency. Lex ET Scientia International Journal, 18, 144-161.

2. F Deane, & R Mason (2016). The uncitral model law on cross-border insolvency and the rule of law. International Insolvency Review, 25(2), 138-159.

What is your opinion on how much impact these are likely to have in addressing international insolvency issues? Elaboration is warranted.

3.5
Marks awarded 11 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.

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.

The Cross-Border Act of Utopia is a piece of legislation enacted under the UNCITRAL *Model Law on Cross-Border Insolvency* (the "Model Law").

Adopting the Model Law, the Act emphasises the principle of COMI – Centre of Main Interests, as the place of the proceeding which is "expected to have principal responsibility for managing the insolvency of the debtor regardless of the number of States in which the debtor has assets and creditors, subject to appropriate coordination procedures to accommodate local needs."[7]
In short, the debtor's COMI determines the most appropriate jurisdiction to solve the insolvency issue.
Applying the principle of COMI to the facts at hand, Nadir does not have its COMI in Erewhon but in Utopia.

However, enacting *Art.* 9 of the Model Law would provide for the entitlement of a foreign representative to apply directly to a court in Utopia for recognition.

[7] UNCITRAL Model Law on Cross-Border Insolvency with Guide to Enactment and Interpretation.

And, In *Art. 15*, a foreign representative may apply to the court for recognition of the foreign proceeding in which the foreign representative has been appointed, meaning that the liquidator in Erewhon can apply to the court in Utopia for recognition.

Applying *Art 17(b)* read with *Art 2(f)*, the Erewhon proceeding shall be recognized by Utopia as a foreign non-main proceeding, as Nadir's COMI rests in Utopia, making Utopia the seat of the main proceeding.

The Utopian Court can grant any "appropriate relief"[8] including placing a moratorium of individual actions and executions subject to the provisions of *Art. 22* which protect the subversion of rights of creditors.
So, the liquidator may possibly succeed in staying the action, at least temporarily, until cooperation has commenced.

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.

(a) No. The filing of proceedings commences the liquidation of Nadir.
(b) Yes. In this situation, the appointment of a liquidator in Erewhon does not come to fruition since no application exists creating an insolvency in Erewhon. It is the foreign representative in the main proceeding – Utopia who apply in Erewhon for recognition.

Refer to Article 29 on concurrent insolvency proceedings, under which the local proceedings in Utopia maintain pre-eminence over the foreign proceedings in Erewhon.
.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?

A. COUNTRY OF INCORPORATION

[8] *Art 21* of the Model Law.

I have selected the UK as the place of incorporation and head office of the debtor. The commencement of the insolvency proceeding is after the 31st December 2020; consequently, and for purposes of this question, the EU Regulations are not applicable.

B. ISSUES

The insolvency representative faces the following four issues, as encapsulated in the UNCITRAL *Model Law on Cross-Border Insolvency* (the "Model Law"):

1. Access:
The insolvency representative has to prove his/her *locus standi* to obtain access to the local court.

2. Recognition:
The insolvency representative has to apply for recognition of its judgment, for it to be recognized as the main judgment, by the local court.

3. Cooperation:
The insolvency representative will require cooperation by local courts in which the foreign judgment has been recognized as the main proceeding. How will assets be distributed, and according to whose laws?[9]

4. Relief:
The insolvency representative's objective is to obtain relief by a court order allowing the representative to deal with the Company's assets and creditors, in the foreign jurisdiction, subject to the laws of the judgment in the main proceeding.

C. LAWS

Domestic laws

The following insolvency domestic laws are applicable:

- *The Insolvency Act*, 1986.
- *The Companies Act,* 2006
- *The Cross-Border Insolvency Regulations* 2006 SI 2006/1030 (CIBR).
- *The Corporate Insolvency and Governance Act*, 2020.
- *The Foreign Judgments (Reciprocal Enforcement) Act, 1993*

International Instruments

The international instruments applicable include:

- *Art.* 15 (recognition), Chapter II (access), *Art.* 19 (relief) and Chapter IV (cooperation) of the *UNCITRAL Legislative Guide on Insolvency.*
- *The Practice Guide on Cross-Border Insolvency Regulation*.

[9]J Townsend, "International Co-operation in Cross-Border Insolvency: HIH Insurance" *The Modern Law Review* Sep., 2008, Vol. 71, No. 5 pp. 811-822

- *UNCITRAL Model Law on Recognition and Enforcement of Insolvency-Related Judgments*, with guide to enactment (MLIJ) 2018.
- *UNCITRAL Model Law on Enterprise Group Insolvency* with guide to enactment, 2019 (MLEG)
- The Guidelines for communication and cooperation between Courts in Cross-border insolvency matters (the "*JIN"* guidelines).
- Modalities for Court-to-Court Communication (JIN Modalities).

D. APPLICATION

The insolvency representative desires to bring a cross-border insolvency proceeding in various States. This is known as an "outward-bound" request. The representative therefore requires access in terms of *Art. 5* of the *Model* Law for authorization to access local courts as a representative of foreign insolvency proceedings in states in which the *Model Law* has enacted domestic legislation which is in force.
Once the representative obtains an English judgment of insolvency and wishes to enforce that winding-up order in any one of the previous EU Member States other than Greece, Russia, he will have to follow the local laws of that State relating to cross-border insolvency.
The insolvency representative may make use of *MILJ* and *MLEG* in requesting access and recognition.

Once access and recognition have been obtained, in terms of the *Companies Act, 2006* the UK has jurisdiction to wind up a foreign company provided the company has its head office and place of incorporation in the UK.
Provided the UK has entered into an agreement with a state as under the *Foreign Judgments Act, 1993, and* should a judgment have already been entered against the Company in that State, the UK will recognize it and enter it as a judgment of the English Court.

Ar. 28 of the Model Law regarding cooperation, allows the commencement of local proceedings subject to the recognition of the main judgment.
The *JIN Guidelines* and *Modalities in Court-to-Court Communication* should assist the insolvency representative in this regard.
Applying section 426 of the *Insolvency Act*, 1986 the UK is cooperative in its efforts to assist foreign courts, by applying its own laws or the laws of the foreign State in obtaining relief, but the section is limited to certain jurisdictions which have entered into agreements with the UK. This section may assist the insolvency representative in his efforts to collect and distribute assets in those jurisdictions in which section 426 is enforceable.

The insolvency representative should be guided by the Practice Guide and more recent international instruments in his/her quest for relief.

For another approach that is closely applied to the facts, see the 'Model' Answer for four key international insolvency issues raised by the facts and facing the insolvency representative in this scenario.

4.5
Marks awarded 10 out of 15
MARKS AWARDED 35/ 50

*** End of Assessment ***