



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 web pages for Module 1 as well as the Course Administration page for this course after the submission date of 15 October 2022.

INSTRUCTIONS FOR COMPLETION AND SUBMISSION OF ASSESSMENT

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

1. You must use this document for the answering of the assessment for this module. The answers to each question must be completed using this document with the answers populated under each question.
2. All assessments must be submitted electronically in MS Word format, using a standard A4 size page and a 11-point Arial font. This document has been set up with these parameters - **please do not change the document settings in any way. DO NOT** submit your assessment in PDF format as it will be returned to you unmarked.
3. No limit has been set for the length of your answers to the questions. However, please be guided by the mark allocation for each question. More often than not, one fact / statement will earn one mark (unless it is obvious from the question that this is not the case).
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5. Before you will be allowed to upload / submit your assessment via the portal on the Foundation Certificate web pages, you will be required to confirm / certify that you are the person who completed the assessment and that the work submitted is your own, original work. Please see the part of the Course Handbook that deals with plagiarism and dishonesty in the submission of assessments. **Please note that copying and pasting from the Guidance Text into your answer is prohibited and constitutes plagiarism. You must write the answers to the questions in your own words.**
6. The final submission date for this assessment is **15 October 2022**. The assessment submission portal will close at **23:00 (11 pm) BST (GMT +1) on 15 October 2022**. 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 **10 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.

A number of authors attempt to define international insolvency law (IIL),¹ by explaining the limitations of applying domestic insolvency law where there are international elements to the specific case. Generally, this is because each country has its own rules, laws, approaches, cultures, politics, customs, policies, etc, and there is no global set of insolvency laws.² Fletcher opines that although this is true of domestic laws, it is also true of each country’s divergence “on many of the private international law aspects of insolvency.”³

I note that the international elements may include (without meaning to be an exclusive list) choice of forum disputes (which may arise from contractual jurisdictional clauses), location of assets or businesses of the debtor that may be recoverable by an insolvency representative,⁴ foreign pre-appointment insolvency proceedings, executory contracts, avoidance provisions, etc.⁵

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Question 2.2 [maximum 5 marks]

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

Universality is effectively the antithesis of territoriality in that the former proposes a unity of jurisdictions to deal with assets and creditors worldwide, whereas, the latter proposes a “grab-rule”⁶ in which the local jurisdiction prioritises local assets and local creditors over international stakeholders.

Universality is a theory in which upon the commencement of an insolvency proceeding⁷ in a given country, no other proceedings or forms of execution against a debtors’ assets should be possible in any other country. This allows the court of the main proceeding (*lex fori concursus*) to regulate the insolvency proceeding world-wide. The *lex fori concursus* may be determined by the choice of forum (ie centre of main interests or jurisdictional clauses in a written contract/document) or a worldwide implemented insolvency law.⁸ An example of how universality theory may work is:

¹ For example, see B Wessells, *International Insolvency Law* (Kluwer, 2006), p 1 and Fletcher, Ian F, “International Insolvency: The Way Ahead” 28 *International Insolvency Review* 1993, Vol 2, p 7.

² B Wessells, *International Insolvency Law* (Kluwer, 2006), p 1.

³ Fletcher, Ian F, “International Insolvency: The Way Ahead” 28 *International Insolvency Review* 1993, Vol 2, p 11.

⁴ I am adopting the definition of insolvency representative on page 30 of the course material. It was not apparent to me on the material how one is to go about referencing the course material.

⁵ See generally the list of nine key issues of universalism described in J L Westbrook, “Global Insolvency Proceedings for a Global market: The Universalist system and the Choice of a Central Court” (2018) 96 *Texas Law Review*, p 1473.

⁶ J L Westbrook, “The Lessons of Maxwell Communications” (1996) *Fordham Law Review* 64 2531, p 2532.

⁷ I am adopting the definition of insolvency proceeding on page 30 of the course material.

⁸ R K Rasmussen, “A new Approach to Transnational Insolvencies” (1998) 19 *Michigan Journal of International Law* 1, 1-36.

Assume Company X has its head office in Australia, but trades operationally in both Australia and the United Kingdom (**UK**). It may have assets and creditors in both jurisdictions. If a creditor in Australia sought to commence an insolvency proceeding in Australia, then the universality theory would dictate that the UK assets would vest in the Australian insolvency representative and any UK creditors would be bound by the decisions of the Australian courts and/or Australian insolvency representative.

Territoriality is a theory in which countries retain plenary power over all local assets and creditors and can mean that multiple insolvency proceedings are required in different jurisdictions. Westbrook remarked that territoriality was akin to a "self-serving ... international free-for-all."⁹ An example of how territoriality theory may work is:

Assume the same facts as in Company X above. If an Australian creditor sought to commence an insolvency proceeding in Australia, then the territoriality theory may mean that the Australian courts would only deal with Australian assets and creditors and may not necessarily have regard to any assets or creditors in the UK. It would, therefore, potentially be up to UK creditors (or any Company X directors) to commence insolvency proceedings (or commence a voluntary insolvency appointment) in the UK.

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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.

The United Arab Emirates have updated their domestic laws by way of the following two decrees and one cabinet resolution:

- Federal Law by Decree No. (9) of 2016 on Bankruptcy¹⁰ (**2016 Decree**) - which (*inter alia*) regulates the insolvency of corporate and government-owned entities or any trading individuals;
- Federal Law by Decree No. (19) of 2019 on Bankruptcy¹¹ - which appears to (*inter alia*) have expanded the 2016 Decree to include individuals who are not traders; and
- Cabinet Resolution No. (5) of 2021 regarding the emergency financial crisis¹² - which appears to have (*inter alia*) been implemented to protect creditor rights in light of COVID-19.

⁹ J L Westbrook, "The Lessons of Maxwell Communications" (1996) *Fordham Law Review* 64 2531, pp 2532.

¹⁰ <https://www.moec.gov.ae/en/federal-decree-law-no-9-of-2016-on-bankruptcy?p_i_back_url=%2Fen%2Fsearch-results%3Fq%3DFuture%2520Economy%26delta%3D40%26start%3D4> (accessed 15/10/2022).

¹¹ <<https://u.ae/en/information-and-services/business/protection-of-insolvent-natural-persons#:~:text=The%20new%20law%20will%20protect,settle%20the%20financial%20obligations%20debtor>> (accessed 15/10/2022).

¹² <<https://mof.gov.ae/bankruptcy-and-insolvency/>> (accessed 15/10/2022).

Saudi Arabia have updated their domestic laws with the adoption of the KSA Bankruptcy Law (2018), which replaced the antiquated Royal Decree No. 32, dated 15/1/1350H (1931 Gregorian calendar) and Royal Decree No. M/16, dated 4/9/1416H (1995 Gregorian calendar).¹³ Alarifi claims that the KSA Bankruptcy Law (2018):

*"followed the structure of a modern bankruptcy regime ... and should help in achieving the Kingdom's goals in creating a business-friendly [bankruptcy code]."*¹⁴

Bahrain and the Dubai International Financial Centre adopted the United Nations Commission on International Trade Law (**UNCITRAL**): Model Law on Cross-Border Insolvency (1997) (**Model Law**) in 2018 and 2019, respectively. I note that according to a website run by UNCITRAL, other Middle Eastern States that are signatories of the Model Law include: Jordan in 2018, and Abu Dhabi Global Market in 2015.¹⁵

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Marks awarded 10 out of 10

¹³ Alarifi, F. (2021), "The bankruptcy law of Saudi Arabia: policy, operation and comparison", *PSU Research Review*, section 2.1. The journal citation does not include a volume number, but can be accessed at:

<<https://www.emerald.com/insight/content/doi/10.1108/PRR-02-2021-0011/full/html>> (accessed 15/10/2022).

¹⁴ *Ibid*, sections 2.1 and 5.

¹⁵ <https://uncitral.un.org/en/texts/insolvency/modellaw/cross-border_insolvency/status> (accessed 15/10/2022).

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.

Anderson and Morrison claim that personal insolvency does not appear to attract the same level of negative reactions as does corporate insolvency and theorises that this may be because personal insolvency primarily impacts the individual and to “those within the person’s contemplation,” whereas corporate insolvency apparently affects a wider group of direct and indirect persons.¹⁶ It may be that the effect that each of the different insolvencies has on the debtor and its stakeholders, has caused a divergence in the approach taken by various countries.

Personal insolvency objectives that may differ to corporate insolvency (in part) include:¹⁷

- A fresh start (subject to pre-appointment and post-appointment conduct). For instance, in Australia, a discharged bankrupt retains an obligation to continue to assist their former insolvency representative;¹⁸
- Protection from further harassment or legal proceedings (but not in all circumstances, eg: in circumstances of fraud);
- Income contribution assessments that are based on objective reasonable tests (ie codified index amounts)¹⁹ and subjective tests that take into account a debtor’s personal circumstance;
- Goal of offering an incentive to engage in revenue producing activities, whereas the natural persons of a corporate entity can (generally) start again;²⁰
- Exempt or excluded assets,²¹ eg: superannuation in a regulated entity, transportation for the purposes of working and tools of trade (up to prescribed index rates), and low value personal effects or furniture; and
- There may be social, religious, moral or cultural differences, mental health concerns or education/experience gaps between owners of business (that can rely upon corporate and personal insolvency) and bankrupted individuals that have no such knowledge or acumen. In my experience, many personal insolvency appointments tend to be a result of non-business-related activities rather than business failure. A report from the Productivity Commission in Australia (2015) found that business-related activities

¹⁶ Anderson, C and Morrison, D, “Is Corporate Rescue a Realistic Ideal? Business as Usual in Australia and the United Kingdom” (2015) 3 *Nottingham Insolvency and Business Law e-Journal* 23 417, p 418.

¹⁷ In M A Clarke et al, *Commercial Law* (Oxford University Press, 2017), chap 28.

¹⁸ *Bankruptcy Act 1966* (Cth), s 152.

¹⁹ <<https://www.afsa.gov.au/insolvency/how-we-can-help/indexed-amounts>> (accessed 15/10/2022).

²⁰ World Bank, *Report on the Treatment of the Insolvency of Natural Persons* (2012), 51.

²¹ I F Fletcher, *The Law of Insolvency*, London (Sweet and Maxwell, 5th ed, 2017), Ch 1.

accounted for only 16% of all personal insolvency cases in Australia (or 20% of bankruptcies).²² This supports what I am seeing at my firm.

Corporate insolvency, on the other hand, includes:²³

- Preservation of the company, its business or parts of same. This may be achieved through sale, restructure, compromise with creditors, etc;
- Piercing the corporate veil to hold relevant persons responsible in appropriate circumstances (eg: insolvent trading or breaching director duties); and
- Winding-up and subsequently deregistering the corporate entity. This obviously does not apply to individuals.

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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.

There is difficulty in defining the word insolvency, at an international level, because each country has its own interpretation.²⁴ For example, the “traditional” definition that is referred to on page 44 of the Guidance Text, is not the laws of Australia.²⁵ *Friman* states that as a result of this difficulty, international conventions and instruments instead focus on defining insolvency proceedings.²⁶

Omar records that the way in which creditors are treated by domestic laws can also have an influence.²⁷ This treatment may be in the way employee entitlements are subrogated by government, secured creditor enforcement rights (for example, in Australia we have the Personal Property Securities Register), contractual or statutory set-off rights, automatic stays on *ipso facto* clauses, moratoriums against personal guarantees, etc.

Other key issues (not already addressed above) and that make up the balance of the nine issues identified by Westbrook are:²⁸

1. Standing to bring proceedings and conflict of laws issues;
2. Creditor participation, and, I would add, creditor’s financial or mental capacity to participate in the foreign insolvency proceeding;

²² Australian Productivity Commission 2015, *Business Set-up, Transfer and Closure Report* (Final Report 75, Canberra), Ch 12.1, 320.

²³ In M A Clarke et al, *Commercial Law* (Oxford University Press, 2017), Ch 28.

²⁴ I F Fletcher, *Insolvency in Private International Law – National and International Approaches* (Oxford: Oxford University Press, 2nd ed, 2005) p 3-5.

²⁵ *Corporations Act 2001* (Cth), s 95A. It is a question of being able to pay your debts as and when they fall due and payable (usually referenced by completing a cash flow test and balance sheet test) and short-term liquidity problems do not ordinarily lead to insolvency proceedings. See, for example, *Sandell v Porter* [1966] 115 CLR 666.

²⁶ I F Fletcher, *supra* note 24, p 3-5.

²⁷ P J Omar, “The Landscape of International Insolvency”, (2002) 11, *IIR* 173, p 175.

²⁸ J L Westbrook, “Developments in Transnational Bankruptcy”, (1995) 39, *St Louis University Law Journal* 753, pp 753-757.

3. Executory contracts;
4. Co-ordinated claims procedures;
5. Voidable transaction provisions; and
6. Discharges.

5

Question 3.3 [maximum 5 marks]

What multilateral steps have been taken in the 21st century to promote harmonisation of domestic insolvency laws? In your opinion, how much impact are these likely to have in addressing international insolvency issues? Include reasons for your opinion.

Developments to harmonise during the 21st century include:

- The World Bank released the Principles for Effective Insolvency and Creditor / Debtor Regimes, with revisions in 2005, 2011, 2015 and 2021.²⁹ A few key aspects of this Principle are: non-discrimination of foreign stakeholders, a clear and speedy process to obtain recognition and relief (in appropriate circumstances) and the granting of foreign insolvency representatives with access to local courts and local authorities.
- Harmonisation of Insolvency Law at EU Level Report was published in 2010, with the primary aim of harmonising a number of laws, including: definition of insolvency, proofs of debts and the adjudication of same, director responsibilities pre-appointment and post-appointment, etc.³⁰

According to the European Commission's Action Plan on Building a Capital Markets Union (2015) (**Action Plan**), harmonisation would give cross-border investors greater legal certainty and would expedite the restructuring process of viable companies.³¹ The Final Report of the High Level Forum on Capital Markets Union (2020) argues in support of the Action Plan justifications and adds that (*inter alia*) it could avoid the build-up of non-performing bank loans, assist investors in navigating the legal complexities by not having to review 27 different national regimes within the European Union and reduce "home bias".³²

I do not agree that harmonisation will achieve the stated objectives, or is even achievable at all. Given this is only a formative assessment, I am only going to provide some reasons:

- Social, religious, moral or cultural differences between nations, including ongoing wars and breaching of the peace;
- Differences in civil and common law jurisdictions;
- Differences in priorities - ie protection of employees, promoting innovation and recovery, debtor-driven insolvency approach compared to a creditor-driven insolvency approach;

²⁹ <<https://www.worldbank.org/en/topic/financialsector/brief/the-world-bank-principles-for-effective-insolvency-and-creditor-rights>> (accessed 15/10/2022).

³⁰ <https://www.eesc.europa.eu/sites/default/files/resources/docs/ipol-juri_nt2010419633_en.pdf> (accessed 15/10/2022).

³¹ <https://finance.ec.europa.eu/publications/high-level-forum-capital-markets-union_en> (accessed 15/10/2022).

³² Final Report of the High Level Forum on Capital Markets Union – A new vision for Europe's Capital Markets (2020), p 114.

- Despite the Model Laws being in effect for some 25 years or so, only 53 States are signatories.³³ Noticeable absentees include: Russia, China, India, Nigeria, Germany, France, etc; and
- In a high inflationary environment (such as we are in now) investors are already pricing in risk of loss and moving to bonds and other types of diversifications. I do not believe insolvency laws play a big part in their decision-making processes. See for example the lack of effective insolvency laws in China, and yet China is one of the biggest global markets for investors.

5

Marks awarded 15 out of 15

³³ <https://uncitral.un.org/en/texts/insolvency/modellaw/cross-border_insolvency/status> (accessed 15/10/2022).

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.

1. Pursuant to article 17(1) of the Model Law,³⁴ a foreign proceeding is to be recognised by a court of signatory country, subject to the following conditions:
 - 1.1. Public policy exceptions in article 6 do not apply - I assume that such an action is not "*manifestly contrary to the public policy of this State.*" I would seek instructions from the Erewhon liquidator as to whether said exception may apply (to their knowledge);
 - 1.2. The foreign proceedings is (*inter alia*) a judicial proceeding in a foreign country for the purpose of liquidating and controlling the assets and affairs of a debtor (pursuant to article 2(a)). I assume that Erewhon court winding-up order was pursuant to an insolvency proceedings. I would seek a copy of the winding-up order from the Erewhon liquidator or from the relevant court registry service in Erewhon;

³⁴ United Nations Commission on International Trade Law (UNCITRAL): *Model Law on Cross-Border Insolvency* (1997).

- 1.3. The person applying for recognition is a foreign representative within the meaning of article 2(d). I assume that the Erewhon liquidator is authorised in Erewhon to administer the liquidation. I would seek all relevant licensing paperwork available from the Erewhon liquidator, or, if no such paperwork is available, conduct investigations into the Erewhon’s regulatory and licensing obligations. I note that article 16(2) provides that the Utopia court is entitled to presume that any licensing paperwork is authentic;
 - 1.4. The Erewhon liquidator is capable of providing (*inter alia*) a certified copy of the Erewhon court winding-up order within the meaning of article 15(2). I would seek a copy of the winding-up order. I note the presumptions available to the Utopian court in relation to this requirement in article 16(1); and
 - 1.5. The Erewhon liquidator has filed in the appropriate court in Utopia, within the meaning of article 4. I need further information on the facts to determine which court in Utopia the Erewhon liquidator is required to file in.
2. Pursuant to article 17(2) of the Model Law,³⁵ assuming article 17(1)(as explained above) has been satisfied, then the foreign proceeding is recognised as a:
 - 2.1. Foreign main proceeding - if the court order in Erewhon is the centre of Nadir’s main interests; or
 - 2.1.1. According to article 16(3), the centre of main interest (**COMI**) is presumed to be the location of Nadir’s registered office or habitual residence.
 - 2.1.2. I note that article 17(2) does not provide a relevant date to assess COMI. The Guide to Enactment and Interpretation (**UNCITRAL Guide**) argues that the relevant date is at the date of commencement of the foreign proceedings (ie as at the date of the Erewhon winding-up order).³⁶ However, I understand that not all countries adopt this approach.^{37, 38} I would need to know whether Utopia jurisprudence has previously determined this issue.
 - 2.1.3. The factual matrix advises that Nadir moved its registered office approximately one month ago from Erewhon to Utopia. It does not advise whether this move occurred prior to or after the commencement

³⁵ Ibid.

³⁶ Guide to Enactment and Interpretation of the UNCITRAL Model Law on Cross-Border Insolvency, Part Two, paragraphs 31 and 157-160.

³⁷ The United States (see page 11 of *In re Paul Zeital Kemsley* [2013] Case No 12-13570 (JMP), U.S. Bankruptcy Court) and the United Kingdom (*Re Videology Ltd* [2018] EWHC 2186 (Ch)) positions appear to follow the UNCITRAL Guide on this issue. The Australian position on this issue is still not decided (see for instance *Kapila, in the matter of Edelsten* [2014] FCA 1112, 39 and *In the matter of Hydrodec Group Plc* [2021] NSWSC 755, 139.

³⁸ Nicki Gunn, Hugh Raisin and Amelia Kelly, “A Saad compromise? Different interpretations of the model law promoting inconsistency in a law meant to remove it” <<https://www.dlapiper.com/ko/korea/insights/publications/2019/12/global-insight-issue-31/a-saad-compromise/>> (accessed 15/10/2022).

of the foreign proceedings. I would need to know this before advising the client.

- 2.1.4. Assuming that the move occurred before the Erewhon proceedings and Utopia adopts the UNCITRAL Guide on the relevant date for determining COMI, then it may be that said application is a foreign main proceeding.
- 2.1.5. I note that this presumption is rebuttable however, as the Model Law does not provide a definition for COMI.
- 2.1.6. Paragraph 145 of the UNCITRAL Guide³⁹ provides the following “principal factors” to determine COMI, the location is: (a) the central administration of Nadir; and (b) readily ascertainable by creditors. The factual matrix claims that the head office and registered office were moved from Erewhon to Utopia. I would need to know whether Utopia jurisprudence has previously defined what central administration means (including whether it includes the head office) and the relevant date of same.
- 2.1.7. Paragraphs 146 and 147 of the UNCITRAL Guide⁴⁰ provide “additional factors” to consider where there is insufficient evidence to determine the “principal factors.” These “additional factors” include (not in a particular order and not on an exhaustive basis), the location of Nadir’s:
- books and records or cash management system;
 - financing was organised;
 - principal assets or operations;
 - choice of law in contractual terms; and
 - requirement to produce audited financial accounts.

The financial matrix does not provide sufficient information in relation to any of these issues.

- 2.1.8. Given Nadir moved its registered and head office presumably in close proximity to the foreign proceedings, paragraphs 148 and 149 of the UNCITRAL Guide⁴¹ also explains that the Utopian court ought to more closely take into consideration the “principal factors” and “additional factors.” The closeness of this proximity would be a factual question that the facts matrix does not provide sufficient information about.

³⁹ Guide to Enactment and Interpretation of the UNCITRAL Model Law on Cross-Border Insolvency, Part Two, paragraph 145.

⁴⁰ Guide to Enactment and Interpretation of the UNCITRAL Model Law on Cross-Border Insolvency, Part Two, paragraph 146-147.

⁴¹ Guide to Enactment and Interpretation of the UNCITRAL Model Law on Cross-Border Insolvency, Part Two, paragraph 148-149.

2.2. Foreign non-main proceeding - if Nadir has an "establishment" in Erewhon. Establishment is defined by article 2(f) of the Model Law as any place that Nadir "carries out a non-transitory economic activity with human means and goods or services."⁴² Paragraph 89 of the UNCITRAL Guide⁴³ refers to the **Virgos-Schmit Report**⁴⁴ to provide the following further explanation of the word "establishment":⁴⁵

- Human resources requires a minimum level of organisation; and
- Non-transitory requires that the place not be occasional, such that stability is required. There does not appear to be a minimum time requirement. However, this appears to be a legal question and I would need to know whether Utopia jurisprudence has decided this point previously.

The factual matrix does not provide sufficient factual evidence to determine whether the movement of said office to Utopia is transitory or what is the nature of the services or goods supplied by Nadir.

3. Assuming the Erewhon liquidator meets the requirements of a foreign main proceedings, then article 20 of the Model Law records the effects on Nadir's assets, rights, creditors, etc, including the staying of any other court actions in Utopia.⁴⁶
4. Assuming the Erewhon liquidator meets the requirements of a foreign main proceedings or foreign non-main proceedings, then article 21 of the Model Law records a non-exhaustive list of potential relief available to foreign representative, including orders entrusting the Erewhon liquidator with the powers to realise assets in Utopia and distribute available funds to Utopian creditors.⁴⁷

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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.

In scenario (a), the answer is not necessarily (assuming the Erewhon liquidator can meet the requirements of a foreign main proceeding or foreign non-main proceeding). This is because the Utopian court may make orders staying any such proceedings⁴⁸ or make

⁴² United Nations Commission on International Trade Law (UNCITRAL): *Model Law on Cross-Border Insolvency* (1997).

⁴³ Guide to Enactment and Interpretation of the UNCITRAL Model Law on Cross-Border Insolvency, Part Two, paragraph 89.

⁴⁴ M Virgos and E Schmit, *Report on the Convention on Insolvency Proceedings*, Brussels 3 May 1996.

⁴⁵ *Ibid*, para 7.1.

⁴⁶ United Nations Commission on International Trade Law (UNCITRAL): *Model Law on Cross-Border Insolvency* (1997).

⁴⁷ *Ibid*.

⁴⁸ *Ibid*, article 20 and article 21.

orders joining the Erewhon liquidator to the proceedings.⁴⁹ I note that article 31 grants a presumption of insolvency in any wind-up proceedings brought by Apex by reason of the foreign main proceeding.⁵⁰

In scenario (b), the answer is potentially yes (assuming the Erewhon liquidator can meet the requirements of a foreign main proceeding or foreign non-main proceeding). Chapter V of the Model Law explains how the courts are to deal with the cooperation and coordination of concurrent proceedings.⁵¹

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⁴⁹ Ibid, article 24.

⁵⁰ Ibid, article 31.

⁵¹ Ibid, article 29.

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?

I have chosen Germany and the four key international insolvency issues are: (a) standing for recognition; (b) voidable transactions; (c) priorities and preferences; and (d) co-ordinated claims procedure.

German insolvency law is codified in the Insolvenzordnung (1994) (**InsO**).

An amended European Insolvency Regulation (**EIR**) Recast (2015) was adopted in 2015 and took effect in June 2017. I have presumed that Germany is bound by the EIR by reason of it being a Member State (the EIR does not provide a definition of Member State).

(a) Standing for recognition - pursuant to article 19 of the EIR, the wind-up proceedings in Germany must automatically be recognised in all other Member States (subject to article 3). Article 3(1) of the EIR states that other Member States shall only recognise the Germany main insolvency proceedings if Germany is that debtor's COMI. COMI is expressed to be where *"the debtor conducts the administration of its business on a regular basis and which is ascertainable by third parties."*⁵² The registered office is presumed to be the debtor's COMI, but only if the registered office has not been moved in the preceding 3 months.

Articles 3(2) and 3(3) of the EIR states that the courts of another Member State may open secondary or independent insolvency proceedings, notwithstanding article 3(1), if the debtor *"possesses an establishment within"* the other Member State.

I note that section 3 (inclusive) of InsO deals with groups of companies and how the German courts are to treat subsidiary entities.

(b) Voidable transactions - pursuant to article 6 of the EIR, the Member State of the insolvency proceedings covered by article 3(1) has jurisdiction to decide causes of

⁵² European Insolvency Regulation Recast (2015), Article 3(1).

action (including for avoidance actions or voidable transactions) that are closely linked to the Member State. If a defendant is not domiciled in the Member State, the insolvency practitioner may bring said action in the territory of the defendant's domicile (see article 6(2) of the EIR). Article 7 of the EIR records that the laws of the Member State of the insolvency proceedings covered by article 3(1) are deemed to be the applicable law.

I was not able to find any voidable transaction or avoidance action provisions within InsO.

- (c) Priorities and preferences - pursuant to article 36 of the EIR, if a secondary insolvency proceedings could be commenced in another Member State, then the insolvency practitioner in Germany is required to comply with, and give a written undertaking to comply with, the distribution and priority rights of the laws of the other Member State.

Section 209 of InsO provides a priority ranking list of costs and debts that must be covered by the insolvency administrator in circumstances where there is sufficient funds. My reading of this section is that each tier of the rankings is treated on a *pari passu* basis.

- (d) Co-ordinated claims procedure - article 36 of the EIR also applies in relation to the insolvency practitioner in Germany being required to provide and undertaking in relation to the distribution rights of the creditors of the other Member State (see also article 36(2) of the EIR). These distribution rights include rules on qualified voting, ability for creditors to participate and vote by distance (see article 36(5) of the EIR). Article 36 includes a number of other requirements for the insolvency practitioner to comply with and deems that insolvency practitioner personally liable in damages if they fail to meet these requirements (article 36(10) of the EIR).

Apologies Professor, I ran out of time on this question, but I will be well prepared for the summative assessment.

5.5

Marks 12.5 out of 15

*** End of Assessment ***

An excellent paper - a thorough response that addresses the questions asked and substantiates the answers well.

TOTAL MARKS 45.5/50