



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 2023.*

## 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 2023. The assessment submission portal will close at 23:00 (11 pm) BST (GMT +1) on 15 October 2023. 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.**

*International insolvency law refers to aspects of the law of debt restructuring, corporate rescue and liquidation proceedings that have an element affecting more than one territorial or legal jurisdiction. The cross-border nature of these cases thus makes it difficult to immediately and conclusively determine such a matter without referring to courts and authorities in a different (foreign) jurisdiction. International insolvency law arises where the assets of the debtor, the debtor's business interests, domicile and creditors cut across jurisdictions necessitating the consideration of more than one local insolvency law to resolve any insolvency issue.*

**There is scope to elaborate with respect to recognition and effect in that for example, with universalism, recognition and effect requires that other States recognise that one set insolvency proceedings (that all agreed is the appropriate jurisdiction) and recognise it as having extraterritorial effect in their States.**

1.5

Question 2.2 [maximum 5 marks]

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

*The concept of universality refers to a unified structure of dealing with international insolvency proceedings. The concept seeks to have a single proceeding covering all the debtor's assets and debts. Under this theory, the commencement of a proceeding against a debtor in one jurisdiction should act as automatic stay of all other proceedings and the insolvency judgement should be recognized and enforced in all other jurisdictions where the debtor has an interest. The forum of choice with jurisdiction over the debtor's matters should be selected based on the debtor's centre of main interest. The theory also propounds that all creditors should be allowed to participate in the proceedings irrespective of their origin and the insolvency representative in such proceedings should be facilitated sufficiently to enable them to control all the assets of the debtor. Recommendation 36 of The UNCITRAL Legislative Guide on Insolvency Law recommends this approach by guiding that legislative provisions should specify that the estate of the debtor includes all assets irrespective of their location.<sup>1</sup> While universality appears more cost effective as proceedings are consolidated and assets handled centrally, its success is highly dependent on comity and reciprocity as well as cooperation and communication between courts and insolvency representatives.*

*On the contrary, the concept of territoriality approaches international insolvency matters from a perspective of national/geographical jurisdiction and states that insolvency proceedings against a debtor should commence in the country where the debtor's asset is situated. The concept allows for concurrent proceedings against the same debtor in more than one jurisdiction and constrains the mandate of the insolvency representative to the jurisdiction where the asset is situated. Further, creditors may only file claims which relate to the jurisdiction of the asset. The principle builds on sovereignty of states and the jurisdiction of local courts over debtors within their borders. The Michigan Law Review describes territoriality as the idea that each country has the exclusive right to govern within its borders.<sup>2</sup> While territoriality is the main principle applied in insolvency cases, there is a consensus on the application of cooperative territorialism where the courts and insolvency representatives communicate and cooperate in resolving the debtor's financial woes across various jurisdictions.*

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.**

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<sup>1</sup> United Nations Commission on International Trade Law, *UNCITRAL Legislative Guide on Insolvency Law* (2005), p.82

<sup>2</sup> Lynn M. LoPucki, *The Case for Cooperative Territoriality in International Bankruptcy*, 98 MICH. L. REV. 2216 (2000). Available at: <https://repository.law.umich.edu/mlr/vol98/iss7/3>



*Recent developments in the Middle East Region have focussed on consensual reorganisation, rehabilitation approach and liquidation as a last resort.<sup>3</sup> This part will address developments in Dubai, Bahrain and Saudi Arabia as representative states in the Middle East Region.*

*In addition to the adoption of the United Nations Commission on International Trade Law Model Law on Cross Border Insolvency (UNCITRAL MLCBI) in 2019 by the Dubai International Financial Centre (DIFC), the DIFC, in 2022, passed amendments to the Insolvency Law of 2019 (and Insolvency Regulations) to align bonding requirements in line with current practices in the UAE.*

*Similarly, Bahrain adopted the UNCITRAL MLCBI in 2018 and enacted the New Bahrain Bankruptcy Law which provides for in-court reorganization with the approved reorganization plan being binding upon all creditors both within Bahrain's jurisdiction and in foreign jurisdictions.*

*Saudia Arabia enacted the Rules of Cross-Border Bankruptcy Proceedings on 16 December 2022 which is based on the UNCITRAL MLCBI.<sup>4</sup> This followed the enactment of the implementing legislation for the Saudi Insolvency Law (Royal Decree M 50 of 1439, Resolution No 264 on 1439) in 2018. The 2018 law addresses cooperation in cross border insolvency among other reforms but does not provide for detailed rules on cross border insolvency. The adoption of UNCITRAL MLCBI was thus necessary to domesticate the cross-border rules.*

3

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.***

*The objectives of insolvency for both individuals and corporations include value preservation to obtain the best outcome for creditors, distribution on a pari pasu basis in the event of a realisation, investigations into reason for failure and an expectation that the secured creditors deal fairly. However, there are differences regarding the objectives of individual and corporate insolvency as discussed below.*

*According to Sealy and Hooley, the major difference in individual insolvencies and corporate insolvencies relates to the excluded assets. In individual insolvencies,*

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<sup>3</sup> Patrick, William "Notable Changes to Insolvency Legislation in the GCC", at <<<https://www.charlesrussellspeechlys.com/en/insights/expert-insights/corporate/2021/notable-changes-to-insolvency-legislation-in-the-gcc/>>> , accessed 5 October 2023

<sup>4</sup>The United Nations. (2023, March 30). [Press release UNIS/L/342]. *Saudi Arabia enacts legislation implementing UNCITRAL Model Law on Cross-Border Insolvency at* <<<https://unis.unvienna.org/unis/en/pressrels/2023/unis1342.html>>>, accessed 9 October 2023

*certain assets central to the bankrupt's economic existence such as the bankrupt's necessary tools of trade; necessary household furniture and personal effects (including clothing) for the bankrupt and the bankrupt's relatives and dependants are excluded. This sometimes includes a motor vehicle up to a certain value. The aim of the exclusion is to allow the debtor to have sufficient assets to make a fresh start which would in turn allow the debtor to make contributions from future assets in settlement of their indebtedness.*

*On the other hand, in corporate insolvencies, certain assets such as assets where the company has no beneficial interest, assets held or obtained by way of bailment or hire purchase and assets held in trust for third parties are excluded. This preserves third party assets from the potential realization to satisfy the debts of the insolvent corporation.*

*Secondly, while individual insolvencies aim at protecting the debtor from harassment by creditors, corporate insolvencies are aimed at preserving the value of the business which would otherwise be lost if individual creditor actions were to be sustained and assets realized on a piecemeal basis. Both protections offered by insolvency law are not absolute since certain proceedings grant power to officeholders to investigate the reasons for failure and impose personal liability on responsible persons.*

*There is scope to elaborate, for example with respect to imposing personal liability on the responsible persons in a corporate context.*

4

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.***

*International insolvency poses difficulties in aligning issues, processes and outcomes in insolvency proceedings which thus make it hard to conclusively and immediately deal with a cross border insolvency without referring to a foreign jurisdiction. Difficulties that may arise include questions on jurisdiction, choice of laws and recognition and enforcement of insolvency judgements.*

*Pertinent differences in relevant systems brings about the question of which forum has jurisdiction to issue commencement orders and determine further issues arising in the insolvency proceedings. Whereas the debtors centre of main interest may be the straightforward determinant of jurisdiction, depending on the system, the creditors place of business or the contract terms may also influence the choice of forum and competence of the authority to determine any issue in the insolvency proceedings.*

*Once the question of forum is settled, the choice of laws that will be applicable comes into play. Agreements between debtors and creditors may provide for the choice of*

*laws that will be applicable or the laws of the forum of choice may be applicable. In certain instances, public international law, whether in the form of ratified treaties or soft law instruments may apply. All parties in insolvency proceedings are then bound by the decisions which are based on the choice of laws applicable.*

*After settling the conflict of laws challenges by agreeing to the applicable law in the competent forum, office holders and creditors are faced with the challenge of recognition and enforcement of the orders of the insolvency court. Certain treaties provide for the cooperation and communication between courts which then makes it efficient to align actions of various courts on proceedings against the same debtor. Office holders require recognition of their judgements and orders to enable them to enforce the same against the assets of debtors in foreign jurisdictions. In the absence of recognition, then assets in foreign jurisdictions are at risk and creditors in foreign jurisdictions risk to lose the benefits they would have otherwise derived from the proceedings.*

*A resolution of these issues would facilitate efficient, timely and cost-effective resolution of cross border insolvency proceedings.*

*Further detail would be beneficial. For example, consideration of Westbrook's 9 key issues.*  
3.5

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.***

*The American Law Institute and the International Insolvency Institute Report of 2012 provides for principles of cooperation in cross border insolvency cases, guidelines on court-to-court communication as well as rules on conflict of laws. This guidance is important in addressing international insolvency issues as it creates a framework and standard reference for both judicial bodies and office holders thus creating certainty and cost-effective management of cross border insolvency cases.*

*The European Insolvency Regulation Recast of 2015 (EIR Recast) promotes the harmonisation of domestic insolvency laws by addressing the question of choice of law. The regulation provides that the applicable laws shall be the laws of where the proceedings are opened. The impact of the EIR Recast resolves the conflict of laws challenges presented by international insolvency by providing clarity on the choice of laws to apply.*

*The Judicial Insolvency Network Guidelines for communication and cooperation between courts in cross border insolvency matters of 2016 provides for a framework to facilitate the recognition and enforcement of foreign judgements in insolvency cases. The Guidelines will facilitate resolution of the dilemma faced by creditors and*

*office holders in seeking recognition of insolvency judgements in foreign countries. This is because states like Australia have recommended the application of the Guidelines as practice notes.*

*The United Nations Commission on International Trade Law (UNCITRAL) has made significant efforts to promote the harmonisation of domestic laws. In the 21<sup>st</sup> century, these efforts include the 2018 UNCITRAL Model Law on Recognition and Enforcement of Insolvency Related Judgements with Guide to enactment which covers judgements in insolvency proceedings with the exclusion of the commencement order. Additionally, the 2019 UNCITRAL Model Law on Enterprise Group Insolvency addresses insolvencies of enterprise groups. These efforts, which are progressively being adopted by various states, are likely to facilitate a uniform approach in cross border insolvency thus addressing the challenges posed by cross border insolvency.*

The question addresses broadly the harmonisation of domestic insolvency laws in general. See the 'model' answer on this sub-question. There is scope elaborate and to consider political pressure, foreign investor pressure and/or loan conditions.

3.5

Marks awarded 11 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.**

*I would require further information on the centre of main interest of Nadir such as location of assets to determine the jurisdiction of the main proceeding and whether to institute further proceedings in Utopia if the assets are situated in Utopia.*

*Additionally, if the court that issued the winding up order and appointed the Liquidator had jurisdiction, I require further information on whether there is, in addition to the Cross-border Insolvency Act of Utopia (CBI Act), any treaty or convention binding on both Utopia and Erewhon states as this would address the challenge faced by the liquidator concerning the recognition and enforcement of the winding up order issued in Erewhon in Utopia.*

*That said, the CBI Act applies where assistance is sought by a foreign court or a foreign representative, in this case the liquidator, in connection with a foreign proceeding. To this extent, the CBI Act is relevant towards the recognition of the liquidator as a foreign representative for purposes of the proceedings against Nadir, the rights of the liquidator to access the courts in Utopia and the requirements that the liquidator needs to satisfy when approaching the court for the recognition of the winding up order issued in Erewhon.*

*Further, Article 20 of the CBI Act provides for the effect of the recognition of the foreign winding up to stay the commencement or continuation of individual action of creditors, stay execution against the debtor and suspend the right to transfer, encumber or dispose of assets.*

*Additionally, the CBI Act will be relevant towards granting the liquidator the right to initiate actions to protect the creditors as well as intervene in any proceedings against the debtor as per Articles 23 and 24 respectively.*

*The CBI Act also provides for cooperation and communication between the local authority administering insolvency matters and the foreign representative which is important to the Erewhon liquidator as it guarantees information sharing and mutual assistance in the administering the debtor's affairs.*

*The CBI Act thus has significant relevance to the Erewhon liquidator as it provides a framework that would allow him to discharge his obligations and protect the interests of all creditors in Utopia.*

*A good understanding of the issues and the answer could be strengthened by more detail.*

4

Question 4.2 [maximum 2 marks]

**Would it make any difference to your answer in question 4.1 in the following two alternative scenarios to Apex suing for its debt?**

**(a) Apex had filed proceedings to wind-up Nadir, but the matter had not yet been heard.**

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

*(a) No. If Apex had filed proceedings to wind up Nadir in Utopia and the application was pending hearing, the Erewhon liquidator would, under Article 20 of the CBI Act, seek the stay of the proceedings and deal with the claim by Apex as a foreign creditor subject to the protection of the local creditors and other interested parties.*

*The applicable law on the stay of proceedings is that of the local insolvency law, so more information is required on Utopia's insolvency laws on stays. It may be that the same principles would apply to a pending winding-up proceeding as to civil commercial litigation for debt recovery and so an order for a stay may be made.*

*(b) In this scenario, yes. The recognition of the Erewhon winding up order would be dependent on Nadir's centre of main interest to determine which becomes the main proceeding and which becomes the concurrent proceeding which in turn affects the liquidator's scope of rights. Reference to article 29 would be beneficial.*

1

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 selected the country of the company's incorporation to be Kenya which has adopted the provisions of the UNCITRAL Model Law on Cross-Border Insolvency in the Fifth Schedule of the Insolvency Act of Kenya, 2015. The following are the key international insolvency issues that will face an insolvency representative and the applicable laws in each case.*



*The insolvency representative will have to deal with the interests of the other creditors in the foreign jurisdictions. Paragraph 3 of the Fifth Schedule of the Insolvency Act 2015 provides for the participation of creditors and other interested parties in foreign jurisdictions in the insolvency proceedings that have commenced in Kenya. Further the Act grants foreign insolvency representatives the right to participate in the proceedings in Kenya. Against this background, the Insolvency Practitioner in Kenya will need to deal with other professionals representing the rights of various creditors outside Kenya.*

*The Insolvency representative will have to deal with the registration and adjudication of creditors' claims including the claims of the foreign creditors. Paragraph 15 of the Fifth Schedule of the 2015 Act excludes foreign tax and social security claims from such a proceeding and as such the taxation and revenue authorities of the foreign jurisdictions may not be able to sustain claims in the proceedings in Kenya. Further the Act mandates the insolvency representative to notify both the local and foreign creditors where an insolvency proceeding involves foreign creditors as in this case.*

*The commencement of insolvency proceedings in Kenya will have an impact on the assets of the company situated in foreign jurisdictions. The Insolvency representative will thus require access to foreign courts to seek the recognition and enforcement of the court order issued in Kenya by the other states where the assets of the debtor are situated. Part 4 of the Fifth Schedule of the Insolvency Act 2015 will apply in this regard in relation to the cooperation and direct communication between the courts, the insolvency representative and the foreign representatives.*

*In addition to the recognition of the commencement order, the insolvency representative will have to deal with executory contracts within the foreign jurisdictions where the assets of the Company are situated. The continuation or termination of executory contracts will depend on the terms of the contracts as well as policy considerations in various states. Thus, the domestic laws of the foreign states as well as private international law shall apply and guide the decision of the insolvency representative.*

**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.**

6.5

Marks awarded 11.5 out of 15

**\* End of Assessment \***

**TOTAL MARKS AWARDED 40 out of 50**

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