



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 8 out of 10

QUESTION 2 (direct questions) [10 marks]

Question 2.1 [maximum 2 marks]

Explain what the term "international insolvency law" means.

'International Insolvency Law' is a sub-species private international law; a distinct branch of conflict of laws and refers to the combination of and interplay between the insolvency regimes of individual legal systems and their cross-border counterparts. International insolvency law denotes the relationship between respective domestic insolvency laws and the various international instruments and regulations that seek to harmonise insolvency regimes globally. It is concerned with the attempted reconciliation of cross-border insolvency issues arising from a legislative, judicial, practical and procedural perspective, including recognition and enforcement of judgments, orders and awards and resolving the competing rights of debtors and creditors in opposing jurisdictions.

International insolvency law is the term for the collective set of insolvency rules, that cannot be ascribed to a single jurisdiction or legal system, thereby requiring the application and consideration of foreign elements in relation to a particular insolvency event.

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Question 2.2 [maximum 5 marks]

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

Territorialism is the principle that proceedings can be commenced locally (*i.e.* where assets are held), but limited to the territory in which the assets are held. This principle provides that each jurisdiction is responsible for the assets held therein and is generally restricted to dealing with these assets. The logical conclusion of this approach is that a multiplicity of concurrent proceedings can be issued in respect of the same insolvent entity or debtor. This can lead to an asymmetry where a debtor can be declared bankrupt under one jurisdiction/legal system but not in another. The proceedings are further restricted in terms of which creditors may file a claim confining claims to local creditors. Territorialism represents a potential local solution for local creditors and in respect of local assets. It is insular in its outlook and foreign creditors participation is ultimately at the mercy of awareness of proceedings and an ability to overcome procedural hurdles. Local creditors can however be disadvantaged if the debt owed exceeds the assets held in that location however they may also benefit from having a large asset pool held for a comparatively small number of creditors.

As the name suggests (and in direct contrast to territorialism) the universality principle provides that there should be only one set of insolvency proceedings encompassing all the debtor's assets and liabilities globally. Once proceedings are commenced there ought to be a moratorium on further action relating to a debtor's estate or assets. Universalism is more complex in that it necessarily grapples with complex issues such as choice of law and priority rules which require to be reconciled before any progress can ultimately be made. Once a forum is seized or agreed as competent (often the COMI, but not exclusively) the universality principle dictates that all issues relating to that debtor and those proceedings be channeled through the one forum, including questions of choice of laws. This, in theory, results in a cohesive and convenient manner in which to resolve the particular insolvency proceedings. Universality attempts to take multiple cross-border strands and weaves them into a single thread whereas territorialism provides for each individual strand to run independently and in parallel with the other strands.

In reality, neither territorialism nor universalism are adopted wholesale and it is fair to say both exist in a modified format under various guises. Pure territorialism and the potential for a multiplicity of proceedings existing concurrently is an inherently unattractive proposition from a costs perspective as well as a practical one. Equally universal agreement between jurisdictions is improbable, therefore a co-operative version of the models exists where a reciprocal collaboration between jurisdictions/courts allows the main proceedings in the COMI to be supported by proceedings in another court of foreign jurisdiction. It is noted that civil law systems are said to favour territorialism and common law jurisdictions favour the universal approach (Omar, 2002).

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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.

Bahrain and the DIFC both adopted the UNCITRAL Model Law on Cross-Border Insolvency in 2018 and 2019 respectively.

Saudi Arabia reformed its domestic insolvency law in 2018 – this established a framework for restructuring of distressed businesses and to allow creditors' claims to be effectively managed. Prior to this no legal framework existed for the restructuring of companies in financial peril and there was no mechanism to rank or adjudicated creditor claims.

Dubai reformed its domestic law in 2019 – this introduced a new debtor-in-possession regime in line with global best practice; developed the rules in relation to winding up procedure, including voluntary arrangements, 'rehabilitation' plans by application to the court.

Marks awarded 10 out of 10³

QUESTION 3 (essay-type questions) [15 marks in total]

Question 3.1 [maximum 5 marks]

Write a brief note on the differences regarding the objectives of insolvency for individuals and corporations.

The objectives of insolvency for individuals include shielding the debtor from being pursued for debt by a creditor or group of creditors and allowing them a "clean slate" particularly in instances where the individual debtor has been the victim of circumstance (e.g. the housing crisis post credit crunch). For individuals there is the objective to allow them to spread repayments over a longer period from present and future income. This can take the form of a government backed debt arrangement scheme and is designed to allow individuals to repay their debts without suffering the catastrophic consequences of bankruptcy or their entire income being utilised for debt repayment. There are also schemes which allow a debtor to retain e.g. his property – protecting certain classes of assets from creditors or ring fencing assets for the benefit of dependents. There may however be certain sanctions for bankrupt individuals including difficulties or prevention of obtaining credit, serving on a board as a director or standing for public office.

By contrast, the objectives for companies are to ensure their survival as a going concern, to preserve jobs where possible and to save the viable parts of the business (this may be a specific department, service or product line as opposed to the whole company's offering). Furthermore, there is the issue of personal liability for directors who are guilty of misconduct in office and who can be pursued the liquidators of a company. A company will not be afforded an exclusion of certain assets from its insolvent estate in contrast to individuals as noted above. Typically an insolvent company will be dissolved upon conclusion of the liquidation and will cease to exist, which is a clear difference between the individual insolvency regime.

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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.

In the absence of a single unifying or codified global insolvency regime or greater harmonisation between countries there will always be difficulties that present in cross-border cases with the competing domestic laws and conflict of laws issues that arise with the application of differing and at times diametrically opposing insolvency regimes.

Having a court recognise a liquidator or liquidation order between jurisdictions can often create problems and necessitate applications and evidence to be led to allow a foreign insolvency practitioner to be recognised in another country. This can be particularly fraught where the country has a chequered history or reputation for e.g. money laundering or corruption.

Different countries have different rules insofar as they related to moratoria on creditor actions. In this regard there can be an element of forum shopping and challenges to the jurisdiction as

a plea in bar of trial where the differences in these statutory positions can be exploited or abused.

Creditor participation varies between nation states and can create an asymmetry in cross border cases where assets may be located in "pro-creditor" or "pro-debtor" countries. Differences in the governing law of contracts in cross border cases may cause difficulties due to a liquidator's ability to abandon a contract or lease/conveyance for a property – equally the treatment of employment contracts can create an imbalance in a multijurisdictional insolvency. Different jurisdictions have different approaches to proofs of debt or the co-ordination of creditor claims. These differences become more pronounced in countries where there is no framework for the filing of creditor claims.

The domestic law of some countries will deal with the issue of priority and preferential debts in different ways. Often there will be specific statutory law or provisions dealing with the question of priority or preference, failing which there will often be case law that establishes a precedent for dealing with these issues. For example employees of a company can enjoy "super preference" in connection with their salaries or the tax revenue service may be a preferential creditor in some nations but not others. This can rank them higher than secured creditors in certain jurisdictions. Some domestic insolvency regimes allow for priority among unsecured creditors (concurrent creditors) and some systems will provide for the subordination of certain claims, which creates a payment waterfall and creates a rank behind unsecured creditors.

Avoidance provisions can differ greatly between states. This can cause issues where the laws on gratuitous alienations or transactions at undervalue cannot be unwound as they ordinarily would under most insolvency regimes. This can be utilised to undermine the asset pool a body of creditors has access to particularly where assets can be easily moved between jurisdictions and transferred without difficulty. It may be the case that the period of time for such transactions to be unwound is materially different depending on the State.

The approach to discharging a debtor from claims is a further issue that is not mirrored between domestic insolvency regimes.

There is some scope to elaborate further. See the model answer.

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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.

The UNCITRAL Legislative Guide on Insolvency Law has promoted the harmonisation of domestic insolvency laws by providing a model for legislatures to reference in the drafting and implementation of domestic insolvency legislation. The effect of this ought to be to have domestic laws that are more consistent with one and other and create fewer difficulties in cross-border cases and the domestic laws will be reflective of a broad set of standards that are being applied in multiple jurisdictions promoting a convergence of insolvency law across states.

The World Bank's guidance Principles for Effective Insolvency and Creditor / Debtor Regimes has been a useful tool in tandem with the UNCITRAL Guide in fostering the international best practice standards. This is beneficial as it will assist in moving towards a homogenous standard that is applied consistently throughout international jurisdictions.

The European Union report on Harmonisation of Insolvency Law in the EU has proposed the introduction of a comment test for insolvency – this would be a positive development in allowing cross-border cases to be uniform in their definition of insolvency and by extension what constitutes an insolvency event. The EU has also proposed harmonisation of lodge and dealing with creditor claims, rules on detrimental acts, and directors' responsibilities. The European Commission's Action Plan on Building a Capital Markets Union has attempted to create greater certainty in the cross-border insolvency sphere.

UNIDROIT have conducted a feasibility study regarding proposals relating to the harmonisation of rules in cases of insolvent banks. Such a collaborative approach would be of particular benefit to the Eurozone countries who share a currency in ensuring the treatment banking institutions is consistent so as not to cause significant currency market fluctuations.

The above attempts and proposals to harmonise domestic insolvency laws is to be welcomed as it will reduce the burden on insolvency practitioners and lead to less interference by the courts in interpreting and addressing the conflicting aspect of domestic law in cross-border cases. It will lead to a reduction in forum shopping and in the manifest unfairness of being subjected to an insolvency regime that is more stringent than that of neighbouring jurisdictions.

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

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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.

One of the key principles of the UNCITRAL MLCBI is co-operation and co-ordination. It places obligations on both courts and IP's in different States to communicate to the maximum extent possible with a view to ensuring a single debtor's estate is administered fairly and efficiently with a view to maximising benefit to creditors.

As Utopia has adopted the model law without modification, it will mandate its local court to co-operate with the Erewhon liquidators as a foreign representative.

The MLCBI is significant for its provisions on recognition and relief in 4.1. Its provisions on cooperation and coordination are secondarily important as the liquidator is primarily seeking advice about staying court proceedings in Utopia.

Under the model law Erewhon would be able to seek recognition in Utopia under Art.19 and if granted relief under Art.21 which may include a stay of proceedings.

It's good that you've touched upon these issues.

3.5

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) Under Art.20 there would be an automatic stay on the basis that the hearing had not yet taken place. See *Samsung Logix Corporation* [2009] EWHC 576 (Ch)

(b) As insolvency proceedings already exist there is no automatic relief under Art.20. (see also Art.29) on the basis the foreign proceedings are recognised in Utopia.

1.5

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?

Guernsey

Recognition

Recognition of the Guernsey insolvency proceedings in a foreign jurisdiction (e.g. England and Wales) will require an application to the Guernsey court pursuant to section 426 of the Companies (Guernsey) Law, 2008 (or alternatively the inherent jurisdiction of the court) for issuance of a Letter of Request which will seek inter alia the following relief:

- i. recognition of the liquidation proceedings from the High Court; and
- ii. such further assistance pursuant to section 426(5) of the Insolvency Act 1986 as is necessary to assist the Joint Liquidators with the performance of their statutory duties.

By virtue of the Insolvency Act 1986 (Guernsey) Order 1989 certain provisions of section 426 of the Insolvency Act have been extended to Guernsey law, with modifications to sections 426(4), (5), (10) and (11) of the Insolvency Act as set out in the 1989 Order. Recognition of foreign judgments is an area that will likely arise in cross-border insolvency scenarios. Recognition and enforcement of foreign judgments in Guernsey is governed by the Judgments (Reciprocal Enforcement) (Guernsey) Law, 1957 or at common law.

Guernsey has not adopted the UNCITRAL model law however the courts have a history of providing assistance to overseas office holders. It is also not a member of the EU therefore Reg. (EC) 1346/2000 on Insolvency proceedings (Insolvency Regulation) does not apply. Recognition outside of the UK is dealt with by way of common law and the leading case is that of *Singularis Holdings Limited v PriceWaterhouseCoopers* (2014) [2014] UKPC 36.

Priority of foreign judgments

Assuming that a judgment is capable of enforcement against the company, a judgment debt absent security would rank as unsecured and *pari passu* under section 419 of the Companies Law with all other claims.

Where the debt concerns security, a proprietary remedy or is a preferential debt, the result is likely to be different. For example, under The Preferred Debts (Guernsey) Law, 1983 salaries of employees employed by a company will, subject to certain limitations, be classed as preferred debts. Therefore, an action brought by a foreign employee for unpaid wages up to the sum of £5,000 should rank in preference to other debts.

The general rule is that (absent security, a proprietary remedy or a preferential debt) a judgment debt ranks as unsecured and *pari passu* under section 419 of the Companies Law with all other claims. In circumstances where a secured creditor obtains a judgment in relation to the secured liability or the security itself, the judgment creditor should be able to take advantage of its security in the usual way.

Similarly, the effect of a judgment can be to grant the claimant a proprietary remedy in respect of particular assets, such as a claim in restitution which is often backed by a proprietary remedy. The effect of a proprietary remedy is that the assets in question are deemed to belong to the claimant, and not the company, such that recovery of those assets takes priority over any unsecured creditors' claims.

It should be noted that foreign creditors are dealt with in the same way as domestic creditors in insolvency proceedings in Guernsey.

Service of Proceedings on Foreign Directors (for e.g. breach of duty, fraud etc.)

Service out of the jurisdiction is governed by Rule 8 Royal Court Civil Rules which provides that the Royal Court may give leave to effect service of a document out of the jurisdiction (Rule 8(1)), but shall not make an order giving such leave unless satisfied, "by affidavit or otherwise" that the matter to which the Summons relates is, pursuant to Rule 8(2):

- (a) properly justiciable before the Court, and
- (b) a proper one for service out of the jurisdiction.

Carlyle Capital Corporation Limited (in Liquidation) & Ors v Conway & Ors (Guernsey Judgment 29/2011) provides guidance on the criteria for service out of the jurisdiction. In summary to allow service out of the jurisdiction, the Court must be satisfied:

- i. that there is a serious issue to be tried on the facts (that is a substantial question of fact or law or both), such an issue being one as to which there is a real (as opposed to a fanciful) prospect of success; and
- ii. that the cause is properly justiciable (the Court being able, should it think fit, to draw assistance as to this from the approach taken by the courts in neighbouring jurisdictions in relation to the available “gateways” prescribed by their rules of court for service out of the jurisdiction); and
- iii. that Guernsey is in the circumstances of the case clearly and distinctly the appropriate forum; and
- iv. that in the circumstances the Court should exercise its discretion (given by Rule 8(1) of the RCCR) to allow service out.

Following an application to the court to serve out of the jurisdiction, service will then require to be effected in accordance with article 10 of the Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters. This will require liaising with the central authorities in the respective jurisdictions and providing them the relevant documents, translated into the designated language of that country and the respective service address for each of the foreign domiciled directors.

COMI

The concept of COMI is not known to Guernsey law. Currently, only a Guernsey registered entity is capable of availing itself of the procedures set out in the Companies (Guernsey) Law 2008, as amended.

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.

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Marks awarded 10 out of 15
MARKS AWARDED 43/50

*** End of Assessment ***