



FORMATIVE ASSESSMENT: MODULE 1

INTRODUCTION TO INTERNATIONAL INSOLVENCY LAW

This is a **formative assessment** relating to **Module 1** and is designed to provide candidates on the Foundation Certificate course with some direction and guidance as to the form and content of assessments on the course as a whole. The submission of this assessment is **not compulsory** and the mark awarded will not count towards the final mark for Module 1 or the course as a whole. However, students are encouraged to submit this assessment as part of their orientation for the submission of the formal (summative) assessments for all the modules on the course.

The Marking Guide for this assessment will be made available on the Course Administration page of the course web pages after the submission date on 15 October 2021.

INSTRUCTIONS FOR COMPLETION AND SUBMISSION OF ASSESSMENT

Please read the following instructions very carefully before submitting / uploading your assessment on the Foundation Certificate web pages.

1. You must use this document for the answering of the assessment for this module. The answers to each question must be completed using this document with the answers populated under each question.
2. All assessments must be submitted electronically in MS Word format, using a standard A4 size page and a 11-point Arial font. This document has been set up with these parameters – **please do not change the document settings in any way. DO NOT** submit your assessment in PDF format as it will be returned to you unmarked.
3. No limit has been set for the length of your answers to the questions. However, please be guided by the mark allocation for each question. More often than not, one fact / statement will earn one mark (unless it is obvious from the question that this is not the case).
4. You must save this document using the following format: **[studentID.assessment1formative.]**. An example would be something along the following lines: 202122-514.assessment1formative. **Please also include the filename as a footer to each page of the assessment** (this has been pre-populated for you, merely replace the words “studentID” with the student number allocated to you). Do not include your name or any other identifying words in your file name. **Assessments that do not comply with this instruction will be returned to candidates unmarked.**
5. Before you will be allowed to upload / submit your assessment via the portal on the Foundation Certificate web pages, you will be required to confirm / certify that you are the person who completed the assessment and that the work submitted is your own, original work. Please see the part of the Course Handbook that deals with plagiarism and dishonesty in the submission of assessments. **Please note that copying and pasting from the Guidance Text into your answer is prohibited and constitutes plagiarism. You must write the answers to the questions in your own words.**
6. The final submission date for this assessment is **15 October 2021**. The assessment submission portal will close at **23:00 (11 pm) BST (GMT +1) on 15 October 2021**. No submissions can be made after the portal has closed and no further uploading of documents will be allowed, no matter the circumstances.
7. Prior to being populated with your answers, this assessment consists of **9 pages**.

ANSWER ALL THE QUESTIONS

QUESTION 1 (multiple-choice questions) [10 marks in total]

Questions 1.1. – 1.10. are multiple-choice questions designed to assess your ability to think critically about the subject. Please read each question carefully before reading the answer options. Be aware that some questions may seem to have more than one right answer, but you are to look for the one that makes the most sense and is the most correct. When you have a clear idea of the question, find your answer and **mark your selection on the answer sheet by highlighting the relevant paragraph in yellow**. Select only **ONE** answer. Candidates who select more than one answer will receive no mark for that specific question.

Question 1.1

It should be relatively easy to develop a single system to deal with cross-border insolvency since all jurisdictions have more or less the same local insolvency law rules.

- (a) This statement is true since all countries have implemented the UNCITRAL Model Law on Cross-Border Insolvency.
- (b) This statement is untrue since there are huge differences in both the approach and insolvency legislation of various jurisdictions.**
- (c) This statement is true since all systems have at least the same general insolvency concepts.
- (d) The statement is true since the historical roots of all insolvency systems are the same.

Question 1.2

The Statute of Ann, 1705 was a very important piece of legislation for the development of English insolvency law.

- (a) This statement is true since this Act introduced imprisonment of debt.
- (b) This statement is untrue because it dealt with the distributions of the proceeds derived from the proceeds of selling the assets of the estate.
- (c) This statement is true since it introduced the notion of discharge.**
- (d) This statement is true since it introduced fraudulent conveyances into English law.

Question 1.3

The purpose of the UNCITRAL Legislative Guide (2004) has direct application in all the member States of the UN.

- (a) This statement is true because UNCITRAL's model legislative guidelines apply automatically to all member States.
- (b) This statement is true because all member States supported its automatic implementation in their respective jurisdictions.

(c) This statement is untrue because the Legislative Guide serves merely as soft law and contains best practice to be considered when countries revise their own insolvency legislation.

(d) This statement is untrue since the Legislative Guide is only available for use by developing countries when reforming their own insolvency laws.

Question 1.4

Modern rescue proceedings have replaced liquidation as an insolvency procedure in most systems.

(a) This statement is true since business rescue is important for socio-economic reasons.

(b) This statement is true because liquidation is viewed as a medieval and outdated process.

(c) This statement is untrue since there is still a need for both liquidation and rescue procedures in insolvency systems.

(d) This statement is untrue since some systems have no formal rescue procedure.

Question 1.5

The principles and requirements for avoidable dispositions and executory contracts are the same in all jurisdictions – hence these do not pose problems in a cross-border insolvency matter.

(a) The statement is untrue, the requirements and principles do differ and pose problems in a cross-border case.

(b) This statement is untrue because the insolvency laws of the State where the original insolvency order is issued will apply to all the other States involved in the matter.

(c) This statement is untrue since avoidable dispositions and executory contracts do not pose any problems in a cross-border case.

(d) The statement is untrue since avoidable dispositions and executory contracts may be disregarded in a cross-border case.

Question 1.6

The domestic corporate insolvency statute of a country makes no mention of the possibility of a foreign element in a liquidation commenced locally. The country has ratified a regional treaty on insolvency proceedings that contain provisions on concurrent insolvency proceedings over the same debtor in a neighbouring treaty state.

In a local liquidation commenced under the domestic corporate insolvency statute, to what law can the local court refer in order to resolve an international law issue that has arisen because of concurrent insolvency proceedings in the neighbouring state?

(a) Public International Law.

(b) UNCITRAL Legislative Guide on Insolvency Law.

- (c) World Bank Principles for Effective Insolvency and Creditor Rights Systems.
- (d) Private International Law.

Question 1.7

Which one of the following documents mandates co-operation or communication between courts in concurrent insolvency proceedings on the same debtor, which are being conducted in different nation states?

- (a) ALI / III Global Guidelines Applicable to Court-to-Court Communication in Cross-Border Cases (2012).
- (b) EU Cross-Border Insolvency Court-to-Court Communications Guidelines (2014).
- (c) **UNCITRAL Model Law on Cross-border Insolvency (1997).**
- (d) JIN Guidelines for Communication and Cooperation between Courts in Cross-Border Insolvency Matters (2016).

Question 1.8

Latin and Middle America states have ratified various multilateral conventions and treaties that address international insolvency issues. While they promote unity of proceedings in the treaty states where a debtor has a single commercial domicile, they acknowledge the possibility of concurrent proceedings.

Which of the following conventions and treaties does **not** provide for judicial co-operation where there are surplus funds remaining in a proceeding in one treaty state and there are concurrent insolvency proceedings over the same debtor in another treaty state?

- (a) Montevideo Treaty on International Commercial Law (1889).
- (b) Montevideo Treaty on International Commercial Terrestrial Law (1940).
- (c) Montevideo Treaty on International Procedural Law (1940).
- (d) **Havana Convention on Private International Law (1928).**

Question 1.9

The Council Regulation on Insolvency Proceedings (European Insolvency Regulation) (2000), which applies in all European Union member states except Denmark, was reviewed after a decade's operation. An amended European Insolvency Regulation (EIR) Recast (2015) was adopted in 2015 and took effect in June 2017.

Which of the following aspects of international insolvency is **not** addressed in the EIR Recast?

- (a) **Proceedings to restructure a debtor that is facing the likelihood of insolvency.**
- (b) Definition of "centre of the debtor's main interests".

(c) A centralised insolvency register of insolvency proceedings opened in member states.

(d) Co-operation and co-ordination provisions applicable to corporate groups.

Question 1.10

An unsecured Creditor is owed monies by the Debtor for services it supplied locally. It has issued proceedings to recover the debt in the local Court. The Debtor has moved its registration and head office to the local country from its original place of incorporation in a foreign country. The Creditor is incorporated and has its head office in that foreign country. The contract to supply, which was created by exchange of emails sent between the head offices, denominates the debt in the currency of the foreign country. The Debtor is being wound-up in the foreign country and the foreign liquidator seeks recognition and a stay in the local Court proceedings. What aspect is an international insolvency issue?

(a) The local Court's jurisdiction over the Debtor.

(b) The standing of the foreign Creditor to sue for its debt in the local Court.

(c) The foreign liquidator's standing to request a stay of the local proceedings.

(d) The fact that the debt owed to the Creditor is in a foreign currency.

Marks awarded 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 is the web of agreements that have international effect which deal, to a greater or lesser extent, with the concepts of recognition, cooperation and coordination between national insolvency laws and proceedings. As a general rule such agreements are forged with the intention of preserving the equality of creditors to a debtor notwithstanding the affairs of the debtor may extend beyond the confines of a single nation state or the creditor be a foreign entity for the purpose of the insolvency proceedings afoot in relation to the debtor.

2

Question 2.2 [maximum 5 marks]

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

Universality and territoriality are the two poles of a spectrum of approaches to insolvency law that concerns a debtor whose assets or debts extend beyond a single country.

Universality is the concept that a debtor should only be subject to a single worldwide proceedings with respect to its assets and debts. To achieve universalism you need the nation state to surrender its sovereignty over entities and assets situate in its jurisdiction in favour of the state ceded control under the principal. In practice nation states find this very hard to do. Whatsmore this is not a system that can be adopted by some and not others (as is the case for the UNCITRAL model law) because it relies on application globally to work. For this reason,

whilst the principals behind it are very worthy (consistency of outcome, fairness and reduced cost) it is unlikely to be implemented in full in practice.

Territoriality is the concept that anything related to a state must be dealt with by the courts of that state without reference to proceedings elsewhere and with effect limited within the jurisdiction of that state only. In a sense this is the default position of all laws, the concept of supremacy of the individual state within its own borders. Clearly that pure concept has been significantly undone over the last two hundred years by the adoption of interstate treaties that modify territoriality in return for the benefit of interstate agreement on how to manage a particular legal issue. A non insolvency related example being the various treaties on recognition of foreign judgements in domestic courts. In the insolvency context a system of pure territoriality is very unhelpful as it fails to allow for recognition of a state of affairs in one state (i.e. a company being insolvent) by another state potentially allowing for the company to continue to trade in the second state and also resulting in an inability to have a ordered resolution or winding up of a company with assets and activities across countries.

A system that acknowledges territorial supremacy but modifies it to recognise proceedings ongoing in other states is known as modified universalism and is the approach adopted by most international treaties in this area.

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.

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.

There are no international treaties that apply across the Middle East in insolvency cases. A regional comparative survey of insolvency systems in the middle east and N Africa was commended in 2009 based upon the World Bank's principals for effective Insolvency and Creditor Rights as a set of principles to guide against. This was an initiative of the Hawkamah Institute for Corporate Governance, the World Bank, the OECD and INSOL.

In 2016 and 2019 the UAE, in 2018 Saudi Arabia and 2019 Dubai all undertook reforms of Insolvency law. **[more details are required]** Bahrain and DIFC have adopted the UNCITRAL Model Law on Cross Border Insolvency. The former in 2018 and the latter in 2019.

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

2.5

Marks awarded 8 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 for, and thereby the differences, between corporate insolvency and personal insolvency are driven largely by the difference in nature of the person to a corporate vehicle. A person, whatever their state of solvency, must continue to exist for their natural life and therefore any insolvency system related to individuals needs to formulate a manner in which

debts can be resolved whilst the person continues to exist. In early systems the treatment of bankrupt individuals was frequently similar to criminal individuals, i.e. the person was penalised and often incarcerated. The disadvantage of such a system is it leaves the person economically unproductive and unable to provide for themselves. Therefore systems developed to permit the discharge of debts of a bankrupt individual after distribution of their assets to their creditors. Such systems may have further developed to allow for rehabilitation plans that permit the debtor to work out some amount of restitution to their creditors over a period of time using their existing assets. One could characterise that as a form of resolution or restructuring arrangement.

Corporate entities are legal creations and unlike living people do not have an existence once the law decrees otherwise. The development of corporate insolvency started with the simple system that once the debts outweighed the assets of a debtor that debtors assets should be realised to satisfy their creditors to the extent that they can and that that corporate vehicle should be dissolved. This is what a common law lawyer would characterise as liquidation. Liquidation may be the only option for an unviable company but most laws have come to recognise that it has downsides in terms of wasted opportunity to rehabilitate, damage to creditors (especially the unsecured), unsatisfactory social outcomes for employees and pension recipients, amongst other things. Laws have therefore developed to facilitate corporate rescue as an alternative to liquidation.

In a sense you could say that both personal and corporate insolvency processes are moving in the same direction, towards greater opportunity for positive rehabilitation.

There is scope to elaborate and discuss for example exempt assets.

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.

Generally insolvency systems have two roots, the English law derived common law system or the European civil law derived systems. In either case national insolvency laws have the starting point of being domestic in concept, i.e. they do not generally cater for processes ongoing in other jurisdictions in relation to the same debtor. The reality of modern life is not intra nation only but cross border giving rise to contractual liabilities that span borders and entities that operate in more than one jurisdiction and using a multiplicity of laws in their contractual dealings. The historical roots of domestic modern insolvency law also means that you have two different traditions and the concepts and consequences of an insolvency are dealt with in a different manner making direct interaction between the two difficult at times. It has also been said that the two traditions have different philosophical frameworks as to how to balance the needs of debtor and creditor with the common law system often said to be more friendly to creditors whereas the civil law systems more friendly to the debtors. Added on top of the differing roots of insolvency systems are national priorities which mean that different interested parties in an insolvency situation are dealt with in different ways. Some countries prioritise the recovery of unpaid tax receipts whereas others prioritise unpaid employee dues. The difference in treatment of creditors versus debtors and the policy choices made by states in relation to who should be paid in priority to secured creditors means that there is often a gulf in substantive law between insolvency systems and, as a general rule, nation states are reluctant to import substantive law from other nation states where there is a difference in philosophy on the legal point. For that reason, whilst universalism is academically preferred (as it should result in a cleaner process with better outcomes) the differing position and territorial supremacy of a state within its own borders means that naturally something closer to territorialism will prevail. Clearly much progress has been made in the 20C and 21C in

adjusting this narrow approach of a state by state process to allow systems to recognise modern trading reality. This has occurred through the works of the UN and also as a result of the development of supranational legal entities, such as the EU, which often lead the way in breaking new ground on cross border issues (e.g. the EU data protection laws have become the standard for global legal developments in this area).

Further detail would be beneficial. For example, consideration of Westbrook's 9 key issues.
3

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.

As I discussed in my previous answer, the starting point for insolvency law is a state by state approach albeit there is some commonality between systems derived from the English common law system and the civil law systems (but it must be noted that as the 20C and 21C pass the differences between systems derived in one of these two traditions grow wider. Today an insolvency process carried out in Singapore has significant differences to one carried out in London, almost to the point that their common antecedents are lost). The EU aside, the main way to effect an alignment of laws between nation states is through international treaties or conventions.

In the EU the member states have agreed to suborn domestic law to EU law passed by way of an EU directive or regulation. A EU directive requires the member state to pass domestic legislation to achieve the aims of the EU directive. An EU regulation take direct effect, i.e. there is no need for domestic legislation as the EU regulation directly amends or supersedes domestic law. Whilst the EU is not globally multilateral but only multilateral within its own group of nations, as I say, it has strong effects outside of its EU jurisdiction when it passes legislation. In the area of insolvency law in the 21C the EU has passed very significant legislation in the form of the European Insolvency Regulation 2000 and an update to that in the form of the European Insolvency Regulation Recast 2015. These two pieces of regulation (the second being a restatement of the first with subsequent amendments in certain areas) have had an important effect in the consideration of key issues such as where an entity has its main presence (known as its COMI), in the priority given to multiple proceedings relating to one debtor, the cooperation and coordination between courts, in extending the scope of the regulation to activities prior to formal insolvency, promoting the concepts that allow for rescues across more than a single state and acknowledging the issues that relate to insolvency in the context of a corporate group.

In addition to the developments in the EU, UNCITRAL has built upon the success of the MLCBI (1997) through the publication of the UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation in 2009 to guide the negotiation of cross border cooperation agreements under MLCBI.

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.

This has been built upon in the NAFTA area (now the USMCA area) through the development of the ALI NAFTA Guidelines Applicable to Court – to – Court Communication in Cross Border Cases 2000 and 2012. The Judicial Insolvency Network has similarly produced the Guidelines

for Communication and Cooperation between Courts in Cross-border Insolvency Matters to facilitate the recognition and cooperation between adopting states.

This second set of developments relates to better cooperation between courts, it does not seek to harmonise or change domestic insolvency legislation.

UNCITRAL has produced three new model laws in the 21C. One on cross-border insolvency (2013), one on recognition and enforcement of insolvency related judgements (2018) and one on group insolvency (2019). Adoption of any of these by a nation state would, to the extent of the model laws adopted, alter pre-existing domestic insolvency law. However, at this time, no state has adopted any of these model laws. Without adoption they will not directly affect any domestic law however there is strong evidence that model laws are considered in great depth when domestic insolvency laws are reformed, so in that regard they will have increasing soft effect over time.

In the 21C it is only the EU that has taken substantive steps to harmonise insolvency laws within its multilateral framework. The new model laws established by UNCITRAL have soft effect when considered by nations considering how to amend their domestic legislation. However all three areas (cross border insolvency, recognition of judgments and group enterprise insolvency) relate to questions of fundamental legal policy that extends beyond the area of insolvency and, for that reason, need to be carefully considered in light of laws relating to these subjects that are not insolvency related laws. For that reason my view is that they will continue to be reference points rather than see wholesale adoption by many countries.

Please refer to the model answer.

3

Marks awarded 10 out of 15

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

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

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

If you require additional information to answer the questions that follow, briefly state what information it is you require and why it is relevant.

Question 4.1 [maximum 5 marks]

Assume the UNCITRAL Model Law on Cross-border Insolvency has been adopted by Utopia without modification, except as required to domesticate it. For example, the Cross-border Insolvency Act of Utopia names its local laws relating to insolvency and its competent court under the Act. The Erewhon liquidator’s investigations detect that Apex is suing Nadir in Utopia. The liquidator would like to stop Apex court action against Nadir in Utopia. Advise the Erewhon liquidator on the potential relevance of the Cross-border Insolvency Act of Utopia.

The MLCBI (if adopted in its entirety in domestic legislation as is the case in Utopia) covers access for a foreign representative and foreign creditors to the domestic court insolvency proceedings; recognition of foreign proceedings; provides appropriate relief in relation to cross

border insolvency issues; and facilitates cooperation between foreign courts and foreign representatives.

For a proceeding to come within the scope of MLCBI it must be a proceeding set out in MLCBI Article 1. In this case it would come within the first limb of Article 1, an inbound request from Erewhon ('E') to Utopia ('U') to recognise the ongoing liquidation. A foreign proceeding must come within MLCBI Article 2; in principle the liquidation proceedings in E appear to come within the definition in Article 2, clearly further due diligence would be needed to establish that that is the case. Leading case on this is the English case of *Agrokor DD* [2017] EWHC 2791. The application must be made by a 'foreign representative' as defined in MLCBI Article 2. Again this needs to be further established on the facts but prima facie a liquidator would normally come within the definition. In order to come within the MLCBI the proceedings must be a 'foreign main proceeding' or 'a foreign non-main proceedings'. The former must take place in the courts of the country where the entity has its COMI (which is not defined in MLCBI), the latter must take place in the country where the entity has 'a place of operations where the debtor carries out non-transitory economic activity with human means and goods or services (MLCBI). It is not possible to establish whether Nadir's ('N') proceedings are foreign main proceedings or foreign non-main proceedings' from the fact pattern, the fact it is registered in U is persuasive but I note that it moved its registration within the last month which may indicate forum shopping. The fact a company is registered in a country does not mean it has its COMI there if it can be shown that its management and central operations are carried out from elsewhere. In this regard the main leading jurisprudence can be found in relation to the EIR Recast which has a definition of COMI.

There are a number of other threshold tests, the relief under MLCBI must not conflict with an international law obligations of U (MLCBI Art 3) and the proceedings must not be contrary to the public policy of U (MLCBI Art 6) albeit that that is a high threshold test.

If the liquidator of N can establish that the proceedings are 'foreign proceedings' of either type and that it the liquidator is a 'foreign representative' then they may seek relief under Chapter III of MLCBI.

If the proceedings in E are 'foreign main proceedings' then under MLCBI Art 20 there is an automatic stay on the proceedings in E. The liquidator of N would need to make application to the courts of U in accordance with MLCBI Art 15. On the facts here, in making application the liquidator would need to disapply the presumption in Art 16 that the registered office is the COMI of N. As mentioned a recent change of country of registration where the substantive centre of main interest has not changed would allow the presumption to be rebutted. The burden of proof in that regard lies upon the liquidator in its application under Art 15. In the event this is not possible to rebut the proceedings in E would be 'foreign non-main proceedings' and the automatic stay would not apply. Instead the liquidator would need to make application under Article 20. I note that on this fact pattern there is no insolvency proceeding afoot in U.

[though in a real world scenario the Gibbs rule complicates Art 20 for any contractual action under a country applying that rule and where the creditor has not submitted to the foreign proceedings. See the very interesting IBA case where the UK supreme court has just refused leave to appeal, the Court of Appeal in IBA is now the leading authority on Gibbs and cross border recognition. In particular, Gibbs poses a problem for the new English Part 26A process (ironically as its an English case) where the laws governing a debt instrument are under a Gibbs applying jurisdiction, the creditor has not submitted to the 26A process and the 26A process results in a claim being compromised in a manner that the creditor considers worse than suing under the law of the contract. All very interesting but not pertinent to this fact pattern!].

Please see the model answer with relevant issues for this sub-question.

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; it depends on whether the proceedings in E are 'foreign main proceedings' or 'foreign non-main proceedings'. If it is the former then it would not change the analysis and the automatic stay would apply. If it is 'foreign non-main proceedings' then the courts in U would take this into consideration in granting any relief under Art 20.
- (b) Yes, in that situation the proceedings in E are unlikely to be 'foreign main proceedings' and therefore would be 'foreign non-main proceedings' so that relief would only be discretionary relief under article 20.

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

.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?

Company is incorporated in Hong Kong.

Issue 1 – recognition in any other state of the Hong Kong proceedings will depend upon whether or not that country has adopted MLCBI. Where the relevant country has not incorporated MLCBI (e.g. India) then recognition will be under the relevant domestic recognition laws.

Issue 2 – Where is the company's COMI. For the purpose of the MLCBI the proceedings are afoot in the location of the debtor's COMI, presumption to its location of registered office is not rebutted here as place of main business is HK. Therefore in MLCBI applying jurisdictions the HK proceedings would be considered a foreign main proceedings.

Issue 3 – what relief is sought? Relief in MLCBI applying countries will be under Article 20 (automatic stay) Article 21 (Further relief available) and, where applicable, Art 19 (Interim relief prior to recognition). Relief in non MLCBI countries will depend on local laws on recognition,

any stay or interim relief is unlikely to be granted, recognition of a final judgement may be the only relief available.

Issue 4 – Gibbs. Gibbs will apply in Hong Kong so any relief will not be available against a Hong Kong law creditor who has not submitted in the foreign proceedings.

Note to examiner – it seems impossible to answer Part 4 without having read and considered Module 2A, I have so I have tried to make my answers full

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

3
Marks awarded 7.5 out of 15
MARKS AWARDED 34.5/50

*** End of Assessment ***