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**.

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.

International insolvency law means the various insolvency procedures and laws governing insolvency on a cross-border basis for example between two States or countries where insolvency proceedings have elements applicable to both countries and thus a single set out insolvency laws or provisions cannot be applied without looking to those in both countries concurrently.[1] It is insolvency laws which are applicable to a matter involving one or more States. This does not mean there is one system of insolvency laws which apply perfectly across two States but rather international insolvency law denotes the interplay between the individual insolvency laws of two or more States and how these systems in their own right apply to the insolvency proceedings.

2

Question 2.2 [maximum 5 marks]

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

Universality takes the position that where the insolvency proceedings are commenced, those proceedings should apply on a cross border basis including the assets and liabilities of a debtor in other countries and not just the country in which the proceedings are

[1] A Borraine, R Mason and E Streten "Module 1 Guidance text: Introduction to international insolvency law 2021/2022" Foundation Certificate in International Insolvency Law course notes, p 33 and 34 (hereinafter the "**Module 1 Guidance Text**").

stared. Universality requires the countries where there are other insolvency proceedings to transfer them to the main proceeding. Basically, you end up having one main insolvency proceeding taking into account a debtor's assets across the world, not just in the country in which the proceedings are started.

Territoriality on the other hand is a system that allows a country's courts to apply its local insolvency laws without deferring to other proceedings. There may be many active insolvency proceedings against a single debtor in multiple jurisdictions. These proceedings however will be limited to the assets or liabilities which exist within that jurisdiction.

There is scope to elaborate with respect to 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.

4

Question 2.3 [maximum 3 marks]

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

The creation of the Dubai International Financial Centre (the "DIFC") and the DIFC Insolvency law in Dubai. This district has its own insolvency laws which are common law based and where the federal laws of the UAE do not apply (for example, the Companies Law (Federal Law No.8 of 1984) and its insolvency provisions will not apply within the DIFC).[2]

Similarly, in Abu Dhabi the Abu Dhabi Global Markets (ADGM) was formed and which is governed by the Financial Services and Markets Regulations 2015. [3] A recent amendment to these regulations has been passed which introduces the concept of priority financing for administrators as well as setting out the procedure for administration.

Bahrain passed the Reorganization and Bankruptcy Law (Bahrain Law No. 22/2018) which, among other things, which emphasises the importance of corporate rescue and provides a clear and detailed system for reorganisation/restructuring of an entity instead of proceeding with liquidating the entity at the outset.[4]

3

Marks awarded 9 out of 10

[2] Brown Rudnick LLP "Middle East – Developments in Restructuring" accessed on 15 October 2021, at https://brownrudnick.com/wp-content/uploads/2016/12/MENA-MEMO-REFORM-DEF.pdf.
[3] P Gearon and William Reichert "Notable Changes to Insolvency Legislation in the GCC" 15 April 2021, accessed on 15 October 2021 at https://www.charlesrussellspeechlys.com/en/news-and-insights/insights/corporate/2021/notable-changes-to-insolvency-legislation-in-the-gcc/.
[4] *Ibid*.

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.

Insolvency law looks to regulate the relationship between creditors and debtors where a debtor becomes unable to pay its creditors as they become due. It provides mechanisms which can be used by the creditors in order to recover their money. With this as the backdrop, it is clear that a debtor we can say that the objectives of insolvency for individuals are in the first instance is to protect the debtor from being maltreated or ambushed by his creditors – it allows for the orderly distribution of assets to pay off the debtors debts to the creditors in a legal manner (especially where the debtor has become insolvent at no fault of their own). Further to this objective, insolvency law also looks at the personal circumstances of the debtor in order to devise a fair and even distribution of assets to the creditors without leaving the debtor destitute or unable to provide for themselves. Insolvency law tries to rehabilitate the debtor to allow them to be able to pay back their debt and be able to participate in the economy debt free.[5]

A similar mind-set can be applied when looking at the objectives of insolvency law in relation to corporate entities. The key objective is to allow the entity the opportunity to rescue its business allowing it to continue to operate. Further, where there is blameworthiness to be apportioned for the failure of a business due to debt, insolvency law also provides for mechanisms which may be utilised to hold directors accountable, in instances where the directors ought to have considered the creditors interests.[6]

Many objectives of insolvency often apply in both instances where a debtor or its creditors are individuals or corporations. The key principle of insolvency is that creditors are to treated *pari passu* (with certain exceptions such as preferential creditors etc). Other objectives of insolvency which can apply to both individuals and corporations include:

- to ensure that in cases where there are secured creditors, the distribution of assets is still done fairly in relation to the debtor as well as fellow unsecured creditors fairly;
- to understand and investigate reasons for the bankruptcy or insolvency state as the case may be – should other factors need to be considered to ensure a fairer outcome; and
- discouraging individual debt collection in cases where collective debt collecting enforcement measures are already underway.[7]

It would also be beneficial to consider some key differences such as exempt assets for individuals.

4

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.

Domestic laws may not effectively provide for regulation of insolvency where there are cross border aspects. Some domestic laws with provisions relating to cross-border insolvency may

[5] Module 1 Guidance Text supra note 1 at p18 with reference to Sealy and Hooley in MA Clarke *et al*, Commercial Law (Oxford University Press, 2017), chapter 28.
[6] *Ibid*.
[7] *Ibid*.

not have been tested practically and by the courts thus not ensuring an effective administration of justice for the creditors or the debtor. Domestic laws on insolvency are often informed or effected in their application by other general laws or matters of policy (within those jurisdictions). For example, the socio economic plight of a States citizens may need to be factored in when resorting to insolvency or bankruptcy proceedings (NINA debtors for example)).

Insolvency proceedings may be commenced in various jurisdictions giving rise to a situation where creditors may not be treated equally or *pari passu.* A creditor in one jurisdiction where the majority of the debtor's assets are may succeed in claiming more than a creditor in whose jurisdiction the debtor has no assets, thus making it harder for the second creditor to attach the assets in a foreign country. Domestic laws also have an influence on creditor position and preferences affecting how various creditors would be treated based on where the insolvency proceedings are taking place.[8]

Where insolvency proceedings are commenced in various jurisdictions and where a unified or cooperative approach isn't followed, it becomes an issue as to which jurisdictions law should be applied leading to the most common issue of conflict of laws. Under which jurisdictions law should the insolvency proceedings take place and why become the forefront of the argument instead of the actual insolvency issues facing the creditors and debtor. Other questions which follow on from the above are:

- Would a foreign judgment have effect in another country – can it be enforced?
- If the assets are in different countries how do you attach them for distribution to creditors

Different jurisdictions have different structures for how proceedings are held and how enforcement takes place will also affect insolvency proceedings in particular with regards to enforcement and distribution.

Further detail would be beneficial. For example, consideration of Westbrook's 9 key issues.
3.5

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.

Some multilateral steps which we have been taken across the globe, include:

- In 2000, the European Union passed a Council Regulation n Insolvency Proceedings (European Insolvency Regulation, EIR). In 2015 certain amendments were made resulting in the EIR (Recast) which came into effect in 2017. This law is multilateral in that it allows the various EU Member States to work effectively on cross border basis. Significantly, one of the amendments captured in the EIR (Recast) is the recognition of the existence of insolvency proceedings outside of the EU.
- In 2015, the member States of the Organisation for the Harmonisation of Business Law in Africa ("OHADA") adopted the UNCITRAL Model Law on Cross-border Insolvency ("MLCB") thus ensuring not only cooperation between the OHADA member States but also to the other States who are signatories to the MLCB.

[8] Module 1 Guidance Text *supra* note 1 at p41.

- The creation of the Dubai International Financial Centre (the "DIFC") and the DIFC Insolvency law in Dubai.
- In 2016, judges from across the world joined together to form the Judicial Insolvency Network ("JIN"). This network allows judges from different jurisdictions to be able to come together to discuss, share and develop innovative ways to improve cooperation on a cross-border basis. For example, the members of JIN have contributed to the Guidelines for Communication and Cooperation between the Courts in Cross Border Insolvency Matters (JIN Guidelines).[9]
- The adoption of the MLCB itself by various States ensures that there is a basis for cooperation between States in relation to insolvency proceedings. It opens the dialogue between two different States courts and allows them to share relevant information in relation to the debtor and the insolvency proceedings.

The issue however, is that there is still no global uniform approach to insolvency law and each country has its own domestic laws regulating its own insolvency laws and policies which affect them. Some States for example may have a pro-creditor insolvency system and provisions which may be incompatible with another State whose basis of their insolvency regime is pro-debtor. Whilst there is cooperation between some groups of countries there is still the issue that insolvency proceedings in one country may be substantially different in another, and that cooperation on insolvency proceedings across some States will be easier than in others, or cause conflict. It would be helpful if more countries in some way domesticated the overarching principles of the MLCB to allow for more uniformity across a variety of more States and also facilitating cooperation on a cross-border basis when it comes to insolvency proceedings. This wouldn't solve all the issues, but it may help lesson them to allow for a more stream-lined approach to recognition of insolvency issues across borders. If anything adopting the MLCB principles into a States domestic law can only be beneficial in instances where the local insolvency regimes is in its infancy stages and having some provisions which have not yet been tested (for example the domestic law in Dubai) and in instances where the domestic law of a State does not contain any provisions covering off how to deal with insolvency on an international scale.

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.

3.5
Marks awarded 11 out of 15

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

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

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

[9] Module 1 Guidance Text *supra* note 1 at p72.

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 terms of further information needed, firstly, it would be helpful to have sight of the agreement between Apex and Nadir as there may be specific provisions dealing with the insolvency of Nadir as well as specific enforcement provisions which could be relevant. Secondly, it would also be helpful to have sight of the actual Cross-border Insolvency Act of Utopia to ascertain its application requirements and whether it applies retrospectively. It will also be helpful to understand the scope of powers of the insolvency practitioner.

Despite not having sight of the above, my advice would be as follows:

As UNCITRAL Model Law on Cross-border Insolvency ("MLCB") has been adopted by Utopia in the Cross-border Insolvency Act of Utopia, concurrent insolvency proceedings become a possibility as well as the cooperation of the courts in Utopia and Erewhon. The MLCB when adopted into a country's domestic laws, that country's Courts will need to recognise insolvency proceedings commenced in another State

It may be relevant for the foreign liquidator to apply to the Court in Utopia to have is appointment and powers in Utopia. When doing so, he will need to supply the Court with his appointment documents (make full disclosure) as well as providing evidence of the proceedings currently lodged in Erewhon for recognition by the Utopian court.

It may then be important for the foreign liquidator to prove whether the main proceedings are those in Erewhon or those in Utopia. To determine this we need to look to the COMI or where the debtor has his centre of main interests. As this is not defined in the MLCB (as presumably not in the Utopian Insolvency law), the COMI is generally considered to be where the registered office of the company is – in this case Nadir's registered office is in Utopia. As a consequence, it is likely that the COMI will be Utopia and the proceedings in Erewhon wouldn't be classified as foreign main proceedings for purposes of the MLCB. If the Erewhon proceedings were to be recognised as the main proceeding, the effect of this would mean that Nadir's ability to transfer or encumber its assets are suspended and individual actions insofar as they relate to Nadir would be prevented from either commencing or continuing.[10]

That being said, the foreign proceedings in Erewhon may still be recognised upon application by the Erewhon liquidator to the Utopia courts and should the proceedings be recognised, the Utopian Court may grant relief to the Erewhon creditor: (i) by way of staying the execution against Nadir's assets on a provisional basis; (ii) entrust all or part of the debtor's assets located in Erewhon with the Erewhon liquidator (or another person designated by the Court) so that their value can be protected and/or preserved; or (iii) any other relief which may be appropriate.[11] For the avoidance of doubt this is only if the COMI is established in Erewhon and the Erewhon proceedings are to be considered the main proceedings – the proceedings in Utopia can still go ahead but only insofar as they affect assets within Utopia.

[10] Articles 20(1)(a) and 20(1)(c) of the UNCITRAL Model Law on Cross-Border Insolvency (1997).
[11] *Idem* at Article 19.

Ultimately, the overarching principle of the MLCB is the harmonisation of insolvency proceedings across multiple states and provides guidance on how these proceedings should be conducted and regulated. It also provides another source to consider instead of only relying on private international law. This means that the courts of Utopia (having adopted the MLCB into its domestic legislation) will attempt to commence a line of communication with the Court in Erewhon in relation to the insolvency proceedings in both states. This way both the Courts and States can work together or concurrently in the interests of the creditors of Nadir which would allow for a fair conclusion to both proceedings and benefit the creditors of Nadir appropriately.

With the above in mind it might be that the Erewhon liquidator would like to avoid having the court action by Apex in Utopia recognised. To achieve this he may have to argue that Utopia is not the where COMI is and as Erewhon has not incorporated the MLCB model, and therefore the main proceedings should be those of Utopia. However, this will be a difficult outcome to achieve since there are more factors supporting the argument that the COMI is in Utopia and given that Utopia has accepted the provisions of the MLCB, it is likely that the Utopian Court will reach out to the Erewhon Court to work together.

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) Yes, as Nadir could raise the argument that there are ongoing proceedings in another jurisdiction which would have a bearing on separate proceedings (Apex proceedings). The relief claimed by Apex would also be affected as Nadir wouldn't have any assets to satisfy any judgment debt which Apex might obtain as those assets are now held by the liquidator in Erewhon. It might be that Apex rather than the Court contacts the liquidator to submit a claim in the liquidation of Nadir.

b) No, as the above process to ensure cooperation between states as to the insolvency proceedings would have been required under Utopian law and also would ensure the most fair outcome to each of Nadir's creditors.

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

.5

Question 4.3 [maximum 8 marks]

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

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

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

For purposes of this question, the country I have selected for the company's incorporation will be the United Kingdom where the MLCB have been adopted into domestic law as part of the Cross-Border Insolvency Regulations 2006 ("CBIR"). The issues facing the insolvency representative in the above set of facts would be:

1) determining where the company's centre of main interests is ("COMI"). This is not specifically defined in the CBIR and is often informed by case law. There is a rebuttable presumption that the COMI is where the company's registered office is but it could be argued that most of its trading activities take place elsewhere and that this should be considered the COMI. In the UK this would require an objective assessment of the facts of the case to determine the COMI and the various factors which may be looked at can be found in case law (for example, the *Stanford International Bank Limited* case).[12]
2) determining whether other insolvency proceedings have been commenced/concluded in other jurisdictions. In the UK an insolvency practitioner in this instance may wish to ask the local court to send a letter of request to the foreign court to assist the goal of the local restructuring or insolvency proceedings.[13] In the UK the insolvency practitioner may alternatively request the local courts for an anti-suit injunction intended to prevent the taking or continuation of proceedings by creditors in foreign jurisdictions.[14]
3) determining what level of cooperation exists between the various states in which it the multiple creditors are present as well as where the assets are situated. One will need to determine whether there are any cross-border agreements between the States or any protocols in this regard.
4) as there are various assets spread across multiple jurisdictions, attachment and distribution is difficult and they will have to see if that property can be attached in relation to one proceeding in a different country.

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. Then apply the current UK laws on CBI to such issues.
4
Marks awarded 9.5 out of 15
MARKS AWARDED 38.5/50

*** End of Assessment ***

[12] [2009] EWHC 1441 (Ch).
[13] *Perpetual Trustee Company Limited v BNY Corporate Trustee Services Limited and Lehman Special Financing Inc* [2009] EWHC 2953 (Ch), accessed on 15 October 2021 at High Court says sending detailed letter of request in cross-border insolvency would be "judicial bad manners", Practical Law UK Legal Update, 2-500-8194.
[14] *Stichting Shell Pensioenfonds v Krys and another (British Virgin Islands)* [2014] UKPC 41, accessed on 15 October 2021 at Use of anti-suit injunction to prevent proceedings by a creditor of a company in liquidation (Privy Council), Practical Law UK Legal Update, 9-590-6045.