INSOL INTERNATIONAL
FOUNDATION CERTIFICATE
IN INTERNATIONAL INSOLVENCY LAW

FORMATIVE ASSESSMENT: MODULE 1

INTRODUCTION TO INTERNATIONAL INSOLVENCY LAW

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

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

INSTRUCTIONS FOR COMPLETION AND SUBMISSION OF ASSESSMENT

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

1. You must use this document for the answering of the assessment for this module. The answers to each question must be completed using this document with the answers populated under each question.

2. All assessments must be submitted electronically in MS Word format, using a standard A4 size page and a 11-point Arial font. This document has been set up with these parameters – **please do not change the document settings in any way**. **DO NOT** submit your assessment in PDF format as it will be returned to you unmarked.

3. No limit has been set for the length of your answers to the questions. However, please be guided by the mark allocation for each question. More often than not, one fact / statement will earn one mark (unless it is obvious from the question that this is not the case).

4. You must save this document using the following format: **[studentID.assessment1formative.]**. An example would be something along the following lines: 202122-514.assessment1formative. **Please also include the filename as a footer to each page of the assessment** (this has been pre-populated for you, merely replace the words "studentID" with the student number allocated to you). Do not include your name or any other identifying words in your file name. **Assessments that do not comply with this instruction will be returned to candidates unmarked**.

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6. The final submission date for this assessment is **15 October 2021**. The assessment submission portal will close at **23:00 (11 pm) BST (GMT +1) on 15 October 2021**. No submissions can be made after the portal has closed and no further uploading of documents will be allowed, no matter the circumstances.

7. Prior to being populated with your answers, this assessment consists of **9 pages**.

ANSWER ALL THE QUESTIONS

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

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

Question 1.1

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

(a) This statement is true since all countries have implemented the UNCITRAL Model Law on Cross-Border Insolvency.

(b) This statement is untrue since there are huge differences in both the approach and insolvency legislation of various jurisdictions.

(c) This statement is true since all systems have at least the same general insolvency concepts.

(d) The statement is true since the historical roots of all insolvency systems are the same.

Question 1.2

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

(a) This statement is true since this Act introduced imprisonment of debt.

(b) This statement is untrue because it dealt with the distributions of the proceeds derived from the proceeds of selling the assets of the estate.

(c) This statement is true since it introduced the notion of discharge.

(d) This statement is true since it introduced fraudulent conveyances into English law.

Question 1.3

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

(a) This statement is true because UNCITRAL's model legislative guidelines apply automatically to all member States.

(b) This statement is true because all member States supported its automatic implementation in their respective jurisdictions.

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

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

Question 1.4

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

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

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

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

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

Question 1.5

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

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

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

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

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

Question 1.6

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

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

(a) Public International Law.

(b) UNCITRAL Legislative Guide on Insolvency Law.

(c) World Bank Principles for Effective Insolvency and Creditor Rights Systems.

(d) Private International Law.

Question 1.7

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

(a) ALI / III Global Guidelines Applicable to Court-to-Court Communication in Cross-Border Cases (2012).

(b) EU Cross-Border Insolvency Court-to-Court Communications Guidelines (2014).

(c) UNCITRAL Model Law on Cross-border Insolvency (1997).

(d) JIN Guidelines for Communication and Cooperation between Courts in Cross-Border Insolvency Matters (2016).

Question 1.8

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

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

(a) Montevideo Treaty on International Commercial Law (1889).

(b) Montevideo Treaty on International Commercial Terrestrial Law (1940).

(c) Montevideo Treaty on International Procedural Law (1940).

(d) Havana Convention on Private International Law (1928).

Question 1.9

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

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

(a) Proceedings to restructure a debtor that is facing the likelihood of insolvency.

(b) Definition of "centre of the debtor's main interests".

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

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

Question 1.10

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

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

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

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

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

Marks awarded 9 out of 10

QUESTION 2 (direct questions) [10 marks]

Question 2.1 [maximum 2 marks]

Explain what the term "international insolvency law" means.

With the Globalisation of International trade and movement of assets across borders, situations to deal with the cross-border legal and insolvency issues may arise, for a creditor, to deal with the estate of the debtor.

Wessels (2006) defines international insolvency law as that part of the law that:

"[i]s commonly describes in international literature as a body of rules concerning certain 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".

However, this definition by Wessels is limited as it is connected to the existence of a national legal framework of insolvency law. Another definition of International insolvency law as proposed by Fletcher (2005) is:

"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 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".

International Insolvency Law can be defined as a set of laws which govern Insolvency in circumstances when an Insolvency occurs beyond a single system of law and domestic insolvency law provisions cannot be applied without considering the foreign aspects associated with the case.

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Question 2.2 [maximum 5 marks]

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

Universalism deals with the concept or approach that the multiple insolvency proceedings pending or originating in different jurisdictions (states) can be dealt with; by one common insolvency law. In other words, one proceeding in one state will have a worldwide effect eg. proceedings at the debtors' Centre Of Main Interest (COMI). The proceedings will be dealt with based on the laws of that state (Home State) and have effect on all other states where the debtor may have interests. The primary objective is that all the Debtors assets are included in the proceeding and the administrator can exercise control over them.

This would mean that all states recognise each other's courts' judgements and all creditors will file their claims to that jurisdiction where the assets are being administered or where the main proceeding is taken (the lex concursus). Therefore, all assets are distributed to the creditors, across states, by the central administrator, regardless, of where they are located, on the basis of equity.

Territorialism is the traditional method where the insolvency proceeding will apply only to that state where the proceeding is opened. It basically addressees the local interests of the creditors in that state only.

In this case, the proceedings will have to be opened in each state where the debtor has assets/ interests. The assets will then be distributed based on the law of that country and the creditors filing their claims there (The Grab Rule). The creditors in other countries may not be protected by the country's laws and there is no obligation to remit the proceeds of the assets to other countries.

Issues:
Universalism:

- Definition of COMI (Main interests or where the assets are available).
- One Common Law (Ideal situation, but difficult to achieve).
- Individual states' Laws relating to property and security of the same
- Uncertainty in home state standards, subject to manipulation.

Territorialism:

- Companies have less chances of survival, as re-organisation is difficult if assets are in different states.
- Assets across different countries would yield less value than combined sum.
- Assets can be moved to other jurisdictions resulting in losses for creditors.
- Nations are less likely to allow the interests of foreign creditors to take precedence over local ones.
- Higher costs of proceedings in multiple jurisdictions.
- Debtor could be insolvent in one state where the debts are accrued but could be solvent in another state where the assets are located.

5

References: (Howell, 2008, and INSOL International, 2021)

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 Middle East region has been developing the insolvency framework in a variety of Middle East and North African (MENA) countries. The GCC counties have been working with the World Bank, for many years now, on the insolvency regulations.

Some Middle Eastern countries have reformed their Domestic Insolvency Laws (Ref: INSOL International, 2021 page 66):

United Arab Emirates (UAE), 2016:

For instance, the Federal Law by Decree No. 9 of 2016 on Bankruptcy, which came into force in December 2016. It helps distressed companies to avoid bankruptcy through different avenues (MoF UAE, n.d):

- Out of court restructuring
- Financial restructuring
- Secure new loans under terms set by the law
- Conversion to declaration of bankruptcy and liquidation of the debtors' assets

This law does not apply to individuals.

Federal Law Decree – Law No. (23) of 2019: Amending Certain Provisions of the 2016 law.

Federal Decree- Law No. (19) of 2019 issued on 29/9/2019 on Insolvency:

- This law defined the term "Debtor" as the "Insolvent physical person".

Scope of Application: this provision applies to Debtors not covered under the 2016 law

DIFC 2019

DIFC Insolvency law No. 1 (2019) effective 13.06.2019
This law introduced the "Debtor in possession" bankruptcy regime and gave the guidelines of the administration process to implement in cases where there is evidence of mismanagement. This law improves the winding-up procedures and incorporates the UNCITRAL Model law on cross border insolvency with certain modifications.

Bahrain, 2018 (Amin and Billington, 2019):

Bahrain established the Reorganisation of Bankruptcy Law (Bahrain Law No. 22/2018)

- This law gives preference to corporate reorganisation over liquidation
- Follows US chapter 11 principles including the moratorium on proceedings
- Sell unsecure assets
- Obtain financing on superiority
- Reorganisation
- Debtor in possession approach
- Bankruptcy trustee is appointed while management stays in place

Saudi Arabia, 2018 (Al-Abbas et al., 2021):

The bankruptcy law that came into effect in 2018

- Established the framework for restructuring and liquidation through Commercial courts
- established a Bankruptcy Commission.
- set out various procedures as well as priority of Debts on a Liquidation
- Solvent restructurings

3

Marks awarded 10 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.

Individuals (Sealy and Hooley in Clarke et al., 2017, p.18)
Bankruptcy for individuals is intended for people who have unexpectedly become unable to pay their debts, and not individuals who are intentionally avoiding to pay creditors, with the principal objective being to rehabilitate the individual for a fresh start.

Some possible reasons for becoming bankrupt include:

- Bad choices for borrowing or spending
- Sudden loss of job
- Health or marital problems

The implications of going in for bankruptcy or being declared bankrupt:

Benefits to individual:

- You are not responsible for your current debts and can stop paying your creditors directly
- Wages will not be garnished
- No further harassment by creditors and protection from legal action
- Enable fresh financial restart
- Quick and easy process
- You can reduce your indebtedness by making contributions from present and future income depending on your circumstances
- Some assets may be excluded in various jurisdictions to enable the individual to maintain self and dependents
- Not subject to collective insolvency proceedings unless trader or entrepreneur

Disadvantages:

- The credit record is tarnished
- The trustee will take over some of your possessions for distribution
- May not be eligible for loans or credit cards
- Have to keep a detailed account of income and expenses
- will be responsible to the insolvency professional or the trustee

- Disqualification from acting as a qualified professional or being a director of a company
- Disqualification from being a member of parliament or as an office holder of an insolvent estate

Discharge:
It should be noted that the individual may be discharged from bankruptcy, which means release from the obligation to repay your debts owed at the time of filing and can become solvent again. These Benefits and Disadvantages may vary from state to state.

Corporations:

The objectives of insolvency for corporations is to preserve the business as a whole, where possible, or parts there-off and not necessarily the company. It is a collective action off the creditors.

The insolvency approach to enable the objectives may vary across different nation-states.

Some states have a Pro creditor (Conservative) approach while defining their Insolvency laws, whereas some adopt the Pro- Debtor (Rehabilitation) approach.

Effects
- Automatic stay or moratorium of action against company
- composition of the estate of the entity and collection of the same
- executory contracts are dealt with to the benefit of creditors
- laws of set off may apply
- setting aside of voidable transactions and investigation / undue preferences

Rehabilitation:
- No discharge like individuals.
- Rescue of corporations is preferred over winding up wherever possible as;
    - sale as a going concern gets better price
    - advantages for society as jobs are preserved
    - rescue can be formal, by way of statutory mechanism or informal, where out of court compromise can be worked out
    - in the case of cross border insolvency many methods are there for dealing with assets of insolvent estates situated in foreign states

Discharge:

The company normally ends up being dissolved.

These Benefits and Disadvantages may vary from state to state

References: (Sealy and Hooley in Clarke et al., 2017, p.18) and (Legal Line, 2021)

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Question 3.2 [maximum 5 marks]

Write a brief note on the difficulties that may be encountered when dealing with insolvency law in a cross-border context relating to pertinent differences in the relevant systems.

Due to the non-existence of a global insolvency system or global court to deal with cross border insolvency, there are a large number of issues which may need to be dealt with, in each case. Some of the key issues are as follows:

Definition of insolvency:

It is generally well defined in the domestic laws and the local context of each state. However, there is no clear definition to address this at a global or international level. Different scenarios may give rise to proceedings in a particular state, but the same scenario may not be applicable to another state e.g., Cash flow Liquidity.

Conflict of laws and approach to Insolvency:

The domestic laws on insolvency may be influenced by local requirements, affecting the position of creditors and their priorities. When multiple claims are put in various states, such conflicts are likely. The presence of local security over the local assets, laws on set-offs and netting arrangements, retention of title clauses, will be based on the national laws of that state.

National policies for protection of the larger interests of the state may gain precedence over international public claims. Another aspect will relate to employee benefits and the local labour laws of each state. The national approach-to insolvency is also important, whether the laws are pro-creditor or pro-debtor.

If multiple proceedings are opened in various states, then each state will apply its own laws and give little effect to foreign proceedings. If proceedings compete against each other or are not compatible e.g., winding-up vs rehabilitation, or which law on security will apply, efforts to rescue the corporation may be hindered. This may result in a race between creditors, for the assets.

Jurisdiction (Commonwealth of Australia, 2002):

Another important issue to be addressed is the jurisdiction of the proceedings:

- where should the proceedings commence (Choice of forum)
- which country's laws will be applicable to different aspects of the case (Choice of law)
- Recognition accorded to the international proceedings

Assets:

- Identifying and locating the debtor's assets across states
- Taking possession for conversion to monetary form

Other issues to be dealt with:

- Recognition of foreign representative for administering the assets
- Moratorium on creditor action across states
- Creditor identification and participation
- Executory Contracts
- Coordinating claims
- Priorities and preferences based on local laws and system
- Avoidance provisions
- Discharges

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.

In 2004 a legislative guide on insolvency law was put forward by UNCITRAL. It was supposed to be a guideline for the national bodies for preparing new laws and regulations and identifying the deficiencies in the current laws for cross border insolvency. These guidelines cover various aspects of insolvency law and have been expanded since then.

Part one recommendation five states "the insolvency laws should include a modern harmonised and fair framework to address effectively, instances of cross border insolvency" Part three addresses Insolvency of enterprise groups and Part four, the director's obligations in the period approaching Insolvency.

In the early 2000s, the World Bank also provided guidelines on the regulation of insolvency entitled principles for "Effective Insolvency and Creditor / Debtor Regimes"; which was revised in 2021 (INSOL International, 2021, p.53). These principles gain significance as the World Bank and International Monetary Fund (IMF) regime require bankruptcy reform in developing countries as a condition, when they gave loan support. The UNCITRAL legislation guide and the World Bank guidelines form international best practice standards for insolvency.

World Bank's Principle C 15 suggests that the country's legal system should establish clear rules with regard to jurisdiction, recognition of enforcing a foreign judgment, cooperation of courts amongst countries and the choice of law (INSOL International, 2021, p.53).

The European Parliament, in 2010, disseminated a report about the harmonization of insolvency law, at the European level. The objective was to cement the differences between domestic law in EU countries. They proposed harmonization based on a number of areas; mainly a common test for insolvency to initiate a formal process. It deals with the filing and verification of claims in formal insolvency, reorganisation plan adoption and their contents, rules on detrimental acts, contractual rights of termination and insolvency, as well as the directors' responsibilities.

These guidelines, will enable countries to identify the lacunae in their domestic laws to address the areas which will enhance the insolvency frameworks to enable cross country or international business with certainty. While it is evident that not all countries will adopt a standard code in entirety, due to their local requirements, these guidelines will help in effective and quick redressal of insolvency of cross border insolvency issues. It will help the debtors and creditors understand the options available to them in case of an International Insolvency. Foreign investors get clarity on creditor protection. As harmonization will address the major issues like COMI, the recognition of the proceedings, claims, distribution of assets, options for

reorganisation, corporations can do business with some level of certainty as they will now be clear on the risks involved.

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Marks awarded 15 out of 15

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

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

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

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

Question 4.1 [maximum 5 marks]

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.

As Utopia has adopted the UNCITRAL law, the Erewhon liquidator can stop proceedings in Utopia. As Nadir has business interests in Erewhon, Erewhon can be established as the Centre of Main Interest (COMI). The Erewhon proceedings can, hence, be recognised as the main proceedings.

The liquidator can initiate an application for recognition of foreign proceedings in Utopia to consolidate all claims in Erewhon. On acceptance of the application of the foreign proceedings, the Court in Utopia can grant recognition to the foreign representative and this will enable:

- Staying of executions against the debtor's assets in Utopia
- Entrust the administration/realization of the debtor's assets to the foreign representative or any other person designated by the court to preserve the value of the assets as these can diminish in the given circumstances
- Enable consolidation of all creditor's claims in Erewhon and distribution of assets Pari-passu (INSOL International 2021, pg. 31) to all creditors irrespective of their location

Ref: **Articles: 15, 17, 19 of the UNCITRAL**

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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.

Answer:

(A) No difference

(B) If company is already liquidated in Utopia, the situation in 4.1 will not be applicable as the Liquidator in Utopia would have already tried to stop proceedings in Erewhon against Nadir and consolidate the claims in Utopia.

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

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Question 4.3 [maximum 8 marks]

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

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

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

State of Incorporation: Malaysia

The key issues facing the Insolvency Practitioner in other jurisdictions will be:

1. Acceptance of Foreign representative in other state
2. Production of information from foreign states **who are you seeking this information from in foreign states?**
3. Stay of court proceedings in other states/ moratorium on creditor actions
4. Recovery of Assets (Local creditors and their priority) **These are two issues**

Malaysia has not signed any special agreements on Insolvency with other states for cooperation in Cross Border Insolvency cases (ZICO Law, 2018, p4). The Winding-up / Cessation of companies is governed by the Companies Act 2016 and is for Domestic companies (ZICO Law, 2018, p4). The Insolvency Professional will derive his powers under the Twelfth Schedule (section 472) of the companies Act 2016 (RSLE, 2021).

Section 483 (1) of the CA 2016 mandates that all properties of the company are to be taken into custody by the Insolvency Professional.

However, the following law may assist the Insolvency Representative appointed in Malaysia in his role for administering Cross Border assets of the company (RSLE, 2021):

Common Law: Private International Law is adopted in Malaysian Law- Section 3 of the Civil Law act 1956
UNCITRAL Model Law

Acceptance of Foreign Representative

The same can be done through Common Law for Common Law countries. For other nation-states, proceedings must be initiated in those states, individually. For countries which have incorporated the UNCITRAL model Law, the recognition can be granted under this framework

Production of information from foreign states:

The Insolvency Representative needs to establish the locus to get information from the foreign states including seeking the examination of key persons with knowledge for enabling the recovery of the company's assets. He is able to do so under the above mentioned laws.
It would be beneficial to discuss directors

Stay of Proceedings:

The Insolvency Representative can use the above instruments for recognition of the main proceeding and stop any ancillary proceedings in the Common Law countries. This will help to consolidate the claims in Malaysia along with the assets, free from encumbrances to be available for distribution to all creditors.

Recovery of Assets (Messrs Shearn Delamore & Co., 2018):

As Malaysia does not have any treaties with other countries, the Insolvency Representative will need to assess the local laws on security, statutory claims over the assets, as well as labour rights in other countries, before he can decide on the recovery actions in those countries.
These vary from country to country and may involve absolute priority before assets can be distributed back to the representative for benefits of other creditors. These will involve local proceedings in those countries.
The conversion of the assets to monetary form without losing value is to be considered as well.

For another 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.

6.5
Marks awarded 12 out of 15
MARKS AWARDED 46/50

*** End of Assessment ***

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