



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.

There is no accepted definition of "international insolvency law". One definition by Wessels is:

"[T]he body of rules concerning certain insolvency proceedings or measures, which cannot be fully enforced because the applicable law cannot be executed immediately and exclusively without consideration being given to the international aspect of a give case"¹.

Key and Walton describe international insolvency law as consisting of the "choice of law rules, jurisdiction rules and enforcement rules. These are the rules that have been

¹ B Wessels, International Insolvency Law, (Kluwer Law International, 2006), note 1, p1.

*determined over the years to deal with any cross-border issues, where the law of two or more countries are relevant*².

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.

Universality and territoriality in cross-border insolvency are two approaches put forward to deal with the issues that arise in international insolvency matters.

Universality	Territoriality
Recognition of extraterritorial dimension of insolvency proceedings.	No recognition of extraterritorial dimension of insolvency proceedings. Affairs of debtor are dealt with in the domestic jurisdiction.
Recognition and trust in foreign insolvency law and legal systems in general.	
One law applies being the law of the country where the insolvency originates (and applies worldwide) i.e. one insolvency proceedings for all the debtor's assets and creditors.	Law of State where property is situated will apply.
Has to deal with choice of law and priority issues.	Office holder in local jurisdiction will need to bring local actions in different jurisdictions dealing with local assets and creditors only. No necessity to deal with choice of law or priority issues.
Single insolvency representative	Potential for insolvency representatives
Having one proceeding and a single insolvency representative may reduce the administrative expenses than if there are multiple insolvency representatives	Having multiple insolvency representatives and proceedings may increase the expenses of the overall insolvency proceedings
Assets are for the benefit of all creditors and participate in the one proceeding equally (regardless of the State the creditor maybe from).	Assets are dealt with in the jurisdiction in which they are located and for the benefit of the creditors in that jurisdiction
One proceeding covering all the debtor's assets and creditors	Plurality of proceedings.

² A Kaey and P Walton, Insolvency Law Corporate and Personal (Lexi Nexis, 4th Edition, 2017), pg 391

regardless of whether they are located in jurisdictions. (The one proceeding should be where the centre of the debtor's interests is located).

No other proceeding possible and no forms of execution can be initiated in another jurisdiction following the initial insolvency proceeding.

Possible for the debtor to not be in an insolvency proceeding in one country while not be in another (the debtor being at the same time insolvent and solvent in different jurisdictions)

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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.

Three countries that have reformed their domestic insolvency laws in the Middle East are:

- i) The United Arab Emirates (reforms undertaken in 2016 and 2019)*
- ii) Saudi Arabia (reforms in 2018)*
- iii) Dubai (reforms in 2019)*

More detail would have improved the mark awarded for this sub-question.

Two countries adopted reforms that address international insolvency law, namely the adoption of the Model Law on Cross Border Insolvency:

- i) Bahrain (in 2018)*
- ii) Dubai (more specifically the Dubai International Financial Centre in 2018).*

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Marks awarded 8.5 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.

*While the objectives of insolvency for individuals and corporations do have similarities (broadly, both assume payment of creditors *pari passu*, stay of proceedings, assets are pooled) there are a number of differences:*

Objectives of insolvency for individuals include:

- Ensuring debtor is not harassed by creditors.*
- Possible entitlement to retain certain types of property/assets i.e. certain assets may be excluded from the insolvency proceeding.*
- Be allowed to have a "fresh start" (recognition of the fact the individuals cannot be dissolved in the same manner as corporations that face insolvency)*

- *Individual accountability (rights, duties and obligations as an individual)*
- *Allowance for reduction of debt by allowance for repayment of debts over a period of time*
- *Certain States do not allow individual insolvency or limit it to traders.*
- *Certain States restrict individuals from acting in certain roles during the period under insolvency.*

Objectives of insolvency for corporations include:

- *All assets are for the benefit of the creditors (none are retained by the corporation)*
- *Allowance for partial or full restructuring*
- *Limited liability of the company. Directors may be held accountable and have certain rights, duties and obligations but as a result of being a director or officeholder. Members do not have liability.*
- *Dissolution of the corporation as the terminal effect of the insolvency (i.e. removal of the physical and legal existence of the corporation)*
- *Certain States have special rules applicable to certain types of corporations e.g. banks or regulated entities.*

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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 fundamental difficulty with dealing with insolvency law in a cross-border context is that there is no set of insolvency rules that governs insolvency across the world nor is there any form of global court to deal with cross-border insolvency matters. Further, historically, domestic insolvency regimes and laws have not developed to deal with insolvency matters that are cross-border. The law only deals with insolvency within their borders.

Different jurisdictions have a different basis and principles that underpin their insolvency system. Such differences affect insolvency law in a cross-border context as well as in more specifically.

The broad differences include, for example, whether the system is pro-debtor or pro-creditor or whether the State has a civil law or common law system. This creates issues of applicable law.

Another fundamental challenge in dealing with cross-border insolvency matters is the definition of "insolvency" and what that means in different States. Different States often having different meanings (for example, it may mean the liabilities exceed the assets or it may mean the inability to pay a debt when it falls due). A further difference

between systems is what constitutes “insolvency proceedings” and their equivalence between different States.

There is also a divide between systems of those that are more pro-business rescue or restructure, a more modern approach to insolvency, and those do not have such provisions in their legislation.

Insolvency regimes in different states have evolved at different paces and have different historical origins. Many developing countries inherited their regime from their former colonial power and those, particularly low-income countries, have not necessarily reformed the legislation whereas countries which may be more affected by global business and the resulting inter-connectedness of states may have introduced more recent (and often more complex) legislation. Insolvency law and practice is often a specialised area of law and the standards and practice in many States may not be of as higher standard as in other States.

States may also have allowed public policy to influence the local insolvency system (such as the introduction of protection of labour rights or the environment) which other States do not similarly adhere.

There is a tendency by States to protect local interests in an insolvency proceeding above those outside its borders which complicates efforts to overcome these differences.

The more specific differences, following Westbrook, in any cross-border insolvency must deal with potential differences with respect to how the following matters are dealt with across States³:

- i. standing for (recognition of) the foreign representative*
- ii. moratorium on creditor actions*
- iii. creditor participation (co-ordinated or not)*
- iv. executory contracts*
- v. claims procedure*
- vi. priorities and preferences*
- vii. avoidance provision powers*
- viii. discharges, and*
- ix. conflict of law provisions.*

These are likely to vary across State because of the differences in legal systems (and because of the broader differences cited above.

5

Question 3.3 [maximum 5 marks]

³ JL Westbrook, “Global Insolvency Proceedings for a Global Market: The Universalist system and the Choice of a Central Court” (2018) 96 *Texas Law Review*, p 1473.

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.

There have been various multilateral steps in the 21st century to promote the harmonisation of domestic insolvency law. Many of these steps build on work done in the 20th Century. A significant portion of this work has been done by international organisations and institutions notably the United Nations Commission on International Trade Law (UNCITRAL) and the World Bank.

*UNCITRAL has developed various guides that may promote the harmonisation on international insolvency law (following on from the *UNCITRAL Model Law on Cross-Border Insolvency* developed in 1997) namely:*

- In 2004 *UNCITRAL Legislative Guide on Insolvency Law*.*
- In 2009 the *UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation**
- In 2018 *UNCITRAL Model Law on Recognition and Enforcement of Insolvency-Related Judgement with a guide to Enactment*.*
- In 2019 *UNCITRAL Model Law on Enterprise Group Insolvency with Guide to Enactment**

There are other guides which also deal with issues that may impact insolvency matters for example guides that deal with Secured Transactions.

*The World Bank has also prepared a number of guidelines on the regulation on insolvency such as *Principles for Effective Insolvency and Creditors/Debtor Regimes*, first drafted in 2005 and revised three times since (in 2011, 2015 and most recently in 2021).*

Other steps have been the work done by the European Union (which is multilateral but affects only the European Union) and the European Commission. This work includes:

- *EC Regulation on Insolvency Proceedings - European Insolvency Regulation (EIR)*, developed in 2000 as well as review and amendment in the form of the *Regulation (EU) 2015/848 of the European Parliament and the Council of 20 May 2015 on Insolvency Proceedings (Recast) (EIR Recast)* and the further amendment of *Regulation 2021/2260 of 15 December 2021*.*
- *Report on the Harmonisation of Insolvency Law at EU Level*, done in 2010.*
- *Action Plan on Building Capital Markets Union*, done in 2015, recognised the need for greater certainty around cross-border insolvency and restructuring proceedings.*
- *European Guidelines on Communication and Co-operation*, done in 2007.*
- *EU JudgeCo Guidelines*, done in 2015.*

North America has also taken steps to promote harmonisation in that region with the American Law Institute (ALI) in 2000 preparing the ALI NAFTA⁴ Guidelines Applicable to Court-to-Court Communications in Cross-Border Cases which applied to insolvencies in the NAFTA member states. This work was further enhanced in 2012 by the development of ALI - III Global Principles for Cooperation in International Insolvency Cases and Global Guidelines Applicable to Court-to-Court Communication in Cross-Border Cases.

The only development in Africa towards harmonisation in the 21st Century has been the adoption, in 2015, by the member states of Organisation pour l'Harmonisation en Afrique Droit des Affaires (OHADA) of the UNCITRAL Model Law on Cross-Border Insolvency

One development that extends across continental boundaries (covering the Americas, Asia and the United Kingdom) is the preparation by the members of the Judicial Insolvency Network of the Guidelines for Communication and Cooperation between Courts in Cross-Border Insolvency Matters (JIN Guidelines).

Given that the majority of the work done to harmonise is regional or within geographical blocs that have pre-existing legal and trade agreements (notably NAFTA and the EU) there may be some success in resolving the issues of cross-border insolvency in part because there is at least a recognition of the challenges and the need to find harmonisation. However, the extent to which this has impact beyond these geographical areas is questionable. It is also too early to tell (given much of the work has only been done in the past 10-15 years) if there is a serious impact. The work done has also been mainly limited to the West. Little work seems to have been done in Africa, Asia or South America.

As for the work done UNCITRAL in developing the UNCITRAL Legislative Guide on Insolvency Law may have more impact in so far as it deals with trying to ensure consistency of definitions so that there is a development of a common language in insolvency law. (The purpose of this document was a reference guide for national authorities and legislative bodies to use when drafting new legislation and regulations or assessing the existing laws and regulations). However, in so far as harmonisation is concerned given that UNCITRAL published the UNCITRAL Model Law on Cross-Border Insolvency in 1997 (over a quarter of a century ago) and there has not been close to universal adoption of it, some large and economically strong jurisdictions have not adopted it all and even those that have made modifications to it which undermine the impact of harmonisation. Therefore, the move towards harmonisation is, therefore, at best, slow.

Further, it is likely to be driven by the West potentially to the exclusion of poorer less developed countries who will have less of an input into the harmonisation taking into the account the effects and impact of their development status as opposed to the

⁴ North American Free Trade Agreement, being an agreement between the United States of America, Canada and Mexico.

*stronger economic powers and regions. Furthermore, even the **UNCITRAL Model Law on Cross-Border Insolvency** is not trying to unify cross-border insolvency law merely to promote co-operation and co-ordination between states as such it is questionable whether even that promotes harmonisation (it does not deal with conflict issues) merely the better practice of insolvency law⁵.*

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

4.5

Marks awarded 14.5 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.

Additional information required:

- Did Apex and Nadir agree the law applicable to the contract as part of the email exchanges?***
- Was Utopia insolvent a month ago? Prior to it moving its registration and head office?***
- Does Apex have any form of security over the goods supplied?***
- Have all the goods been supplied and delivered in terms of the contract? Has the contract therefore been concluded?***
- Was the date of the issuance of court proceedings in Utopia prior to the date of issuance of court proceedings in Erewhon?***

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

⁵ A Kaey and P Walton, *Insolvency Law Corporate and Personal* (Lexi Nexis, 4th Edition, 2017), pg 400

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.

The Cross-Border Insolvency Act has relevance for the Erewhon liquidator as follows:

- *It will ensure the court in Utopia and the court in Erewhon co-operate and co-ordinate with respect to the insolvency in Erewhon.*
- *The Utopian court will recognise the insolvency proceedings and the foreign liquidator in Erewhon.*
- *There should be a stay of proceedings in Nadir including the Apex court action i.e. a moratorium on creditors actions. Whether this is automatic or not will depend on whether the centre of main interest is determined to be.*
- *The foreign liquidator may also be able to apply to commence the winding up of Nadir in Apex.*
- *It clarifies that the assets and claims will be dealt with in terms of the centre of main interest (likely Utopia). It will be necessary to determine where the centre of main interest is as this is where the principal insolvency will be. Given Nadir has moved its registration and head office to Utopia it may be considered to be Utopia in which case then Utopian insolvency law will apply however given the change was only made a month ago this may not be certain (this will need to be determined based on the relevant facts).*

A good understanding of the issues and the answer could be strengthened by more detail. The question requires candidates to apply the relevant MLCBI articles to the facts provided in more detail than that above.

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) The importance of the fact that the proceedings have commenced in Utopia but have not been heard will depend on the insolvency laws of Utopia as to when the commencement of insolvency proceedings are determined and whether this is the main proceeding. It may be that the filing of proceedings is sufficient for the insolvency proceedings to commence. If this is the case then it will not make a difference to the answer in 4.1. However, if the matter needs to be heard as opposed to merely being filed then insolvency proceedings have not commenced*

in Utopia and as such Nadir is not in any form of insolvency proceeding. It may be possible in this instance to join the proceedings and commence the winding up of Nadir.

(b) If the court order has been granted to wind-up Nadir then assuming Utopia is the centre of main interest of Nadir then the primary proceedings will be in Nadir and this needs to be considered in the pending legal proceedings in Erewhon as the court in Erewhon needs to consider whether it can or will hear the matter. If Utopia is considered the centre of main interest then there may be an automatic stay on legal matters in Utopia and in foreign States.

Refer to Article 29 on concurrent insolvency proceedings, under which the local proceedings in Utopia maintain pre-eminence over the foreign proceedings in Erewhon.

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?

For purposes of the question the country of the company's incorporation is Botswana. Botswana has not adopted Botswana adopted UNCITRAL Model Law on Cross-border Insolvency. There are no governing treaties between Botswana and other States i.e. where the assets, directors and creditors are.

Four key international insolvency issues facing the insolvency representative in Botswana are:

- i) Jurisdiction: Do the countries where the assets, creditors and directors have any legislation governing foreign insolvency? If not are they common law or civil law countries? Botswana will recognise, under common law, claims by local and foreign creditors against the company in Botswana.***
- ii) Recognition: Will the States recognise the Botswana proceedings? Have any of the foreign States adopted the Model Law? Where any modifications made? Will it be necessary to open proceedings in all of the States in which the company has assets, creditors and/or directors? If the directors are found***

liable for the insolvency of the company in Botswana will there be any recognition of this in the States in which the directors are based. What were the directors' obligations in the States in which they were based in respect of the operations in that State?

iii) *Assets: Is there any choice of law provisions in any of the contracts governing the assets? Are the assets (real property, land or tangible assets) situated in other States secured? Who holds the security and are they inside or outside of Botswana? If the security is registered in Botswana does it have any cross-border effect?*

iv) *Revenue Authority Creditor: Claims for revenue authorities are not cross-territorial therefore cannot be claimed against the company in Botswana. Does the company have any assets in the same country as the revenue authority creditor? Does an application need to be made for recognition in this foreign jurisdiction to deal with these assets and the taxation/revenue authority claim? How will these creditors be dealt with if there are no assets in this State? What are the insolvency laws in that State? Is the revenue authority and taxation claims given priority in this State?*

This is a reasonable 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

Marks awarded 11 out of 15

*** End of Assessment ***

TOTAL MARKS 42/50

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