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).

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**.

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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.

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.

International insolvency i.e. cross-border insolvency law concerns the domestic and, depending on the country, multilateral treaties that deal with the insolvency of a company or individual where the individual or company has assets and/or creditors in multiple jurisdictions. Notwithstanding that individuals or companies operate on an international scale, most local legal systems are not adequately equipped to deal with foreign elements of insolvency, which gives rise to many issues, including among other things:

1. Choice of law;
2. Recognition and enforcement; and
3. Coordination and co-operation.

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Question 2.2 [maximum 5 marks]

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

The main difference in approach between Universalism and Territoriality concerns the overarching mechanism to deal with cross-border insolvency. Under the Universalism principle, cross-border insolvency proceedings are administered under the provisions of one global insolvency law. The policy behind this approach is two-fold. First, there should only be one forum where the debtor's principle place of business or interests are located. Secondly, it affords equal treatment of creditor claims to be dealt with swiftly and in a cost-efficient manner.

In contrast, the Territoriality approach accepts that it is not possible to have one forum for insolvency proceedings and that there will be concurrent proceedings in more than one jurisdiction. As a consequence, insolvency proceedings are governed by each jurisdiction's domestic laws. The advantage of this approach is that it protects the interests of creditors operating within the jurisdiction who may otherwise not be in a position to participate in foreign insolvency proceedings[1]. This is achieved by confining insolvency proceedings to deal with the creditors and assets located within the jurisdiction. As stated above at 2.1, this gives rise issues concerning international insolvency.

These theories also involve recognition and effect (as well as jurisdiction) 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.

3.5

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.

Since the global downturn of 2008, Middle Eastern countries have begun to modernize their insolvency laws. These countries have recognized the importance of having insolvency laws that are familiar to global enterprises to encourage business growth within their country. Notable examples include Saudi Arabia (**KSA**), the United Arab Emirates (**UAE**), and the Kingdom of Bahrain (**KB**).

KSA[2] has introduced bankruptcy laws that overhaul its laws for restructuring and liquidation of companies. In summary, the new bankruptcy laws provide for, among other things:

1. Protective settlements;
2. Formal restructuring; and
3. Liquidation.

The UAE[3] reforms provide for new court-driven procedures. In summary:

1. Preventative Composition – which provides for a 'business rescue' framework that allows arrangements to be made between debtors and creditors under the supervision of the court to avoid the consequences of a bankruptcy adjudication.
2. Bankruptcy – which consists of formal restructuring and insolvent liquidations.

The KB[4] modernizations have borrowed concepts from Chapter 11 of the US Bankruptcy Code. KB's reforms include:

1. Automatic stay of claims against the bankrupt estate;
2. Sale of assets out of the estate free from security provided certain statutory requirements are met;
3. Subject to Court approval, the debtor in possession may raise financing; and
4. Restructuring

It would be beneficial to clearly set out the reforming legislation in your above paragraphs.

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[1] Module 1 at page 28 5.2.3

[2] Http://www.whitecase.com/plublications/alert/Saudi-bankruptcy-law-sesmic-shift

[3] [3] https://www.nortonrosefulbright.com/en/knowledge/publications/97324a48/the-new-uae-bankruptcy-law

[4] https://www.clearygottlieb.com/-/media/files/emrj-materials/issue-9-2018/bahrains-new-bankruptcy-law-pdf.pdf

Marks awarded 8.5 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.

While many of the insolvency principles apply to both individuals and companies (i.e. automatic stay), there are significant policy differences underlying each regime. In relation to individuals, the objective is to free the debtor from harassment of his/her creditors and allow the debtor to be granted a 'fresh start' or discharge from his/her debt. By way of example, payment of the debt can be achieved from the debtor's current and future assets. In addition, some jurisdictions have enacted laws to exempt certain classes of assets necessary for the debtor and his/her dependents to live from falling within the debtor's insolvency estate.

In respect of companies, the objectives governing insolvency differ because a company, unlike an individual, are a separate legal personality from the principles (i.e. legal persons). Where possible, a company will be put into business rescue to preserve the company as a going concern. The policy behind this is that the business is good for society by providing jobs. In circumstances where the local law does not provide for, or rehabilitation is not possible, the company will be placed into liquidation; the assets will be collected and distributed to the creditors of the company. Unlike an individual, after completing insolvency proceedings, the company's affairs are wound up, and it ceases to exist.

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.

Firstly, there is a difference in approach to insolvency across jurisdictions where domestic law tends to favour the interests of creditors (i.e. pro-creditor). An example of this approach to insolvency is where the domestic law does not provide for an automatic stay. By contrast, other jurisdictions laws adopt a more friendly approach to debtors (pro-debtor). An example of this approach is where a debtor is allowed to remain in possession and take on further credit to discharge its debts[5].

Secondly, the starting point in most insolvency cases is to determine the proper forum to bring the proceedings. The approach varies across jurisdictions but generally speaking a court will may have jurisdiction to determine the matter where an individual/company has assets or a branch within the jurisdiction or the jurisdiction is the principle place of business for the company. However, in some jurisdictions, like Bermuda, the domestic laws do not give the Court jurisdiction to wind-up foreign companies.

Thirdly, another area which presents difficulties where there is a cross border elements concerns the choice of law to apply to a matter. Jurisdictions adopt a different approach but in most common law jurisdictions proof of foreign law is a question of fact whereas civil law courts treat choice of law as a question of law. Generally, a party will invoke choice of law arguments where there is there is an advantage to that party to apply the foreign law[6].

[5] https://prodstoragesam.blob.core.windows.net/highq/2537123/insolvency-review-sixth-edition-2018-england-wales.pdf at Viii

[6] Module 1 at page 45

Fourthly, jurisdictions approach varies in respect of recognition and enforcement. This raises questions concerning whether a jurisdiction will recognize the insolvency proceedings or acts by the liquidators pursuing claims against third parties. By way of example, difficulties may arise where assets of the company have been transferred at an undervalue to parties located in another jurisdiction or there are claims against a director who resides outside of the jurisdiction. In order for the liquidator to pursue these claims, the liquidator will have to seek recognition or in the case where there is a judgment look to the courts to enforce the judgement.

Finally, jurisdictions adopt a different approach with respect to preferential payments. These are statutory payments which are given priority over the unsecured debts of the individual/company. Generally, these payments include among other things, payments to revenue authorities and/or wages due to employees for services rendered.

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.

Globally, regions have taken steps to enter into multilateral agreements with the view towards efficiently dealing with cross-border insolvency issues.

By way of example, North American countries have adopted the UNCITRAL Model Law and protocols dealing with issues arising in corporate insolvency concerning cooperation and reorganization [7] . **While adoption of the MLCBI may harmonise various domestic insolvency laws in so far as they address international insolvency issues, the question addresses more broadly the harmonisation of domestic insolvency laws in general. See the 'model' answer on this sub-question.**
The NAFTA Principles provide for the following:

- Court's cooperate to maximize the debtor's global assets
- Insolvency of a debtor in one member state shall be recognized in other member states swiftly and cost effectively.

Nevertheless, the member states have been unsuccessful in implementing more radical substantive changes moving towards uniform laws governing insolvency.

While harmonization of domestic insolvency law would be helpful given the globalization of individuals and businesses, I believe that these efforts will not have a significant impact on addressing cross-border issues. First, the underlying policies (i.e. pro-debtor or pro-creditor) of a state's insolvency laws differ, creating tension in attempting to make universal domestic laws. A further example of a tension to harmonizing domestic laws, concerns a state's domestic laws address local interests and creditors operating within the state.

The area where agreement may be reached, and I believe would have a more significant impact on cross-border matters, is cooperation. As matters stand, unless a state's domestic law or multilateral treaty expressly deals with cooperation it is left to the insolvency

[7] Module 1 at pg 62 5.4.3.2

practitioners and courts to navigate these issues on a case-by-case ad hoc basis. This implicitly accepts the reality that harmonization will not be possible but provides some certainty and a framework that, in practice, should reduce the cost of insolvency proceedings.

3
Marks awarded 12 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.

In order to properly advise the Erewhon liquidator, it is necessary to know, firstly, whether Erewhon has entered into any treaties with Utopia. This is important because under Article 3 of the Model Law, to the extent that there is a conflict between the laws of Utopia or obligations under a treaty, the requirements under the treaty shall prevail. Second, the facts are silent as to whether the winding-up order was obtained before relocating its principal place of business to Utopia.

Subject to the foregoing, for the liquidator to stay the court action in Utopia during the currency of the insolvency proceedings, it will be necessary to make an application to the Utopia Court for recognition of the winding-up order.

Such application may be made by lodging an application with the Utopia Court supported by:

- A certified copy of the decision commencing or appointing the foreign representative[8]; and
- A statement identifying all foreign proceedings in respect of the debtor known to the foreign representative[9].

Under Utopia law, the court will recognize insolvency proceedings as a foreign main proceeding provided it is taking place in a state where the debtor has its "centre of its main

[8] See Article 15(2)(a)
[9] See Article 15(3)

interests[10]." Based on the information available, a Utopia Court would not recognize the Erewhon proceedings as 'main proceedings' as its head office has been relocated to Utopia. Nevertheless, the Utopia Court will recognize the Erewhon proceedings as a non-main proceeding provided it retains an establishment within the jurisdiction[11].

Upon recognition of the foreign insolvency proceedings, the liquidator will have to apply to the Utopia Courts for a stay or continuation of Apex's claims in Utopia according to Article 20(a) as a 'foreign main proceeding' or Article 21(a) 'non-main proceeding.'

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.

4.2(a) – No, until presentation of the petition there is no automatic stay.

4.2(b) – Yes, while the liquidator will still need to apply for recognition the liquidator will not have to apply to stay the proceedings because upon presentation of the petition all claims against the company are stayed.

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

1

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?

The legislative framework for dealing with insolvency is set out in the Companies Act 1981 (the **Act**) and the Companies (Winding-Up Rules) 1982. As an international business hub, Bermuda has companies that are part of a group of companies that carry on business outside of the jurisdiction. Bermuda has not adopted the UNCITRAL Model Law on Cross-Border Insolvency, nor is it a party to multilateral treaties. As a consequence, this gives rise to issues in the cross-border context. To deal with this lacuna in Bermuda's domestic laws, the court has exercised common law principles to address areas where the domestic law is silent.

Recognition

[10] See Article 17(2)(a)
[11] See Article 12(2)(b)

Bermuda's domestic law does not deal with the recognition of foreign proceedings. As an international business hub, the court has adopted a global approach to plug in legislative gaps. For the court to recognize the foreign order in Bermuda, an application must be made to the court seeking recognition. Recognition is achieved by the court ordering to stay proceedings under section 167(4) of the Act.

In the case of *In the Matter of Energy XXI Ltd* (2016) SC (Bda) 79 Com[12], the Court made clear that the Bermuda Court has the jurisdiction to recognize (by way of a stay) and enforce a foreign restructuring where the effect of such recognition extinguishes claims against an insolvent Bermuda company.

Cooperation[13]

As stated above, the Bermuda Court has adopted a global approach and have cooperated with foreign proceedings provided (i) it is in the best interests of the company; and (ii) the foreign court has the closet connection to the business of the company. Although Bermuda is not a party to multilateral treaties, the Bermuda court has issued the Commercial Court Practice Direction No 6 of 2017 which is modelled upon the Singapore Judicial Network Guidelines. This guidance deals with communication between courts and acceptance of foreign process with the view to swiftly and cost efficiently assist in global insolvencies.

Voidable Transactions

While assessing the company's financial affairs, the liquidator will need to consider transactions completed 6 months before the presentation of the petition to wind-up the company. Section 237 of the Act provides that any mortgage, conveyance, delivery of goods, payment or other act relating to the property is deemed a fraudulent preference and void. If such transactions exist, the liquidator will have to issue fresh proceedings in the company's name to recover such property. Suppose the individual or company resides outside of Bermuda, it will be necessary to make an application to the court to serve proceedings outside of the jurisdiction to bring the company/individual within the jurisdiction of the Bermuda Court.

Distributions

In Bermuda, the funds available for distribution to the company's unsecured creditors is on a *pari passu* basis. Notwithstanding the foregoing, section 236 of the Act provides for preferential payments, which shall be paid as a priority out of all the company debts. In this case, where the company's creditors include revenue authorities or employees, due regard must be given to section 236. Preferential payments under the Act are as follows[14]:

- All taxed owing to the government;
- All wages or salaries to employees for services rendered to the company 4 months before the relevant date (i.e the date the company is wound up);
- All accrued holiday remuneration payable on the termination of employment before or by the date of the winding-up order; and
- All monies owing in respect of pension payments or any insurance contract unless the company is being wound up voluntarily

[12] http://www.gov.bm/sites/default/files/Reasons-RE-Energy-XXI-LTD.pdf
[13] Practical law *Restructuring and Insolvency in Bermuda: an overview*
[14] See section 236 of the Act

This is a satisfactory response. For an approach more 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 10.5 out of 15
MARKS AWARDED 39/50

*** End of Assessment ***