



## 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 8 out of 10

### QUESTION 2 (direct questions) [10 marks]

#### Question 2.1 [maximum 2 marks]

Explain what the term "international insolvency law" means.

[ Set of rules and that can be enforced in cross-border insolvency of a corporation or an individual that transcends a single domestic legal system. This would be achieved through establishing the jurisdiction of the international insolvency proceedings, application of the law to be applied and the enforcement of the orders of the proceedings in multiple States.

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#### Question 2.2 [maximum 5 marks]

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

- [
1. Jurisdiction – Universality approach allows for one State where the insolvency proceedings to be opened is where the centre of the debtor's interests is located as opposed to Territoriality bases its premise that proceedings may be initiated in every State where debtor has assets.
  2. Assets – Under Universality all the assets of the debtor are to be included whereas in Territoriality assets are restricted to the territory or within the State.

3. Creditors – Universality allows for creditors worldwide to participate in the proceedings and their claims to be treated on an equal basis. However, Territoriality restricts the claims to creditors within the State confines.
4. Costs – Universality approach argues for lower insolvency related costs whereas Territoriality populates multiple insolvency proceedings leading to higher costs.
5. Choice of law – Territoriality subjects the proceedings to the local legal systems and mostly Civil Law countries advocate for it. Universality proposes the law to be of the State where the centre of the debtor's interests is located and Common Law countries are more aligned to it.

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**There is scope to address recognition and effect in that for example, with universalism, recognition and effect requires that other States recognise that one set insolvency proceedings (that all agreed is the appropriate jurisdiction) and recognise it as having extraterritorial effect in their States.**

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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.

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In Middle East region, UAE in 2016 and 2019, Saudi Arabia in 2018 and Dubai in 2019 reformed their domestic insolvency laws. The salient features of the developments were:

1. UAE – The Federal Law on Bankruptcy was decreed in 2016. Its objective is to identify ways to avoid bankruptcy and liquidation of debtor assets including out-of-court restructuring and compositions. The law is applicable to Commercial Companies, Government Companies, Companies established in free zones. The 2019 law was extended to debtors who were not subject to the provisions of law of 2016.
2. Saudi Arabia – Adopted the bankruptcy law in 2018 to give boost to credit growth to the SME sector. The main objectives of the law are to support distressed debtor to financial restructure, recognising creditor rights, to ensure fair treatment to creditors, and to maximise the value of assets.
3. Dubai – Insolvency laws were enacted in 2019 with the objective of balancing the interest of stakeholders in the context of distress and bankruptcy. The new law is pro-debtor oriented and provides for administration process where there is evidence of mismanagement or misconduct.

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**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.

[ Individual insolvency involves natural persons as against corporate insolvency involves artificially created legal persons. The difference in objective of the two types of insolvencies can be observed as follows:

1. Protection – Individual insolvency focusses on the personal aspects of insolvency of those individuals who are not engaged in significant business activity such as traders, merchants, and therefore issues such as collective insolvency proceedings and personal privacy are of importance. Companies are subjected to collective insolvency proceedings.
2. Social v. Economic consideration – Individual matters relating to social, political and cultural issues that present too many differences to be treated uniformly such as counselling, financial education, social welfare and family & housing policy. In contrast Company insolvency consideration is purely economic in nature.
3. Preserving business – The primary objective of Company Insolvency is to Rescue the business wherever possible. Rescue may involve restructure of debt that could entail fresh credit whereas insolvency of individual limits their contractual capacity to obtain new credit.
4. Reduce indebtedness, Excluded assets, Future income – Individual insolvency focusses on the human element in providing protection against financial tragedy by offering an incentive to engage in income producing activities, to maintain self & dependents and to keep alive the entrepreneurial spirit. Whereas Companies may shut down their business where there is no possibility of debt restructure for continued productivity.
5. Dissolution vs. Fresh Start – Individuals cannot be “dissolved” after their bankruptcy proceedings as in the case of dissolution of a company after its business is wound up or liquidated. Individuals are provided an opportunity make a fresh start by discharge of their debts. Companies cannot be rehabilitated but are liquidated and dissolved.

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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.

[ Numerous difficulties are faced in matters involving cross border insolvency primarily on account of non-existence of global insolvency law system and a global court. Some simple problems experienced are with regard to non-standard insolvency terms and their definition. Other issues are with conflict of laws, jurisdiction and enforcement of orders. Harmonisation of laws will continue to remain a problem on reasons of domestic compulsions of States.

The several differences in domestic law systems of States are:

1. To establish common test of insolvency since the terms may have different meanings in separate jurisdictions;
2. Some legal systems are pro-creditors whereas others are pro-debtor;
3. Failure to recognize of foreign proceedings and foreign representatives as there is no single, unified piece of bankruptcy legislation covering all aspects;
4. Commencement of insolvency could be crucial as some systems may recognize informal process of opening the process (by way of resolution) whereas in other State

it could through a formal court order. Many aspects of insolvency are determined from the time of commencement;

5. Liabilities imposed on the directors and officers of the debtor differ in States as per their domestic laws;
6. Some States enact separate legislations for Individual Insolvency and Corporate Insolvency although most legal systems apply the same principles;
7. Administration of debtor estate by in some States is regulated by an Insolvency Regulator and in some through Courts. This may impact matters of Co-operation and Co-ordination among legal systems.
8. Hardships to foreign creditors and disparity in claims treatment between foreign and domestic creditors. Different payment preferences in States on account of security treatment and priorities;
9. Non-standardisation of terms, rules and treatment of reorganisation plans in separate jurisdictions;
10. Separate terminology for detrimental acts or avoidance transactions and State preference for out-of-court settlements;
11. States may allow Executory contracts and/or termination of contractual rights, however some States may have special rules to specific types of contracts like lease, employment contracts, etc.;
12. Legal systems may differ in their treatment of pre-commencement and post-commencement of set-offs;
13. Separate treatment of director responsibilities, and
14. Treatment of group businesses as single entity in certain legal systems.

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### **Question 3.3 [maximum 5 marks]**

What multilateral steps have been taken in the 21<sup>st</sup> 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.

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To address international insolvency issues, differences in domestic laws of States are being ironed out through international instruments. Several initiatives have been made by States and inter-government bodies to suggest legislative guidance or model laws so as to harmonise domestic laws of separate States in order to impact international insolvency. These initiatives primarily have been in the nature of regional grouping of States those have drafted treaties and conventions or through multi-lateral agencies such United Nations Commission on International Trade Law (UNCITRAL) and World Bank who have promoted soft laws on international insolvency issues or through professional bodies such as International Bar Association and INSOL International for their advocacy in solving the issues.

The UNCITRAL Legislative Guide on Insolvency Law was promulgated in 2004 as a reference for national authorities to prepare their domestic insolvency laws. Consequently UNCITRAL has recommended the enactment of the Model Law on Cross-Border Insolvency in continuation to its Legislative Guide. The World Bank has produced guidelines, Principles for Effective Insolvency and Creditor / Debtor Regimes and the same was revised severally and as late as April 2021. These guide materials form the best practice standards for insolvency regimes.

The European Union has published reports for harmonisation of domestic laws and towards this objective their stated Action Plan on Building Capital Markets Union, the EC laid stress on convergence of insolvency and restructuring proceedings for cross-border investors. The EU

also passed a Council Regulation on Insolvency Proceedings (European Insolvency Regulations) for cross-border insolvency.

The Latin American States have achieved cooperation through multilateral agreements by concluding general treaties on private international law and commerce. The Montevideo Treaties of 1889 and 1940 and the Havana Convention on Private International Law 1992 are most long-lasting agreements.

The Nordic Convention in 1993 between Denmark, Finland, Iceland, Norway and Sweden associated for mutual benefits by stating common law in treatment of cross-border insolvency.

Professional bodies such as International Bar Association drafted the Model Bankruptcy Code that later made contributions to the text in the UNCITRAL project.

Commonly the above initiatives aimed at achieving the following objectives:

1. Harmonisation of domestic insolvency laws;
2. Uniform choice of law
3. Uniform recognition laws
4. Cooperation and co-ordination to promote recognition and enforcement

Adoption of UNCITRAL Model Laws and Principles promoted by World Bank have found adoption around the Globe as these institutions require bankruptcy reforms as pre-conditions of loan support. Presently the Model Laws have been adopted in 49 States<sup>1</sup>.

In my opinion, in a global trade environment inter-dependency is paramount as a result of market reach-out, supply-chain linkages and financial markets, these multilateral agencies initiatives will become the driving force for achieving common ground for States that essentially serve their domestic interests. There will be States that shall be bound by the regional trade treaties, some to improve their ranking in World Bank Doing Business Report, some on account of international financial aid / loan support and yet others to invite global investments from multinational corporations.

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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.

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]**

<sup>1</sup> [https://uncitral.un.org/en/texts/insolvency/modellaw/cross-border\\_insolvency/status](https://uncitral.un.org/en/texts/insolvency/modellaw/cross-border_insolvency/status)

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.

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The Liquidator need not stop the proceedings as the Model Law allows for concurrent proceedings and recognition of foreign insolvency representative. However the Law provide for putting together workable structure to maximise value, minimise expenses and judicial conflict in these concurrent proceedings. The information required to advise the Liquidator would be:

1. Date of commencement of insolvency in Utopia would become critical. Model Laws do not require reciprocity. **It's good you recognise there is no need for reciprocity.**
2. Under what provisions of the domestic law that allows direct communication with the competent local court for cooperation and coordination in insolvency proceedings. Working structure to treat claims and administer the estate of the debtor in Utopia.
3. Will the judicial pronouncements of Erewhon Court be enforceable in Utopia Court or judicial forum? Model mandates enforceability of judicial decisions of one court in a State to court in another accepting State.

**]See the model answer. A stay should be considered.**

**3.5**

#### **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 competent Court in Utopia would need to co-operate and co-ordinate with the Liquidator and recognise as a foreign insolvency representative.  
(b) Yes. Insolvency has commenced prior to commencement order in Erewhon proceedings. Liquidator shall place his claim with Insolvency officer in Utopia.

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**It would be beneficial to refer to Article 29 on concurrent insolvency proceedings, under which the local proceedings in Utopia maintain pre-eminence over the foreign proceedings in Erewhon.**

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#### **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?

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India is the country of incorporation and head office for the debtor. The National Company Law Tribunal under the Insolvency and Bankruptcy Code are the Adjudicating Authority. The key issues dealt with are:

1. Moratorium – On admission of the debtor to insolvency, i.e. the date of commencement of insolvency, moratorium is declared by the Adjudicating Authority. No action can be brought upon the debtor by third party in the territory under Indian jurisdiction. However, the same is not applicable to proceedings in other States unless India has treaties or cross-border agreements with those States. The insolvency professional shall make an appropriate application to the Adjudicating Authority for a letter of request to stop such action. In State, that has adopted UNCITRAL Model Law, local courts are mandated to cooperate with foreign insolvency courts without reciprocity.
2. Claims from domestic and foreign creditors – There is no differentiation made between foreign or domestic creditor under the Indian Law. However classification is done on basis of secured and unsecured creditors and between financial and operational creditors. The foreign creditor may claim higher in the priorities of payments leading to judicial conflict. Further, in some States, Set-off and mutual credits within the same party may be allowed. The Indian law does not allow for it under the insolvency process but is allowed under the liquidation process for the debtor that follows where rescue is unsuccessful. The insolvency professional apply to the Court for adjudication.
3. Assets – Assets owned by the Indian debtor are physically located in another State and subject to security charge of the foreign creditor in that State. The Indian law allows for the asset to be part of the estate but foreign creditor with lower priority charge may not give up claim. If the foreign state does not have recognised treaty with India, the asset may become “not so easily realisable” and may not form part of the resolution plan. The insolvency professional shall make an appropriate application to the Adjudicating Authority for a letter of request to stop such action. In State, that has adopted UNCITRAL Model Law, local courts are mandated to cooperate with foreign insolvency courts without reciprocity.
4. Group businesses – Business in other States being run under subsidiary and / or group companies. The Indian law provides for insolvency of individual businesses. Where the foreign subsidiary or associate company are insolvent in a State that has no reciprocal arrangements with India, the insolvency professional will experience difficulties in coordinating the proceedings. The insolvency professional shall make an appropriate application to the Adjudicating Authority for a letter of request to stop such action. In State, that has adopted UNCITRAL Model Law, local courts are mandated to cooperate with foreign insolvency courts without reciprocity.

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**Marks awarded 11 out of 15**  
**MARKS AWARDED 43/50**

**\* End of Assessment \***