



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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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.

Mark awarded 9 out of 10

QUESTION 2 (direct questions) [10 marks]

Question 2.1 [maximum 2 marks]

Explain what the term "international insolvency law" means.

There is no internationally recognised formal definition of "international insolvency law". However, Wessels¹ defines international insolvency law as that part of the law that "*is commonly described in international literature as a body of rules concerning insolvency proceedings or measures, which cannot be fully enforced, because the applicable law cannot be executed immediately and exclusively without consideration being given to the international aspect of a given case*". Wessels concedes that due to its connection to the existence of a national legal framework, this definition is limited and makes reference to definitions provided by other commentators including Fletcher, who posits that "*international insolvency*" or "*cross border insolvency*" should be considered as a situation.... in which an insolvency occurs in circumstances which in some way transcend the confines of a single legal system, so that the [sic] a single set of domestic insolvency law provisions cannot be immediately and exclusively applied without regard to the issues raised by the foreign elements of the case"².

These are authoritative sources. It could perhaps better to also convey your personal understanding in your own words.

1.5

Question 2.2 [maximum 5 marks]

¹ B Wessels, *International Insolvency Law* (Kluwer Law International, 2006), page 1

² *Idem*, p1 *et seq.*

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

The simplified concept of universality provides for only one insolvency proceeding which covers all of the debtor's assets and debts worldwide. It is often said that common law countries align with this approach³ which envisages one forum having jurisdiction and an officeholder appointed in that single set of proceedings, furnished with tools to control and obtain all assets (irrespective of where they are located) and gives creditors worldwide the opportunity to participate in the proceedings with all claims being treated equally⁴. However, difficulties can arise in establishing a single State in which insolvency proceedings will exclusively proceed because the jurisdiction of such proceedings would need to have extraterritorial effect in order to be effective, and address difficult legal issues such as choice-of-law and priority rules. This, in turn, may create uncertainty in domestic markets because the single or "home" State may have standards which are indeterminate (especially when the debtor is a corporate group) and be vulnerable to strategic manipulation⁵. However, proponents contend that it provides a more streamlined and cost-effective way of dealing with a debtor's assets and liabilities, than the alternative approach of territoriality⁶.

Finding its genesis in universality or universalism is "modified universalism" which allows for more than one insolvency proceeding starting or originating in different states to be dealt with under the provisions of one insolvency law, which is often the law of the State in which the debtor has its centre of main interests ("**COMI**"). This means that the law of the "main proceeding" will have worldwide effect, even outside the territorial jurisdiction of the State where the so-called main proceedings have commenced.

Diametrically opposed to the concept of universality is territoriality, which provides for multiple insolvency proceedings in every State where the debtor holds assets. Although this accepts the concurrency of multiple proceedings, this concept acknowledges that the jurisdiction of each State in which there are proceedings are commenced is confined to the property within that State. This approach gives preference to a State's national interest thereby giving preference to local creditors who act within the domestic market. Local officeholders will often evaluate local assets only before giving credit. However, this means that without the benefit of a local proceeding, creditors outside of the State which favours a territorial approach may face practical and economic challenges to participating in, what is for their purposes, a foreign insolvency proceeding. The pleurisy of territorial proceedings can be costly⁷. Moreover, when a debtor is declared solvent in one State (where the assets are) but insolvent in another (where the debts are), this can result in the assets being out of the reach of the officeholder and creditors in the State where debts are situate. To mitigate against this problem where assets are located in more than one State, a balance has sought to be struck by the development of

³ P J Omar, "A Paragon of International Insolvency Law: Part 1", (2002) *International Company and Commercial Law Review* 366 p 366 to 376; 2002 ICCLR, pp 416 to 422

⁴ J L Westbrook, "A Global Solution to Multinational Default", (2000) *98 Michigan Law Review* 2276, pp 2276 to 2328; A T Guzman, "International Bankruptcy: In Defence of Universalism", (2000) *98 Michigan Law Review* 2177, 2177 to 2215; P Perkins, "A Defence of Pure Universalism in Cross-Border Corporate Insolvencies", (2000) *32 New York University Journal of International Law and Politics* 787, pp 787 to 828.

⁵ L M LoPucki, "Cooperation in International Insolvency: A Post-Universalist Approach", (1999) *84 Cornell Law Review* 696, pp 696 to 762.

⁶ J L Westbrook, "Choice of Avoidance Law in Global Insolvencies", (1991) *17 Brooklyn Journal of International Law* 499, pp 499 to 538; J L Westbrook and D T Trautman, "Conflict of Laws Issues in International Insolvencies", in J S Ziegler, (ed), *Current Development in International and Comparative Corporate Insolvency Law*, Oxford: Clarendon Press, 1994 pp 655 to 669; J L Westbrook, "Universal Priorities", (1998) *33 Texas International Law Journal* 27, pp 27 to 45.

⁷ LoPucki, *supra* note 5 p 2216

"modified territorialism" or "cooperative territoriality", which advocates for communication and collaboration between the courts and officeholders of the different States⁸.

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.

A number of states have recently reformed their respective domestic insolvency laws. The first example relates to reforms in the UAE. The Federal Law by Decree No. (9) for 2016 on Bankruptcy identifies different ways to avoid bankruptcy cases and the liquidation of debtor's assets, including consensual out-of-court financial restructuring, composition procedures, financial restructuring and the potential to secure new loans under terms set by the law⁹. The Federal Decree Law No. (19) of 2019 on Insolvency applies to debtors who are not subject to Federal Decree-Law No. (9) of 2016.

In Dubai, Insolvency Law DIFC Law No. 1 of 2019 came into effect on 13 June 2019 which provides for a new debtor in possession bankruptcy regime and a new administration process where there is evidence of mismanagement or conduct. The reforms also enhance the rules governing winding up procedures and incorporates the UNCITRAL Model Law on cross border insolvency proceedings with certain modifications for application in the DIFC.¹⁰

In addition to Dubai, Bahrain also adopted the Model Law on Cross-Border Insolvency in 2018¹¹.

In 2018 Saudi Arabia introduced reform by way of the Bankruptcy Law. This legislation includes general regulations, preventative actions, measures for financial restructuring as well as settlement procedures¹².

3

Marks awarded 9.5 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.

The objectives of insolvency for individuals include protection from harassment by creditors, to enable the debtor to make a fresh start – especially in less blameworthy cases (where insolvency has not been brought about by the actions or conduct of the debtor, but by circumstances or external factors which are outside of his / her control); to reduce indebtedness by making contributions from present and future income to the estate while at

⁸ *Ibid.*

⁹ Federal Law by Decree No. (9) of 2016 on Bankruptcy (<https://www.mof.gov.ae/en/lawsAndPolitics/financial-banking-sector/Bankruptcy/pages/Laws.aspx>)

¹⁰ <https://www.difc.ae/newsroom/news/dubai-international-financial-centre-enacts-new-insolvency-law/>.

¹¹ Foundation Certificate in International Insolvency Law Module 1 Guidance Text, p66 at 6.4.4.2

¹² <https://www.thenational.ae/business/economy/saudi-arabia-approves-landmark-bankruptcy-law-1.707236>.

the same time taking his personal circumstances into consideration¹³. The differing objectives of insolvency relating to corporations include the preservation of the business or viable parts thereof (not necessarily the company) where possible, and where personal and professional duties (including fiduciary) have been abused (such as by directors and officers of the company), the imposition of personal liability on such responsible persons.

However, there are principles which apply to insolvency of both individuals and corporations. Namely, the need to ensure *pari passu* distribution of the proceeds of asset realisation except in so far as creditors have priority (by way of security or other preferential debt); that secured creditors deal fairly towards the debtor and the other creditors; to investigate reasons for failure; and to reclaim voidable dispositions where the insolvent debtor dealt improperly with assets¹⁴. Although some of these topics overlap there are differences. For example, in relation to an individual, some insolvency systems will allow the retention of some assets to maintain the individual and any dependants¹⁵. As is plainly not possible where an individual is concerned, in a corporate insolvency, once the affairs of the company have been wound up it is dissolved.

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.

National insolvency laws differ from State to State, and in some States, the standard of insolvency laws may be relatively low and traditionally lack structure. Because national laws in many States historically concentrate on the debtors operating within the State, international or cross-border dimensions which may arise are not always easily accommodated which can be problematic when the insolvency of a company involves more than State (e.g. where its operations, assets, debt and / or creditors are not in the same State). In the absence of international protocols for dealing with this situation, where there are multiple concurrent insolvency proceedings, each State will seek to apply its own laws (including its choice of law rules), with no, or very limited extraterritorial effect granted to foreign proceedings. The difficulties associated with multiple proceedings can be exacerbated by a lack of cooperation or coordination between the courts and the insolvency practitioners involved in the different insolvency proceedings.¹⁶

Difficulties may arise not only in relation to differing domestic insolvency laws, but because these laws are also affected by differing local legal culture, approach to basic rights and by the different ways in which matters such as security rights or labour issues are treated. In addition to having different competing systems which may be involved in any given cross-border insolvency, office holders and / or courts must sometimes grapple with whether to apply the law of a different jurisdiction to a particular issue. This is discussed by Omar, who notes "*[a] part from the general situation in conflict of laws, differences in domestic norms have an impact on the position of creditors and the priorities they assert in insolvency. Where the debtor faces creditors pressing their claims in more than one State, this will inevitably raise issues of conflict of laws. The conflict may itself be made more complex by the presence of qualifications, including the presence of security, set-off and netting arrangements, retention of title clauses and other means of protecting title available to creditors in national laws*"¹⁷.

¹³ Sealy and Hooley in M A Clarke et al, *Commercial Law* (Oxford University Press, 2017), chap 28.

¹⁴ P R Wood, *Principles of International Insolvency* (Sweet and Maxwell Ltd, 2007), pp 1-30

¹⁵ I F Fletcher, *The Law of Insolvency*, London (Sweet and Maxwell, 5th ed, 2017), Ch 1

¹⁶ Foundation Certificate in International Insolvency Law Module 1 Guidance Text, pp 35 to 36

¹⁷ P J Omar, "The Landscape of International Insolvency", (2002) 11, *IIR* 173, p175

Different systems of law also adopt different approaches to resolving conflict and choice of law questions. In a common law jurisdiction such as England, choice of law issues arise only if a party invokes them, which naturally will only happen if it is to a party's advantage to do so. Moreover, proof of foreign law is a question of fact¹⁸. However, in civil jurisdictions, foreign law is presumed to be a question of law to be applied regardless of whether it is pleaded by the parties or not. This may result in inconsistencies in how issues materialise, are resolved and how parties are consequently treated (noting also that some States may be pro-creditor whereas other States may be pro-debtor).

Where the insolvency of a company involves multiple States and therefore, more than one potential forum, a dispute over jurisdiction can arise which different States may look to resolve differently owing to their differing private international law rules. Generally it will require an examination of the connection with the jurisdiction of the parties or the dispute which can arise at the commencement or during the course of the local insolvency proceeding. States may place a differing degree of importance on the nature and location of assets, creditors or examinable corporate officers. These factors may nevertheless involve issues of foreign law (aside from insolvency related laws) and, if already the subject of foreign proceedings, may impact upon a different State's ability to hear the matter or the way in which ought to be treated in any insolvency proceedings.

The existence of a foreign judgment can also be problematic as States will have different laws and rules governing its recognition and enforcement (or effect). If it is a judgment commencing insolvency proceedings this can impact whether a court in a different State can or should exercise jurisdiction. If a foreign judgment is obtained and the judgment creditor seeks to enforce against assets in another jurisdiction which are or soon will be subject to an insolvency procedure, the court overseeing the insolvency will need to consider issues such as what court gave the judgment, the type of judgment, its validity and effect.

3.2

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.

During the 21st century there have been a number of multilateral developments to promote harmonisation of domestic insolvency laws. Firstly, in the early 2000s, the World Bank produced guidelines on the regulation of insolvency, entitled '*Principles for Effective Insolvency and Creditor / Debtor Regimes*', which were subsequently revised in 2005, 2011, 2015 and most recently, in April 2021. Secondly, in 2004, UNICITRAL promulgated the 'Legislative Guide on Insolvency Law' for the use of national authorities and legislative bodies when drafting new laws and regulations or reviewing and updated existing ones. Part One Recommendation 5 states "*The insolvency law should include a modern, harmonized and fair framework to address effective instances of cross-border insolvency. Enactment of the UNCITRAL Model Law on Cross-Border Insolvency is recommended*"¹⁹. The Principles and Guide aim to promote harmonisation of domestic insolvency laws and their significance in the

¹⁸ Y Nishitani (ed) 2017, "Treatment of Foreign Law – Dynamics towards Convergence?", *Ius Comparatum - Global Studies in Comparative Law* 26, DOI 10.1007/978-3-319-56574-3_1.

¹⁹ https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/05-80722_ebook.pdf

context of developing countries should not be overlooked given that they are sometimes referred to by the International Monetary Fund (IMF) and the World Bank in cases where bankruptcy reform is made a condition of financial support. The reference to the Principles and Guide in this way promotes convergence of insolvency law in developing countries, and more broadly, across the globe, as Mevorach notes "*The UNCITRAL Legislative Guide together with the World Bank Principles form the international best practice standard for insolvency regimes (the Insolvency Standard)*"²⁰. Although considered the "*international best practice standard*", the Guide and Principles are just that, guidance or soft law. Unless their status is elevated or their implementation mandatory, or treaties become ratified so as to be binding (so as to be enforceable in law), the extent to which States follow or comply (unless necessary for funding) may vary quite significantly, and therefore consistency of harmonisation of domestic laws across the globe may be variable²¹.

Another example of how harmonisation and uniformity continues to be strived for is the European Parliament's report on Harmonisation of Insolvency Law at EU level²², in which the differences between domestic insolvency laws at EU level were noted and a number of areas of insolvency law where harmonisation at EU level is believed to be achievable have been identified. These areas include a possible common test of insolvency as requirement of a formal insolvency process; formal aspects of lodging and dealing with claims in a formal insolvency; certain aspects of the manner in which reorganisation plans are adopted and their contents; rules regarding so-called detrimental acts; interrelationship between contractual rights of termination and insolvency; and directors' responsibilities. To the extent that harmonisation can be achieved by standardising these prevalent insolvency issues across Europe, greater consistency in approach should result. However, it is arguable that having a standardised system in Europe will only have limited effect in addressing insolvency issues which span beyond Europe, for example where an element of the debtor's insolvency is situated or a separate insolvency proceeding is taking place, outside of Europe.

Although these moves to harmonise domestic insolvency laws can reduce the significance of an insolvency crossing a State boundary and reduce the need for regulators or courts to resolve international insolvency issues, for harmonisation to have greater efficacy, all States would need to undertake to harmonise their domestic laws in the same way. This may not be realistic given the different legal systems underpinning the domestic insolvency laws and domestic norms / conflicts concerning a whole range of issues affected by private international law. Therefore, harmonisation of domestic laws cannot be itself ensure consistency of international insolvency law. Other strategies which have been adopted such as uniformity of choice of law rules, uniform or reciprocal recognition laws, and cooperation and coordination to promote recognition and enforcement, are also at least equally important. In addition, the more recent actions of multilateral organisations introducing what can be considered 'soft law' guidance has also assisted States in addressing international insolvency issues in a more consistent manner.

There is scope to consider political pressure, foreign investor pressure and/or loan conditions.

4.5

Marks awarded 13.5 out of 15

²⁰ | Mevorach, *The Future of Cross-border Insolvency: Overcoming Biases and Closing Gaps* (Oxford University Press, 2018).

²¹ *Ibid*

²² https://www.eesc.europa.eu/sites/default/files/resources/docs/ipol-juri_nt2010419633_en.pdf.

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.

On the basis that the UNCITRAL Model Law on Cross-border Insolvency ("**Model Law**") has been adopted without modification, except as required to domesticate it, and to the extent that the Cross-border Insolvency Act of Utopia ("**CBIA**") gives the Model Law statutory force in Utopia, the CBIA is likely to provide Erewhon's liquidator with standing to apply for foreign recognition of the proceedings in Erewhon in Utopia, as the State enacting the Model Law²³.

Assuming that the definitions in Article 2 of the Model Law have been adopted under the CBIA; the Erewhon proceedings qualify as a "foreign proceeding", the Erewhon liquidator qualifies as a "foreign representative" and the winding up order was granted by a court which qualifies as a "foreign court" (definitions as provided in Article 2 of the Model Law²⁴), Erewhon's liquidator should be able to establish standing in order to apply to the Utopian court for recognition of the Erewhon proceedings. The Erewhon liquidator will need to obtain recognition of the Erewhon proceedings in order to avail the Erewhon proceedings of various relief, which will include stopping or staying Apex's debt recovery proceedings.

Depending on whether these proceedings would be considered by the court in Utopia to be "foreign main proceedings", the Erewhon liquidator is likely to be able to either invoke a mandatory automatic stay²⁵ of the debt recovery proceedings commenced by Apex in Utopia, or request that the Utopian court exercises its discretionary power to impose a discretionary stay²⁶ of Apex's debt recovery action.

²³ Article 9 of the Model Law provides for direct access by a foreign representative to courts of the enacting State.

²⁴ However, also note the UNCITRAL Guide to Enactment gives further guidance on the interpretation of the elements comprising certain definitions, for example, the "collective in nature" element of "foreign proceeding" is addressed at pp39-40.

²⁵ Article 20 of the Model Law.

²⁶ Article 21 of the Model Law.

As to whether the proceedings in Erewhon are likely to be considered "main" proceedings will depend on Nadir's centre of main interest ("COMI"). It is not apparent whether Erewhon has adopted the Model Law²⁷ and accordingly or in any event whether the Erewhon court considered Erewhon to be Nadir's COMI when determining to grant the winding up order. Equally the absence of information concerning the location of Nadir's head office at the time the contract with Apex was entered into is not known and would be helpful to this analysis. This information, if it were available would enable a view to be taken as to whether Erewhon, Utopia or indeed another State should properly be considered Nadir's COMI, having regard to the two key factors for determining COMI under the Model Law²⁸ which are (i) the location where the central administration of the debtor takes place; and (ii) which is readily ascertainable as such by creditors of the debtor. Additional factors which may be considered in the determination of COMI include, but are not limited to, the location of the Nadir's books and records, where financing was organised or authorised, location of the Nadir's principal assets or operations are found and the location in which commercial policy was determined.

In the absence of information pertaining to when the contract with Apex was entered into and the law governing it, where Nadir was situated at that time, the whereabouts of its operations generally and pertaining to the performance of the contract with Apex, and the nature and status of other creditors and their claims, it is difficult to assess definitively where Nadir's COMI is. This is because although Nadir was incorporated in Erewhon, only one month ago it moved its registration and head office to Utopia. If the contract was entered into when its head office was in Erewhon, the contract was governed by the law of Erewhon and the performance of the contact took place in Erewhon, then it would seem at least arguable that its COMI should be considered to be Erewhon for the purposes of the recognition application.

If Nadir's COMI is Erewhon then the Erewhon proceedings are likely to be considered "main foreign proceedings", in which case pursuant to provisions in the CBIA which mirror Article 20 of the Model Law, recognition will automatically attract a stay of the Apex claim and any other commenced or continued individual actions concerning Nadir's assets, rights, obligations or liabilities, a stay of execution against the debtor's assets and a suspension of the right to transfer, encumber or otherwise dispose of any assets of the debtor.

Alternatively, if Nadir's COMI is Utopia (on the basis of where its head office and registration is now), the Erewhon proceedings are or may be considered "non-main foreign proceedings", in which case, the Erewhon liquidator can seek discretionary relief (assuming a similar provision to Article 20(1)(a) of the Model Law has been enacted by the CBIA) on the recognition application which includes staying the Apex claim.

Finally, in making the recognition application, the Erewhon liquidator would need to fulfil the procedural and evidential requirements of the equivalent to Article 15 of the Model Law.

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.

²⁷ Although note that reciprocity is not required in order for an enacting state to recognize a foreign proceeding (The Judicial Perspective, p18, para 47)

²⁸ Similar to the COMI concept under recital 13 of the European Insolvency Regulation (1346/2000) and recitals 28-30 of the Recast EU Insolvency Regulation (2015/848)

(b) Apex had obtained a court order to wind-up Nadir in Utopia prior to the Erewhon winding-up order.

In relation to alternative situation (a) the effect of Article 28 of the Model Law (assuming an equivalent or materially similar provision exists in the CBIA) is that the recognition proceedings would not prevent the commencement of the domestic insolvency proceedings by Apex at the hearing of Apex's petition, provided Nadir had assets in Utopia. However, the recognition proceedings will not be prevented or terminated by the filing of proceedings by Apex to wind-up Nadir and therefore the application can still proceed²⁹, but any relief previously granted to the Erewhon proceedings under provisions equivalent or materially similar to Articles 19, 20 or 21 will be subject to review, modification or termination by the Utopian court to the extent inconsistent with the domestic proceedings once commenced.

In relation to alternative situation (b), again the insolvency proceedings in Erewhon may still be the subject of a recognition application³⁰, however primacy will be given to the Utopia court proceedings and automatic relief of Article 20 of the Model Law does not apply. Any relief will granted will be on a discretionary basis under Article 21 of the Model Law must be consistent with the domestic proceeding and the Court will need to be satisfied that the relief relates to assets that, under the law of Utopia, should be administered in Erewhon, or concerns information required in that proceedings³¹. Cooperation and direct communication between the appointed officeholders and the courts in both jurisdictions is mandatory³².

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

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 insolvency proceeding has been commenced in England, where the corporate debtor is incorporated and its head office is based. England and Wales adopted the UNCITRAL Model Law in 2006. However, section 426 of the Insolvency Act 1986 still applies to relevant countries as listed and common law principles still apply. As a former Member State of the EU, the EU Insolvency Regulation no longer applies to cross-border insolvency matters between the UK and other EU Member States. Although the Corporate Insolvency and Governance Act 2020

²⁹ Article 29(b) of the Model Law

³⁰ Article 29(a) of the Model Law

³¹ Article 29(c) of the Model Law

³² Articles 25 and 26 of the Model Law

has reformed certain aspects of the English insolvency regime including the relaxation of wrongful trading, new moratorium rules and the suspension of the winding-up petitions and statutory demands, for the purposes of answering this question, the Corporate Insolvency and Governance Act is deemed not to have prevented the commencement of these insolvency proceedings.

International insolvency issues arise from the fact that the company has assets and debt owing to creditors, in a number of different states. Creditors may seek to wind up the company in their own State (if the company has an establishment or operational presence there) which may result in multiple concurrent insolvency proceedings. As the UK has adopted the Model Law, foreign main or non-main proceedings may be recognised by the English court (Article 29) and relief granted on a discretionary basis (Article 21), and cooperation and direct communication with the courts overseeing those proceedings and as between the appointed representatives will be mandatory (Articles 25 / 26). Such cooperation may be formalised in an approved or implemented agreement concerning the coordination of proceedings (Article 27(d)) once negotiated between the parties prior to their presentation to the courts for review and approval. As the head office and incorporation of the company is in England, the COMI of the Company may be England but foreign non-main proceedings may be in a different jurisdiction and therefore the English liquidation may be the primary proceedings to which a territorial proceedings (where assets are situated) are ancillary to. The English liquidator should therefore cooperate, communicate and coordinate with the appointed officeholder in those proceedings in accordance with the Model Law and other soft law instruments which apply³³.

However, in the English proceedings are considered to be ancillary to any foreign proceedings, section 426 of the Insolvency Act 1986 may also apply. In that regard the English House of Lords decision in *McGrath v Riddell*³⁴ is instructive and in particular, the judgment of Lord Scott at paragraph 62 where it was held "*...if the country of the principal winding up is a 'relevant country or territory' for section 426 purposes and the liquidators in that country have requested English liquidators to remit them the assets collected in England so that they (the principal liquidators) can, pursuant to the insolvency law of that country, implement a universal scheme of pari passu distribution to ordinary secured creditors, the request is one to which, in principle, the English liquidators ought, in my opinion, to accede*". In particular, section 426(5) authorises the local court to "*apply, in relation to any matters specified in the request, the insolvency law which is applicable by either court in relation to comparable matters falling within its jurisdiction*"³⁵.

A second international insolvency issue which may arise, even in the absence of any existing proceedings afoot in any other jurisdiction from which a request for the remittance of assets is received, the liquidator appointed in the English insolvency proceedings will be required to take into custody and under their control, all tangible and intangible property (including but not limited to real estate and other interests in land) including that which is situated in a foreign State³⁶. To take control of property of any kind in a foreign State, it is likely that the liquidator will need to apply for recognition in those States; standing to do so, grounds for recognition and applicable procedure being dependent upon the domestic and international instruments that apply in that State.

A third international insolvency issue may arise from the claims of creditors in different jurisdictions. Although the liquidator is authorised to accept proofs lodged by foreign creditors in respect of liabilities incurred overseas or governed by foreign law³⁷ reference may need to

³⁴ [2008] UK HL 21

³⁵ Section 426(5) of the Insolvency Act 1986

³⁶ Fletcher, *supra* note 15, [30-040]

³⁷ *Idem* [30-041]

be made to a foreign law to establish the validity of the actual claim where that claim is for a debt governed by foreign law. There may be a certain type of security held by foreign creditors and given that there are a number of important differences between the types of real security found in various States, for example a floating charge is common under English law, but not generally known in civil law States, the extent to which security asserted is recognised and enforceable may need to be determined by reference to a foreign law. This may necessitate the liquidator obtaining advice on foreign law or any dispute over which law should apply being referred to the English court. The English court will only determine choice of law disputes in the event raised by a party, otherwise the law of the forum applies and the court will apply domestic laws. Under the Insolvency Act 1986, English law will apply to matters of procedure and substance³⁸. The English liquidator may be faced with a judgment given in another jurisdiction. If the UNICITRAL Model Law on Recognition and Enforcement of Insolvency-Related Judgments applies because this judgment falls within the definition of an "insolvency-related judgment" provided by Article 2(d), this liquidator and the English court will treat the judgment in accordance with this instrument. However, if it does not fit the criteria in Article 2(d), domestic enforcement and recognition provisions or common law principles will apply. It is also noted that there is reference to claims of foreign taxation / revenue authorities. Some jurisdictions, such as Germany, have abolished the "Crown preference" rule which affords priority to revenue authorities. However, in England this was reintroduced in December 2020 such that HMRC will rank ahead of floating charge holders and unsecured creditors.

Fourthly, another area which may involve a foreign law element is the liability of any directors and / or officers of the company for any wrongful acts committed that reside in other jurisdictions. Although the liquidator will have the ability to commence proceedings pursuant to sections 212 to 214 of the Insolvency Act 1986 and / or common law principles against any delinquent directors that the English court can properly exercise jurisdiction over, the enforceability of any judgment against a directors' assets if situate outside of England will be subject to the laws on recognition and enforcement of judgments in the particular State and whether that State has enacted legislation or ratified any international treaties which assist the English liquidator for these purposes. If jurisdiction over such individuals is an issue, the liquidator may have to consider issuing proceedings in a foreign court to recover funds for the benefit of the estate.

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Marks awarded 14 out of 15
MARKS AWARDED 46/50

*** End of Assessment ***

³⁸ *Idem*, [30-052-053]