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).

4. You must save this document using the following format: **[studentID.assessment1formative]**. An example would be something along the following lines: 202223-336.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 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**.

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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.

2.1 There are two possible definitions of "international insolvency law" ("**IIL**"):

a. Wessels describes IIL as a body of law involving insolvency proceedings, which cannot be fully enforced within a particular jurisdiction. This is because the applicable law in question cannot be implemented without considering the international elements of a case;

b. Fletcher describes IIL where an insolvency case goes beyond the limits of a single jurisdiction, such that the domestic insolvency legislation cannot be applied exclusively without taking into account the foreign elements of the case.

These are authoritative quotes. The answer would be improved if it also included information in your own words to indicate your personal understanding of the explanation also.

1.5

Question 2.2 [maximum 5 marks]

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

2.2 The concepts of universality and territoriality in cross-border insolvency:

a. In its strictest form, the laws applying "universality" seeks to cover all of the debtor's assets, wherever situated:

i. The debtor's worldwide assets are administered in a single proceeding. No other insolvency or execution proceedings are allowed.[1]

ii. All creditors worldwide would have to submit their claims in the debtor's home country, deferring to the latter country's rules on priority and avoidance powers.

b. The territoriality" principle respects the rule of sovereignty and emphasises the rights of local creditors:[2]

i. Following the strict rule of sovereignty, the office holder would administer assets found within its own borders and the legitimacy of foreign insolvency proceedings with regards to the same debtor is often ignored. The domestic court would then distribute the proceeds according to its own domestic rules of priority and distribution.

ii. Foreign creditors are if not explicitly barred from lodging proofs, they may be discriminated against where the laws and/or the courts "*ring-fence*" local assets for the satisfaction of claims of ordinary local creditors first, to the detriment or prejudice of foreign creditors.

iii. Flowing from this principle, it is possible to have multiple insolvency proceedings commenced and running in tandem in relation to the debtor.

There is some scope to elaborate upon effect and recognition

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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.

2.3 The three recent examples of domestic or international insolvency developments in the Middle East region are:

a. In 2018, Saudi Arabia issued the Royal Decree No. M05/2018 to reform the restructuring process. As part of the reforms, Saudi Arabia adopted a hybrid approach by allowing debtors a right of election whether to remain in possession of its business, or to appoint a trustee or administrator;

b. Bahrain adopted the UNCITRAL Model Law on cross-border insolvency in 2018;

c. Dubai adopted the UNCITRAL Model Law on cross-border insolvency in 2019.

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[1] Although the term "unity" has been for administration of the debtor's assets in a single proceeding. *See* Harmer and Flaschen *"Report on Project of Cross-Border Insolvency: Access and Recognition"* at 7.

[2] Claudia Tobler, *"Managing Failure in the New Global Economy: The UNCITRAL Model Law on Cross-Border Insolvency"* 22 B.C. Int'l & Comp. L. Rev. (1999) 383 at 396.

Marks awarded 9.5 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.

3.1 The differences regarding the objectives of individuals and corporations in insolvency are as follow:

Individual Insolvency	Corporate Insolvency
a. An objective and/ or trend in individual insolvency laws is to move away from criminalising, penalising or stigmatizing bankrupts, and to use bankruptcy process as a way to ***rehabilitate bankrupts financially, and to provide a "fresh start"*** with a discharge of the bankrupt's debts. There is also a humanitarian or psychological perspective in individual insolvency laws, which is to save an individual from being harassed by creditors.[3]	a. By way of contrast, the focus in corporate insolvency is usually to (if restructuring or rescue is not possible) provide an orderly administration, winding up of a company's affairs, payment of dividends to its creditors, and ***eventual dissolution and "death" of the company***.
b. There is a view that individual insolvency never involves complete liquidation of an individual's assets, but ***has the objective of reorganising a bankrupt's affairs/assets***. This is because an individual bankrupt may retain some essential assets (e.g. a person's human capital, interest in a home, salary, tools of trade, pension, etc.) to maintain a reasonable standard of living, and may be required to pay over a portion of their future earnings to the trustee (very much like a corporation in reorganisation). [4]	b. This is contrasted with a corporate insolvency/liquidation scenario, where ***all of a company's assets are sold*** and the proceeds are paid to the creditors. In a corporate re-organisation, a corporation would usually keep some of the assets and undertake to use part of the company's earnings to repay the debts.[5]

[3] Vinod Kothari "Section VI: Non-Corporate Insolvency" found at https://vinodkothari.com/wp-content/uploads/2019/06/Section-VI-Non-Corporate-Insolvency.pdf

[4] Michelle J. White "Corporate and Personal Bankruptcy Law (For Annual Review of Law and Social Sciences)" p 3.

[5] *Ibid.*

Policy-makers have to take into the nature and extent of the assets that do not form part of a bankruptcy estate, for **a bankrupt to retain these assets, in order to *maintain a reasonable standard of living during bankruptcy***.	
c. An objective of individual insolvency laws may be to protect third parties or the public when dealing with a bankrupt. Thus, individual insolvency laws may ***disqualify a bankrupt from appointments where he may be in a position to handle monies on behalf of other persons*** (i.e. disqualification as a trustee, executor, solicitor, accountant, etc.) or to ***disqualify a bankrupt from being in a position to make commercial or business decisions*** (i.e. disqualification to act as a director of a company or to carry on business as a sole proprietor or partner).	c. Corporate insolvency laws typically do not focus on limiting a director's duties during a liquidation. This is because the directors of a wound-up company are *functus officio* upon liquidation, as the liquidator would have effective control and possession of the company's assets during a liquidation. Instead corporate insolvency laws also seek to protect third parties/the public, by typically ***disincentivising directors from incurring liabilities on behalf of the company before liquidation*** when the company is likely already insolvent, by ***imposing personal liability on the director*** for such debts incurred. By way of contrast, there are usually no such equivalent disincentives in individual insolvency laws before the onset of insolvency, even for individual traders/business-owners.
d. There are usually ***no specialised insolvency rules or regime(s) for individuals***, even for individuals who carry on business or trade either as an individual or as a partner without corporate vehicle, and would be governed by the default individual insolvency laws.	d. There may be ***specialised rules for the insolvency of certain entities such as banks, financial institutions or state-owned enterprises***. The policy consideration for a specialised insolvency regime is because the insolvency of such entities would usually have a large social and economic impact on society, and would require quick and circumspect action by the government and/or relevant

	authority. The "default" rules in the corporate insolvency regime may not be adequate to cater to the insolvency of such entities.
e. Policy-makers for individual insolvency laws may have to ***take into account the objectives of, and the intersection or interaction with other more "human" and non-economic issues such as human rights, civil liberties, and family laws***. These laws may cause policy-makers to consider, for example the extent to which a bankrupt's interest in a matrimonial home that may vest in the bankruptcy trustee (e.g. whether there is a time limit for a trustee to realise the bankrupt's interest in the matrimonial home, failing which the bankrupt's interest would re-vest in the bankrupt). Another example, is that a trustee's traditional powers to impound a bankrupt's passport and/or to restrict a bankrupt's freedom to leave the jurisdiction without the trustee's approval, may conflict with (more modern) human rights/civil liberties laws, and may require reconsideration/reform.	e. Policy-makers for corporate insolvency laws may have to ***take into account the objectives of, and the intersection or interaction with other more "commercial" subjects such as company laws, financial markets and securities laws, etc***. Thus, policy-makers of corporate insolvency may have to take into account financial market stability issues when considering for example, the application of prohibition of *ipso facto* rules to certain financial contracts or entities may potentially *destabilise* markets (e.g. certain financial contracts, netting off or derivative agreements). Another example is policy-makers may have to consider appropriate laws to deal with multi-related corporate insolvencies, and formulate appropriate laws for an administrator to pool together and administer assets of the group related companies. All these policy considerations are distinct to corporate insolvencies and are not found in the realm of personal insolvencies.

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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.

3.2 Some of the issues arising from cross-border insolvency relating to differences in systems include:

a. There may be ***inadequate commercial and/or insolvency "infrastructure"*** in some jurisdictions. The commercial and insolvency laws may not well-developed, and fall behind commercial and practical realities. Some jurisdictions may only have corporate insolvency regime but do not have any formal/ informal corporate rescue processes. The courts may not be well-equipped/trained to hear complex insolvency matters. There may be a lack of properly trained and qualified insolvency practitioners to guide a company in an insolvency and/or restructuring.

b. Some of the systems may still be steeped in ***territoriality***, and may not have laws and/or practices that promote co-operation in cross-border insolvency. The disputes/issues arising from the cross-border insolvency may be resolved with reference to the specific laws of the country where the entity was incorporated or where the asset is located. A foreign insolvency administrator or proceeding may not be recognised. A foreign creditor may be barred from participating or rank lower in priority behind the local creditors in the local insolvency and/or restructuring proceedings ("***ring-fencing***").

c. Even, in jurisdictions that recognise foreign insolvency administrators/proceedings on principles of comity/reciprocity, **access to the local courts** may only be effected through ***diplomatic channels or via letters of rogatory*** which may be ***time-consuming and cumbersome***. There may be no local laws that provide foreign insolvency administrators *direct* access/rights of audience before the local court.

d. The variations in legal systems may raise difficulties for foreign insolvency administrators who seek to seek to ***enforce security over land or other assets overseas***.[6] For example, in some civil law countries, there is no recognition of a trust and beneficial ownership concept. In another example, there may be a difference between ownership over land vs ownership of a building that is situated on the land. The insolvency administrator may be unable to enforce the security without the consent of the owner of the building or land as the case may be.

e. Multiple and concurrent insolvency and/or restructuring proceedings may be commenced in various jurisdictions. Each jurisdiction would apply its own laws with little or no regard to foreign proceedings. There may be an ***issue/lack of co-ordination and co-operation*** amongst the administrators and/or the courts in the various jurisdictions.

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

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Question 3.3 [maximum 5 marks]

[6] Patrick Ang "Cross-border Insolvency Issues in Asia", Singapore Law Gazette, April 2009.

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.

3.3 The multilateral steps to promote harmonisation of domestic insolvency laws include:

a. The first draft of an **EC Convention on Bankruptcy and Related Matters** in 1970, which required enacting States to incorporate into domestic law, a "Uniform Law" on several issues:[7]

b. UNCITRAL's Legislative Guide on Insolvency Law issued in 2004 ("**UNCITRAL's Legislative Guide**"), which is intended to be a guide or reference on a uniform standard or approach to insolvency and/or restructuring for national bodies to consider incorporating, when considering its laws for reform;

c. The **World Bank's Principles for Effective Insolvency and Creditor/ Debtor Regimes** which are guidelines on the regulation of insolvency. The International Monetary Fund and the World Bank on occasions, require developing countries to have regard and adopt these principles and UNCITRAL's Legislative Guide as a condition precedent for loan support;

d. The European Parliament's report on the **Harmonisation of Insolvency Law** at the EU level in 2010.[8]

The efforts in harmonising and/or improving the standard of domestic insolvency laws would to some extent, resolve some of the problems arising in a cross-border insolvency scenario. However, these domestic reforms may not address the main issue of co-operation and co-ordination of multiplicity of concurrent proceedings in a cross-border insolvency situation.

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

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Marks awarded 13 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

[7] The issues included actions for fraud against creditors, set-off, extension of insolvency of firms or corporate entities to individual person managing the businesses, etc.

[8] The issues for harmonization include a common test for insolvency as a condition for the commencement of a formal insolvency proceeding, the lodgment of claims in a formal insolvency, the process for reorganization plans, etc.

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.

4.1 The Cross-border Insolvency Act of Utopia ("**CIAU**") may be relevant to the Erewhon liquidator ("**EL**") in the following ways:

a. The CIAU applies where ***assistance is sought in Utopia by a foreign court or foreign representative in connection with a foreign proceeding***.[9] Since EL is seeking assistance from the Utopia court in connection with the winding up proceedings of Nadir in Erewhon, the CIAU applies in this situation.

b. For the purposes of CIAU, the winding up of Nadir in Erewhon and the EL would qualify as a "***foreign proceeding***" and a "***foreign representative***".[10] This is because the winding up is a **collective judicial proceeding** in a foreign State (i.e. Erewhon) and EL is appointed as the ***person authorised to act in the liquidation*** of Nadir's assets or affairs in Erewhon.

c. The EL, as a foreign representative as defined in the CIAU, has ***direct access*** to the Utopia court, and is entitled to apply directly to a court in Utopia.[11]

d. The EL, as a foreign representative as defined in the CIAU, may apply to a court in Utopia for the ***recognition of the winding up of Nadir in Erewhon***.

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[9] Article 1(a) of the CIAU/Model Law.
[10] Articles 2(a) and 2(d) of the CIAU/Model Law.
[11] Article 9 of the CIAU/Model Law.

e. As The EL would like to stop the Apex court action already commenced against Nadir for a debt due and owing in Utopia, EL would want to apply to the Utopia court for recognition that the winding up of Nadir in Erewhon as a ***foreign main proceeding*** under the CIAU:

i. This is because there is an ***automatic moratorium*** imposed on the commencement or continuation of all individual actions or individual proceedings against Nadir in Utopia, upon recognition of the winding up of Nadir in Erewhon as a foreign main proceeding.[12]

ii. The EL has to ***gather more evidence and prove that Nadir has its centre of main interests ("COMI") in Erewhon*** for the Erewhon liquidation to be considered a foreign main proceeding.[13] EL may use the fact that that Nadir was incorporated in Erewhon before moving its registration and head office to Utopia one month ago, as one of the pieces of evidence that Nadir's COMI was and still is in Erewhon. The EL may wish to gather information to ascertain/prove Nadir's COMI, which may include the ascertaining the following factors that may indicate that Nadir's "nerve centre" is in Erewhon despite its registration in Utopia: (1) whether the location of Nadir's headquarters is in Erewhon;(2) the location of those who actually manage Nadir is in Erewhon; (3) whether the location of Nadir's primary assets is Erewhon; (4) whether the location of the majority of Nadir's creditors is in Erewhon; (5)whether Erewhon is the jurisdiction whose law would apply to most disputes.

iii. If EL is unable to prove that Nadir has its COMI in Erewhon, Nadir's COMI will be presumed to be in Utopia. This is because the ***debtor's registered office (which is now in Utopia) is presumed to be the COMI***, unless proven otherwise.[14] In such a situation, Nadir's winding up in Erewhon would be recognised as a ***foreign non-main proceeding.*** The ***relief*** (i.e. moratorium against the action commenced against Nadir in Utopia) granted upon recognition of a foreign non-proceeding is ***not automatic*** and is subject to the discretion of the court.[15]

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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.

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[12] Article 21(1)(a) of the CIAU/ Model Law.
[13] Article 17(2)(a) of the CIAU/Model Law.
[14] Article 16(3) of the CIAU/Model Law.
[15] Article 21(1)(a) of the CIAU/Model Law.

(b) Apex had obtained a court order to wind-up Nadir in Utopia prior to the Erewhon winding-up order.

4.2 (a) Yes. When the winding up proceedings against Nadir in Utopia is taking place at the time when EL's application for recognition of the winding up of Nadir in Erewhon has been filed with the Utopia court under the CIAU, the CIAU mandates that:

i. Any relief granted by the Utopia court must be consistent with the winding up proceedings against Nadir in Utopia[16]; and

ii. If the winding up of Nadir in Erewhon is recognised as a foreign main proceeding, then the automatic relief in article 20 of the CIAU does not apply.[17]

4.2 (b) Answer same above at 4.2(a).

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

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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?

4.3 The country selected for the country's incorporation is **Singapore**. The four key international insolvency issues facing the insolvency representative (of the company wound up in Singapore are:

a. The ***choice of forum*** to exercise jurisdiction:

i. The issue is whether a Singapore court has jurisdiction to wind up a company incorporated in another state, that has carried on business in Singapore, but has not complied with the statutory requirements to register itself in Singapore.

[16] Article 29(2)(i) of the CIAU/Model Law.
[17] Article 29(a)(ii) of the CIAU/Model Law.

ii. The answer to [4.3(a)(i)] is "yes". Section 246(1)(c) of the Insolvency, Restructuring and Dissolution Act 2018 ("**IRDA**") provides the Singapore High Court may wind up a foreign company if the company has *inter alia*, ceased to carry on business in Singapore or is unable to pay its debts.

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b. The Singapore court's ***recognition*** for the foreign proceeding and foreign representative:

i. Section 250(2) of the IRDA provides that if a foreign company goes into liquidation or is dissolved in its place of incorporation or origin, the court may on the application of the foreign liquidator (or the Singapore Official Receiver), appoint a liquidator of the foreign company for Singapore;

ii. Singapore has adopted the UNCITRAL Model Law on Cross-Border Insolvency ("Model Law") with little substantive deviations.[18] A foreign representative may apply directly to the Singapore Court,[19] and seek recognition of the foreign proceeding in which the foreign representative has been appointed.[20]

c. The Singapore court's ***relief*** accorded to the foreign representative:

i. Section 250(3)(c) of the IRDA provides that a liquidator of a foreign company appointed by the Singapore Court may turnover assets to the foreign representative, but only if the Singapore liquidator is satisfied that the interests in Singapore are adequately protected;[21]

ii. If the foreign representative has sought recognition of the foreign proceeding under the Model Law, the nature and extent relief from the Singapore Court will depend on whether the foreign proceeding is recognised as a foreign main proceeding,[22] or foreign non-main proceeding.[23] The foreign representative is also entitled to participate in a proceeding regarding the foreign company under the Singapore insolvency law.[24]

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[18] Sections 252 and 253 of the IRDA, the entire Model Law is found at Third Schedule to the act.
[19] Article 9 of the Model Law.
[20] Article 15 of the Model Law.
[21] Section 250(5) of the IRDA.
[22] Article 20 of the Model Law.
[23] Article 21 of the Model Law.
[24] Article 13 of the Model Law.

d. The ***applicable/choice of law*** for the Singapore winding up of a foreign company.

i. Singapore law i.e. the IRDA applies to the Singapore winding up of a foreign company.

ii. There is no equivalent provision in Singapore like s 426 of the UK Insolvency Act 1986, where the English court where it is acting under the aid and assistance under that provision, to recognise and cooperate with a foreign representative, it may apply either the English law or the foreign law.

iii. The Singapore case law affirms the common law position[25] that the ***Singapore courts would not enforce the revenue laws of another country, whether directly or indirectly***.[26] Thus the foreign creditors who are tax authorities would be advised not to commence a winding up proceeding against the debtor company in Singapore, or to file a proof of debt in the Singapore liquidation of the company.

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

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Marks awarded 11 out of 15

* End of Assessment *

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

TOTAL MARKS AWARDED 42.5/50

[25] *Peter Buchanan LD and Macharg v McVey [1955] AC 516; Government of India, Ministry of Finance (Revenue Division) v Taylor* [1955] AC 491.

[26] *Relfo Ltd (in liquidation) v Bhimji VElji Jadva Varsani* [2008] 4 SLR(R) 657 (S'pore High Court).