



## 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**.

## **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 7 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 entails an imperfect and non-codified interplay of laws and jurisdictional principles of two or more nations in the event and circumstance of insolvency of a legal entity with cross-border and transnational repercussions.

**There is some scope to elaborate**  
**2**

### **Question 2.2 [maximum 5 marks]**

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

'Universality' and 'Territoriality' in their purest form are the opposites, being as simple as 'one' vs. 'many' respectively. While Universality promulgates that a single insolvency proceeding is administered, mostly in the state where the corporate entity carries on its business activities or has major business interests and dealings, effectively imposing a moratorium on any enforcement action or insolvency action in any other state, Territoriality entails multiple actions and proceedings against the debtor's entity and assets in different states where the said assets or interest and dealings may lie.

Universality has an advantage of collective participation, cost efficiency and complete control over the estate of the debtor irrespective of a cross-border nature. On the other hand Territoriality brings about comfort in an asset, territory and creditor specific approach, keeping in mind the respective national laws and domestic markets.

While Universality has been the more holistic of approaches, it has indeed been difficult in achieving this almost 'utopic' approach, as there is general non-coordination between

states and an added risk of compete sub-ordination of local laws and principles before the laws of the state where the main insolvency proceedings are being administered. Territoriality on the other hand is a cash intensive approach, with basic aspects of confusion and procedural delays, given the various concurrent proceedings that take place, which may have different outcomes.

**5**

### **Question 2.3 [maximum 3 marks]**

Describe **three** recent examples of developments in the Middle East region to reform domestic insolvency laws or to address international insolvency Issues.

1. Insolvency Law DIFC Law No. 1 of 2019 ('The New Insolvency Law'): New concepts have been introduced by the Dubai International Financial Centre ("DIFC") with effect from June 6, 2019, which include rehabilitation with a debtor-in-possession scheme, appointment of an administrator in cases of mismanagement and adoption of the UNCITRAL Model Law on Cross-Border Bankruptcy to assist in cross-border situations.
2. KSA Bankruptcy Law- Saudi Arabia: The kingdom adopted a 4-part bankruptcy law in 2018 with various procedures on offer such as 'Protective Settlement Procedure' which aims to facilitate a settlement between the debtor and the creditor, financial restructuring which aids in rehabilitation, and two different liquidation procedures. Features such as rehabilitation, maximisation of value for stakeholders, equitable treatment of creditors have been included therein.
3. Bahrain's Bankruptcy Law (Decree Law 22/2018): The most striking feature of Bahrain's new Bankruptcy Law which came into force on December 7, 2018 was the adoption of UNCITRAL Model Law on Cross-Border Bankruptcy, which have been preserved under Title 5.

**3**

**Marks awarded 10 out of 10**



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

#### **Question 3.1 [maximum 5 marks]**

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

Insolvency and/or bankruptcy process of an individual means the administration of the state of insolvency of a natural individual, while the insolvency and/or liquidation of a corporate is the process of administration of the affairs of an unnatural but a legal entity and its estate either when the value of its liabilities have exceeded the value of its assets and its unable to repay its debts. Fundamentally, the objective of an individual insolvency process is to protect the individual debtor from its creditors and offer some sort of a workable solution to the interested parties in order to give a fresh start to the debtor, hence an individual insolvency or bankruptcy process, depending on the concerned state jurisdiction, is often the last resort for a bankrupt individual, that is to seek intervention and protection of the legal machinery, barring the situations involving elements of fraud.

On the other hand, the insolvency process of a corporate individual can be various depending upon the choice of procedure, such as a restructuring, rehabilitation, a formal out of court debt work out, an administrative liquidation and so on. The fundamental element of a corporate insolvency may or may not be protection and preservation as the same depends on the circumstances, and facts.

The impact of commencement of insolvency proceedings is also quite different on a natural individual and a corporation, for instance the individual may be barred from raising any fresh debt during such a period, while on the other hand its encouraged that interim finance be provided to corporates if the need arises. Disqualifications in the nature of limitations on holding certain posts, traveling abroad etc. are almost always imposed on individual debtors, while the same may or may not be an automatic imposition on the individuals of the management of a corporate and may depend on the peculiar facts. One very distinct feature of an individual insolvency process is the concept of 'excluded debt', which does not exist in a corporate insolvency process. It's loosely, excluding of the basic necessities of a natural individual from the impact of the proceedings, such as a dwelling unit, household goods, customary and religious objects etc. Another characteristic of an individual insolvency is that the natural person is not as such 'dissolved', which dissolution is the end result of all liquidation process of a corporate. A corporate entity and its business can be re-organised or liquidated and sold in bits and pieces. The business, if any of an individual can be re-organised but the individual cannot, however, be liquidated or sold<sup>1</sup>. Further, as individuals in bankruptcy never liquidate, there is no issue of filtering failure in personal bankruptcy<sup>2</sup>. Lastly, Insolvency of a natural person concerns an individual and his or her creditors whilst the insolvency of a corporate can impact more parties. Directors, shareholders, creditors, and employees could be impacted by a company going into

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<sup>1</sup> Sahoo, M.S, "Individual Insolvency: The Next Big Thing", <<[https://www.ibbi.gov.in/uploads/resources/NewsLeter\\_Jan-March\\_2019-R.pdf](https://www.ibbi.gov.in/uploads/resources/NewsLeter_Jan-March_2019-R.pdf)>>, accessed 13 October 2022.

<sup>2</sup> White J, Michelle, "Corporate and Personal Bankruptcy Law: Chapter II, Personal Bankruptcy", Working Paper 17237 National Bureau of Economic Research

liquidation and/or insolvency, whether it's through termination of employment, recovering debt, or not successfully recovering debt<sup>3</sup>. Hence the insolvency of a corporate impacts much more people and the economy at times as well.

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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.

The challenges faced in cross border insolvencies start from the foundations itself. For instances, the usage of the terms, 'insolvency', 'bankruptcy', etc. have different connotations in different jurisdictions and often entail very specific and detailed procedures which are often set in evolution of their respective law as well as judicial precedence's. Hence harmonisation of the aforesaid at a very nuclear level is always going to pose itself as a challenge. Secondly, respective jurisdictions have varying thresholds, for example in certain states, even an incipient stress or one default can trigger an insolvency action, while certain states, may have a formal out of court debt work out scheme to rehabilitate the corporate entity before any insolvency action is considered. Also, there are diametrically opposite approaches being debtor-in-possession and creditor-in-possession which vary from state to state and at times the challenges can stem from one country's law being more advanced and mature in comparison to the other. In addition to the aforesaid, where insolvency proceedings are governed by the laws of several jurisdictions, various conflicts of law issues are bound to arise<sup>4</sup>. Especially in regard to commercial treatment of claims, laws on set-off and netting, treatment of creditors and various class of creditors, treatment of crown or state debt, waterfall or distribution mechanism, the procedure of seeking bids/resolution schemes, terms of interim finance, workings of the committee of creditors and their influence. The challenges can also arise from local laws on recognition of foreign jurisdictions and foreign court orders and their enforcement locally specially when they are monetary and or commercial in nature. There is also an inherent difficulty as to whether a certain court has jurisdiction over foreign assets.

**Further detail would be beneficial. For example, consideration of Westbrook's 9 key issues.**  
4.5

### Question 3.3 [maximum 5 marks]

What multilateral steps have been taken in the 21<sup>st</sup> 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.

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<sup>3</sup> Mackay & Goodwin, "Understanding the Difference Between Liquidation and Bankruptcy", <<<https://www.mackaygoodwin.com.au/insights/understanding-difference-liquidation-bankruptcy/>>>, accessed 13 October 2022.

<sup>4</sup> Ian F. Fletcher, *The Law of Insolvency* (4th edn., Sweet & Maxwell 2009)

The multilateral steps taken in the 21st century to promote harmonisation of domestic insolvency laws are as follows:

1. The UNCITRAL Legislative Guide on Insolvency Law (2004): In its purpose states that it is a comprehensive statement of key objectives and principles that should be reflected in a State's insolvency laws<sup>5</sup>. Part one deals with key objectives of insolvency law, part two lists core features of an insolvency process which deals with the various stages thereof, part three deals with group insolvencies, part four focuses on the key responsibilities that should be shouldered upon the management of a corporate the moment stress is visible or anticipated while part five deals with MSME stress and insolvencies.
2. The efforts of the International Bar Association in 1997 in drafting a model bankruptcy code which could be adopted and relied upon by states who were looking to draft or amend their insolvencies laws. They are not concluded, however nevertheless it was instrumental in shaping the literature on the subject.
3. The World Bank's 'Principles for Effective Insolvency and Creditor / Debtor Regime: The principles are a distillation of international best practice on design aspects of these systems, emphasizing contextual, integrated solutions and the policy choices involved in developing those solutions.<sup>6</sup>
4. EU's "Harmonisation of Insolvency Law at EU Level": It provides a list of problems which might occur in the absence of common rules on insolvency, such as problems related to insolvency of corporate groups, liability of shareholders being nationals of different member states, reference to national laws for the insolvency of 'Community' companies and strategic cross-border movements for insolvency purposes.<sup>7</sup>
5. ICR Standard: The World Bank and the United Nations Commission on International Trade Law (UNCITRAL), in consultation with the International Monetary Fund (IMF), designed the Insolvency and Creditor Rights Standard to represent the international consensus on best practices for evaluating and strengthening national insolvency and creditor rights systems. The ICR Standard does this by combining the World Bank Principles for Effective Insolvency and Creditor/Debtor Regimes and the UNCITRAL Legislative Guide on Insolvency Law<sup>8</sup>.

The aforementioned efforts have been undeniably, greatly instrumental in addressing international insolvency issues as firstly they promote and encourage adoption of best domestic practices in home nations and member states, which is the first step towards a

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<sup>5</sup> United Nations Commission on International Trade Law " UNCITRAL Legislative Guide on Insolvency Law" , << [https://uncitral.un.org/en/texts/insolvency/legislativeguides/insolvency\\_law](https://uncitral.un.org/en/texts/insolvency/legislativeguides/insolvency_law)>>, accessed 13 October 2022.

<sup>6</sup> The World Bank "Principles for Effective Insolvency and Creditor and Debtor Regimes", << <https://documents.worldbank.org/en/publication/documents-reports/documentdetail/518861467086038847/principles-for-effective-insolvency-and-creditor-and-debtor-regimes>>>, accessed 13 October 2022.

<sup>7</sup> Directorate General for Internal Policies, Policy Department, European Parliament Harmonisation of Insolvency Law at EU Level", << [https://www.eesc.europa.eu/sites/default/files/resources/docs/ipol-juri\\_nt2010419633\\_en.pdf](https://www.eesc.europa.eu/sites/default/files/resources/docs/ipol-juri_nt2010419633_en.pdf) >>, accessed 13 October 2022.

<sup>8</sup> World Bank << <https://pubdocs.worldbank.org/en/538701606927038819/ICRStandard-Jan2011-withC1617.pdf>>>, accessed 13 October, 2022

more mature outlook in the realm of international insolvencies. These works have made available ample and quality material to developing and under-developing nations to revamp their insolvencies laws, who inadvertently will be on the cusp of facing cross-border issues given the rampant development and globalisation. Additionally, most of the aforementioned works have elements which address one or the other fundamental international insolvency issue, such as methods of cooperation and coordination, multinational insolvencies, entering of and into pre-insolvency detrimental transactions, access to foreign international representatives to have access to courts and other relevant authorities, to name a few.

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

**4.5**

**Marks awarded 14 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.

1. In accordance to The UNCITRAL Model Law of Cross-border Insolvency ("Model Law"), the 'centre of main interest' should correspond to the place where the debtor

conducts the administration of his interests on a regular basis and is therefore ascertainable by third parties<sup>9</sup>. Hence in the case of Nadir, Utopia will be considered as its 'centre of main interest' as its registered in Utopia, has its head office in Utopia, and was the place where Apex supplied services to goods to Nadir. The action brought by Apex in Utopia will be considered as the 'main insolvency proceedings', which will have a universal scope and shall encompass all of Nadir's assets on a world-wide basis<sup>10</sup>. Furthermore, 'Erewhon' will now only be considered an 'establishment'<sup>11</sup> under the Model Law, and hence the winding-up order/proceedings in Erewhon will be termed as 'foreign non-main proceedings'<sup>12</sup>.

Further, under the Model Law, there is no presumption with respect to determination of an 'establishment'<sup>13</sup>. The interests and authority of a representative of a foreign non-main proceeding are typically narrower than the interests and the authority of a representative of a foreign main proceeding, who normally seeks to gain control over all assets of the insolvent debtor. Therefore the following principles are applicable in the present matter given that the liquidator is a foreign representative of a foreign non-main proceedings, with the objective that the said non-main foreign non-main proceedings should not interfere with the administration of the main proceedings<sup>14</sup>:

- (a) that relief granted to a foreign non-main proceeding should be limited to assets that are to be administered in that non-main proceeding, and;
- (b) that, if the foreign representative seeks information concerning the debtor's assets or affairs, the relief must concern information required in that non-main proceeding<sup>15</sup>.

Hence, the above-mentioned principles should be taken into account by the liquidator before filing/applying for injunction or stay applications in the main insolvency proceedings in Utopia

**The question requires candidates to apply the relevant MLCBI articles to the facts provided in more detail than that above.**

**The MLCBI is significant for its provisions on recognition and relief in 4.1.**

**3**

**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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<sup>9</sup> UNCITRAL Model Law of Cross-border Insolvency, Article 3

<sup>10</sup> *Ibid*

<sup>11</sup> *Idem*, Article 2(f)

<sup>12</sup> *Idem*, Article 2(c)

<sup>13</sup> Which is available in the cases of 'foreign main proceedings'

<sup>14</sup> UNCITRAL Model Law on Cross-Border Insolvency with Guide to Enactment and Interpretation, Paragraph 193, p. 88

<sup>15</sup> *Ibid*

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

(a) No

(b) No

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

**0.5**

### **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?

The country of the corporate debtor's incorporation has been chosen as India. The country has adopted a unified legislative code governing the corporate insolvency resolution process and liquidation process of corporates, partnerships, fresh start process, insolvency and bankruptcy individuals etc. in the Insolvency & Bankruptcy Code, 2016 ("IBC"). Though only certain parts of the IBC have come into force on date, it nevertheless has had a seismic shift and improvement in the insolvency law landscape in the country.

Cross-border insolvency law under the IBC is currently dealt with under Sections 234 and 235. Section 234 empowers the central government to enter into bilateral agreements with other countries to resolve issues in international insolvency situations. Section 235, on application and proofs empowers the local adjudicating authority<sup>16</sup> to issue requests letter to any competent authority or court located in a foreign jurisdiction in relation to the asset of the corporate debtor with which reciprocal arrangements have been made under section 234.

In addition to the above, for Indian proceedings to be recognised abroad, the law of that country will apply. If the country has adopted the UNCITRAL Model Law, they would typically recognise the proceedings without having India adopt the Model Law, for example Singapore, the United States of America, the United Kingdom. However, countries that have

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<sup>16</sup> Special company and insolvency law courts being the National Company Law Tribunals.

not adopted the Model Law or the ones that have adopted the Model Law with modifications, may have requirement of reciprocity<sup>17</sup>. This would mean that such other country would provide recognition, cooperation and appropriate reliefs in relation to any Indian insolvency proceedings only if certain requirements are met by the Indian domestic Law<sup>18</sup>.

The further drawbacks of the current position in relation to the aforementioned fact position are as follows<sup>19</sup>:

1. Requirement of entering to bilateral agreements, which can be a very long and tedious negotiation process;
2. In the current fact position, there will be procedural complexities as multiple jurisdictions are involved, and bilateral agreements will have to be invoked with each;
3. In the current scenario, where the assets of an Indian debtor are in a foreign jurisdiction, with which if, for example there are no bilateral agreements, there would be no guidance on remedies available to the Indian insolvency professional/representative in order to avail evidence to take any action in relation to such assets of the debtor;
4. Due to the lack of the required structural support, it may disincentivise a foreign creditor, who may prefer assistance and recognition of Indian proceedings in their home country;
5. The current domestic laws such as the Civil Procedure Code, 1908, is not broad enough to include all orders in the realm of international insolvency laws which may make foreign orders unenforceable in India.

While there are very limited domestic laws to assist the insolvency professional in relation to the assets of the debtor located abroad, other than the limited scope of Section 234 and Section 235 of the IBC, which have their own set of drawback, India can most definitely benefit from the adoption of the UNCITRAL Model Law, which will have massive positives and benefits for the Indian Insolvency laws such as ease of doing business, flexibility, protection of domestic interest, priority of domestic proceedings, empowerment of insolvency representatives, mechanism for cooperation, protection of Indian creditors, remedies in jurisdictions with reciprocity and so and so forth.

**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.**

**5.5**

**Marks awarded 9 out of 15**

**\* End of Assessment \***

**A very good paper that generally addresses the questions asked and substantiates its answers.**

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<sup>17</sup> They may require that India also have a cross-border insolvency law formulated on the Model Law.

<sup>18</sup> Government of India, Ministry of Corporate Affairs, Insolvency Section File 30/27/2018 dated 20.06.2018, "Overview of Cross-Border Insolvency Framework for Corporate Debtors under the Insolvency & Bankruptcy Code, 2016", << [https://www.mca.gov.in/Ministry/pdf/PublicNoticeCrossBorder\\_20062018.pdf](https://www.mca.gov.in/Ministry/pdf/PublicNoticeCrossBorder_20062018.pdf)>>, accessed 14 October 2022.

<sup>19</sup> *Idem*

TOTAL MARKS AWARDED 40/50