INSOL INTERNATIONAL

FOUNDATION CERTIFICATE

IN INTERNATIONAL INSOLVENCY LAW

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).***

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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: 7 out of 10

QUESTION 2 (direct questions) [10 marks]

Question 2.1 [maximum 2 marks]

Explain what the term "international insolvency law" means.

Cross border, or international insolvency, in its simplest form is an insolvency proceeding in one county, with creditors and/or assets located in at least one other country.

There is no global parliament, single system, enforcement body or international court in place that applies throughout the world, therefore there is no single international insolvency law that applies to an international insolvency throughout the world, however many people refer to "international insolvency law/rules". When referenced to in this way, it is acknowledging that there are cross-border insolvency rules, but they may differ between states.

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

Fletcher proposes that international insolvency should be considered a situation rather than a law or set of rules, whereby a set of circumstances occur which in some way cause a need to transcend the confines of a single legal system[2].

2

Question 2.2 [maximum 5 marks]

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

There are various two main approaches to insolvency proceedings that are followed around the world, known as universality (or universalism), and territoriality (or territorialism).

The first, Universalism, prescribes that the law of lex concurus should regulate the matter, in other words, the rules and regulations where the main procedure has been opened should apply, and there should only be one set of proceedings. The location is usually the same place as the centre of main interest (COMI) of the corporation (i.e. the headquarters, place of incorporation etc.). The COMI will issue the insolvency order, and the legal system in that location will regulate the whole insolvency matter, even if the assets are in other jurisdictions.

Territorialism, which takes the opposite approach to universalism, prescribes that where a debtor has assets in more than one location, the local laws (and their respective consequences) of each state where the debtor has an interest will apply. New proceedings should be brought in each location.

The difficulties of territorialism are that any state where the debtor has an establishment may have jurisdiction to open separate insolvency procedures in relation to assets already subject to procedures elsewhere, which can cause concurrent insolvency proceedings. Concurrent proceedings will rely on the courts of the various states to co-operate and communicate in relation to the assets. Some states may feel that national interest must be protected before any assets can be transferred abroad.

Universalism has not been widely accepted, as many states still determine territorialism to be the preferred approach. A modified universalism approach can be taken, which aims to fall between the two approaches. This is called "modified universality", whereby the proceedings opened in the state where the COMI is located (main proceedings) may be supported by proceedings in the alternative location

[1] B Wessels, International Insolvency Law (Kluwer, 2006), p1.
[2] Wessels, *idem*

(secondary proceedings). Again, to be successful, this relies on the courts of the states to co-operate and communicate efficiently and effectively.

Another modified alternative to territorialism is co-operative territorialism, in which each state has jurisdiction over the assets within its own state. As with the other cross border approaches, this method relies on the co-operation and communication of each state.

It is also important to note that it is not always the case that full proceedings will need to be opened in every jurisdiction; some systems will allow recognition orders allowing insolvency professionals to deal with assets in foreign jurisdictions without opening full concurrent insolvency proceedings.

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.

4

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.***

Several Middle Eastern States have reformed their domestic insolvency laws over recent years.

The UAE released an update to its Bankruptcy Law in 2016, and its Insolvency Law (DIFC) in 2019[3], however, following the global Covid-19 pandemic, the UAE made some further radical changes to its approach and laws in relation to insolvency. Amendments were made by Federal Law No. 21 of 2020, to modify and supplement the existing 2016 law to provide for the shift in approach from liquidation being the main aim of such regimes, to a new three-tiered approach with liquidation as a last resort.[4]

Saudi Arabia, in a bid to become less reliant on oil and attract foreign investment, introduced its Bankruptcy Law in 2018. Prior to this introduction, Saudi Arabia had no single bankruptcy law setting out procedures for businesses in financial trouble[5].

Specifically in relation to insolvency, Bahrain (in 2018), Dubai (in 2019) and Saudi Arabia (in 2022) adopted the Model Law on Cross-Border Insolvency.[6]

[3] Federal Law by Decree No. (9) of 2016 on Bankruptcy, and No. (19) of 2019 on Insolvency https://mof.gov.ae/bankruptcy-and-insolvency/

[4] https://globalrestructuringreview.com/review/europe-middle-east-and-africa-restructuring-review/2022/article/shifting-sands-the-move-towards-restructuring-in-the-uae

[5] https://www.thenationalnews.com/business/economy/saudi-arabia-approves-landmark-bankruptcy-law-1.707236

[6] https://uncitral.un.org/en/texts/insolvency/modellaw/cross-border_insolvency/status

Many of the Middle Eastern States have always had a close working relationship with the World Bank for several decades, however further strides forward were taken in 2009 when the first regional comparative survey of insolvency systems in the Middle East and North Africa region was launched, which was based on the World Bank's principals for Effective Insolvency and Creditor Rights Systems (2005). The survey was a joint initiative with the Hawkamah Institute for Corporate Governance, the World Bank, the OECD and ISOL International. **what impact did this have on reforming domestic insolvency laws or addressing international insolvency Issues in the Middle East?**

2.5
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 there are some common characteristics between the objectives of personal and corporate insolvency proceedings, there are also some key differences.

The first difference is in relation to assets. While in both personal and corporate proceedings one of the main objectives is to determine what assets form part of the estate, the difference with personal proceedings is that there are some systems (due to socio-economic reasons) that make provision for some assets to be exempt or excluded from the estate that will remain vested in the debtor. This provision does not exist in corporate proceedings, however it is still important to work out which assets belong to the corporation, and not a related group entity, for example.

The second difference relates to personal consequences and liabilities flowing from the commencement of formal insolvency. One of the objectives of proceedings is to determine the conduct of the individual or the director and officers of a corporation. The outcome of these investigations will determine the restrictions that may be placed upon the individuals involved. In proceedings concerning individuals, the rights, duties, and liabilities pertain to the debtor as an individual. Consequences may include not being able to obtain credit, or to take up certain positions or roles. For corporations, the rights, duties, and liabilities pertain to the directors and officers of the company, for which they could be held personally liable for the debts of the company, depending on the circumstances. They could be subject to disqualification orders in the case of reckless or fraudulent trading.

The third difference relates to the ultimate objective for the outcome of proceedings. For a debtor in individual insolvency, the discharge of proceedings for pre-insolvency

debt depends on whether a pro-debtor, or pro-creditor approach is being followed. In a pro-debtor system, it will be easier to obtain a discharge. For either approach, the formal process and prescribed time periods will depend on the jurisdiction in which they are being followed, however the ultimate end is a discharge of proceedings. In corporate insolvency proceedings, corporate rescue is the most likely objective as generally, the preservation of the business benefits society (i.e. jobs retained), and often better value for creditors than a piecemeal sale of assets. A few questions would need to be posed for corporate rescue that would not be considered in individual proceedings: moratorium, debtor in possession or rescue practitioner, post commencement finance, etc.

The fourth difference relates to the available alternatives to the main liquidation procedure. In personal insolvency, there are some systems that offer formal statutory repayment plans as an alternative to the liquidation of assets, or a hybrid of both approaches. In corporate proceedings, there can be a variety of rescue procedures, provision for non-formal workouts, or pre-packs.

The fifth difference arises due to the special rules that can be found in some states. In individual insolvency, there are some systems that do not make provision for collective procedures for individuals, however most often special rules are restricted to traders in corporate proceedings. Examples of this are banks and financial institutions, groups of companies, state owned enterprises, non-profit associations, municipalities and sovereign debt that may occur if states go bankrupt.

There is some scope to elaborate regarding fresh start and avoidance of harassment re individuals.

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.

The main difficulties that arise when dealing with insolvency law in a cross-border context are often due to the differences that can be found between the various location, such as the following:

1) *The terminology – this will not always be the same in various states across the world. The same principal may have a different word or set of words to describe it.*

2) *The approaches to insolvency – different systems may not have the same approach to insolvency, such as when granting a discharge; one system may be pro-debtor and the other pro-creditor, or one may prefer rescue to liquidation.*

3) *Differences in domestic laws (both general and insolvency) – this makes the rules and application of cross-border insolvency law complex in some circumstances, such as the various rights of securities (floating charges or other), creditor preferences, or executory contracts such as the rights of employees and labour dispensations.*

4) *The technical meaning of insolvency – whether cashflow or balance sheet insolvency (or both) prevails can differ by location.*

5) *Dealing of over-indebtedness – different procedures exist to deal with this, such as collective proceedings.*

6) *Absence of global court, parliament, law etc – makes the quest of predictability (the notion of wanting to know what will happen in any given situation) difficult.*

7) *Territoriality – many states are very protective of proceedings within their own jurisdiction and be against releasing assets to foreign jurisdictions.*

8) *The standing of foreign insolvency professionals – the ability to obtain recognition orders in foreign jurisdictions will vary from state to state (as do the requirements for domestic office holders in different locations).*

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 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.

Most of the efforts in promoting harmonisation of domestic insolvency laws in the 21st century have been led by private associations and judicial activism, whereas the efforts that proceeded this in the 20th century were largely supported by governments, who drafted multilateral and bilateral treaties.[7]

The goal of a harmonisation initiative is to create an instrument that reconciles differences in the way legal systems define and interpret cross-border commercial contracts. There are several types of instruments that may result from a successful project. Some create binding rules that will apply whether or not expressly incorporated into a contract, such as conventions, uniform acts, regulations, and directives. Others create "soft law" instruments that do not have binding obligations,

[7] Harold S Burman, Fordham Law Review, Volume 64, issue 6

but do reflect industry norms, such as model laws, standard terms and international trade terms, guides, principals and model clauses or provisions.[8]

In a binding rule, a State will amend their domestic insolvency laws specifically to address international issues. One such example of this is to promote co-operation and co-ordination where there are concurrent proceedings, as seen in Australia in sections 580-581 of the Corporations Act 2001, which permits co-operation between Australia and foreign courts in external administration matters such as liquidation.

The extent to which a change in binding rules and laws will have an impact on addressing international issues is dependent upon the number of States who make such changes. A single change in a single state goes little way to resolving the issues, and success can only be maximised when widely carried out. Even once widely carried out, changes such as that made in Australia noted above, only go so far as to encourage co-operation and communication between states and does not address specific differences in domestic laws between States.

As mentioned above, in the absence of domestic laws being changed, several bodies attempted to draft guidelines to promote harmonisation.

In the early 2000's the World Bank produced its "Effective Insolvency and Creditor / Debtor Regimes" guidelines on the regulation of insolvency. These principals have been revised several times, most recently in 2021. The principals have been designed as a broad-spectrum assessment tool to assist countries in their efforts to evaluate and improve core aspects of their law systems to promote economic growth, while giving efficient and transparent creditor and debtor regimes and insolvency systems to aid in investor confidence.[9] *To aid in the encouragement of adopting these guidelines, the IMF and World bank often require insolvency law reform as a prerequisite to an offer of loan support, which helps increase its adoption across several States and goes some way to addressing the issues raised above as to the extent of their impact.*

The United National Commission on International Trade Law (UNCITRAL) was established in 1996, and its mission is to promote and further the modernisation and harmonisation of laws relating to international business. In 2004, UNCITRAL released the first two parts of its "Legislative Guide on Insolvency Law" as a guide for national authorities and legislative bodies when preparing new laws and regulations or reviewing the adequacy of existing laws and regulations. Since 2004, it has been extended to include part three – insolvency of enterprise groups (released in 2010), Part 4 – directors' obligations in the period approaching insolvency (released in 2013, then revised in 2019), and part five - micro and small enterprises (released in 2021). It specifically recommends that "The insolvency law should include a modern, harmonised, and fair framework to address effectively instances of cross-border insolvency.[10]

[8] L Turner, GlobaLex Publised June 2022

[9] https://openknowledge.worldbank.org/entities/publication/de2cc5c4-c1ec-55eb-ad20-d27e916d000f

[10] https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/05-80722_ebook.pdf

Similar regional laws or guidelines have been published in several places, such as The Organisation for the Harmonisation of Business Laws in Africa (OHADA), the EIR Recast in the European Union, the Nordic Convention of Bankruptcy in Scandinavia. All of these have a positive impact on the regions in which they apply to, however also serve to create more regional differences as all have a slightly different approach. Cross-border issues then become cross-region issues.

5
Marks awarded 12.5 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.

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.

As Utopia have adopted the UNICTRAL Model Law on Cross-border Insolvency (Model Law) without modification, save as required to domesticate it, the liquidator (or other insolvency representative) and any local court based in Utopia are mandated (per chapter IV of the Model Law) to co-operate with foreign courts or foreign representatives (such as the liquidator in Erewhon), either directly or through representatives.

It is not known from the information provided whether Erewhon has adopted the Model Law, which is relevant as it will determine whether the liquidator of Nadir in Erewhon is mandated to co-operate and communicate with any foreign proceedings that may be occurring in Utopia.

The MLCBI is significant for it provisions on recognition and relief in 4.1. (Its provisions on cooperation and coordination are secondarily important as the liquidator is primarily seeking advice about staying court proceedings in Utopia.) The question requires candidates to apply the relevant MLCBI articles to the facts provided.

The above points aside, it is important for the liquidator of Nadir in Erewhon to determine where the centre of main interest (COMI) of Nadir is located. This is relevant because it will determine whether the proceedings in Erewhon are foreign main proceedings, or foreign non-main proceedings per the definitions in Article 2 (b) and (c)[11]. The COMI should correspond to the place where the debtor conducts the administration of his interests on a regular basis. The registered office is presumed to be the COMI in the absence of proof to the contrary.[12] Given that Erewhon recently moved its place of registration and head office from Utopia to Erewhon, further clarification is needed as to which is the COMI.

The liquidator in Erewhon (as a Foreign Representative[13]) can apply to the court in Utopia for recognition of the foreign proceedings in which they have been appointed. [14] From the time of filing an application for recognition, until the application is decided upon, the court may, at the request of the liquidator of Nadir in Erewhon as the foreign representative, stay an execution against the assets of Nadir[15], if relief is urgently needed to protect the assets of Nadir or the interests of the creditor.

If it is determined that Erewhon is the COMI, then the proceedings in Erewhon will be classified as foreign main proceedings, which means a foreign proceeding taking place in a state where the debtor has its COMI.[16] Upon recognition of a foreign main proceeding:

a. *commencement or continuation of individuals actions or proceedings concerning the debtor's assets, rights, obligations, liabilities is stayed;*
b. *execution against the debtors assets is stayed, and;*
c. *the right to transfer, encumber or otherwise dispose of any assets of the debtor is suspended[17].*

In other words, the action Apex has brought against Nadir for monies owing for goods is stayed, which is the objective of the liquidator in Erewhon.

If it is determined that Utopia is the COMI, then the proceedings in Erewhon will be classified as foreign non-main proceedings, which means a foreign proceeding taking

[11] UNCITRAL Model Law on Cross-Border Insolvency
[12] https://cms.law/en/int/expert-guides/cms-expert-guide-to-finding-comi
[13] *Idem* Article 2 (d)
[14] *Idem* Article 15.1
[15] *Idem* Article *19* (a)
[16] *Idem* Article 2 (b)
[17] *Idem* Article 20

place in a state where the debtor has an establishment[18], but not a COMI. The proceedings will then be regarded as concurrent, and, as Utopia have adopted the Model Law, the court in Utopia shall seek cooperation and coordination with the court in Erewhon to the maximum extent possible.[19] The liquidator in Erewhon will not be able to stop the proceedings.

3.5

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) If Apex had filed proceedings to wind-up Nadir, but the matter had not yet been heard, the proceedings are not deemed to have commenced and the answer in 4.1 would not change as obtaining recognition as a foreign representative will (in the interim before being granted) stay the proceedings that have already commenced[20], and if/once determined as the foreign main proceedings, then the commenced action will be stayed[21].

(b) If Apex had already obtained a court order to wind up Nadir in Utopia prior to the Erewhon winding-up order, then proceedings in Utopia are deemed to have commenced. In this situation, any relief that could be granted (such as from the time of filing the application for recognition of the foreign proceedings[22], and if/once Erewhon proceedings are determined as the foreign main proceedings[23]) must be consistent with the proceedings in Utopia.[24]

If, after foreign recognition application, the proceedings in Erewhon are recognised as being the foreign main proceeding, the effects of recognition of a foreign main proceeding under Article 20 (mentioned above) do not apply where proceedings have already commenced in Utopia. Both proceedings would be deemed to be concurrent, and the liquidator in Erewhon will not be able to stop the proceedings.

It would be beneficial to refer specifically to article 29

[18] *Idem* Article 2 (c)
[19] *Idem* Articles 25, 26, 27
[20] *Idem* Article 19
[21] *Idem* Article 20 p1
[22] *Idem* Article 19
[23] *Idem* Article 21
[24] *Idem* Article 29 (a)

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?

This question has been answered assuming the Company was incorporated in the British Virgin Islands (BVI).

Issue One – Domestic Law

The first issue facing insolvency professionals (IP) in the BVI, is that there is no domestic law to deal with cross border issues, where assets are located in foreign jurisdictions.

Insolvency law in the BVI is codified in the BVI Insolvency Act 2003 (IA), supplemented by the BVI Insolvency Rules 2005. The IA has two parts dealing with cross border issues. The first part, XVIII, sets out the UNCITRAL Model Law on Cross-Border Insolvency, however the first stumbling block for a BVI insolvency representative is that this has not been brought into force and there is no current intention to do so.

Issue Two – Requests for Assistance

An IP in the BVI has powers under the IA[25] to obtain information from a range of parties concerning the affairs of the company, including the formation, accounts, assets, and liabilities. They can request books and records from persons involved in the company, as well as the registered agent, accountants, and auditors (amongst others). These powers will assist a liquidator seeking information for relevant persons located within the BVI, however assistance will be required from parties in other jurisdictions where other assets of the company may be located.

This can often cause an issue for IPs within the BVI; however, they can seek assistance via an application to the BVI court to issue a letter of request to the foreign

[25] Section 282 of the Insolvency Act 2003

jurisdiction's court, requesting recognition of the appointment and appropriate assistance within the foreign jurisdiction.

Issue Three – Recognition

As a follow on from issue two above, foreign courts may not accept a letter from the BVI court noting the appointment of a BVI IP, and in this situation the IP will need to seek formal recognition.

As an example, many companies within the BVI jurisdiction are holding companies with shares in subsidiaries located in Hong Kong. The IP in the BVI will often require more than just the basic information noted in issue two above to piece together the state of affairs of a company, and related company structures. Frequently, Hong Kong based service providers refuse to produce documents and information sought based on a BVI court order, as it is not enforceable under Hong Kong Law. Hong Kong has not adopted the UNCITRAL Model Law on Cross-Border insolvency, and there is no statutory framework for the recognition of a foreign liquidation which would enable the Hong Kong Court to assist a liquidator in a scenario such as this.

The options open to a BVI IP to address this issue would be an application to the Hong Kong court for recognition and assistance under the common law[26], or alternatively, commence ancillary winding up proceedings of a foreign company.[27] The first option of recognition has become more standard, and its application can be seen in Re Joint and Several Liquidators of Pacific Andes Enterprises (BVI) Ltd.[28] However, there has been a recent shift in the policy of the Hong Kong court regarding the recognition of BVI liquidators, as seen in Re Global Brands Group Holding Limited, where it was noted that the JPL's appointment, being in a location other than the COMI, was not a reason which the court would grant recognition and assistance. However, recognising other circumstances, and consistent with the principles outlined in Global Brands, it was eventually ordered that the JPLs be recognised as the company's "authorised agents" in Hong Kong, "entitled to take action on its behalf or cause the company itself to instigate action, in order to advance or protect the company's interests". The order granted reflects "that to the extent ordered by the BVI court, the JPLs have stepped into the shoes of the directors of the Company".[29]

Depending on the wider circumstances, if any of the assets of the company were in the USA, then the IP has several ways they can gain recognition and assistance through the US federal court system such as by commencing Chapter 15[30], Chapter 7, or Chapter

[26] Companies Ordinance, s 237
[27] P4.2 INSOL International, Cross-border Investigations and Comity: A Toolkit for Insolvency Practitioners and Restructuring Advisors
[28] HCMP 3560/2016 (date of decision 17 January 2017).
[29] https://www.hfw.com/HFW-acts-for-BVI-provisional-liquidators-in-contested-Hong-Kong-recognition-proceedings-Dec-2022
[30] Section 1782

11 proceedings. Some of the US districts have also formally implemented the JIN guidelines, which could aid in assets located in Delaware, New York[31] and Florida[32].

Issue Four – Sanctioned Entities

Companies with entities and assets around the world can be subject to sanctions, particularly recently with sanctions relating to Russian owned or controlled companies. The UK Sanction regime[33] has been extended to the BVI[34] in its status as a British Overseas Territory, and comprises financial, trade and immigration sanctions.

A BVI IP dealing with an insolvency proceeding of a company with entities and assets across the world could find themselves with the issue of how to deal with assets in a sanctioned entity, particularly where the financial sanction is an asset freeze. The IP will be unable to deal with frozen funds, make funds available for creditors etc.[35]

The IP can also request a General Licence[36] from the Governor's Office, to make, receive or process payments, or take any other action in connection with any Insolvency Proceedings related to entities that are subject to sanction[37].

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.

5.5

Marks awarded 10.5 out of 15

*** End of Assessment ***

TOTAL MARKS 38.5/50

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

[31] 17 February 2017; General Order M-511
[32] 1 February 2018; Administrative Order 2018-03
[33] Sanctions and Anti-Money Laundering Act 2018
[34] Russia (Sanctions) (Overseas Territories) Order 2020
[35] https://www.jdsupra.com/legalnews/uk-russian-sanctions-regime-and-bvi-3605241/
[36] Under regulation 64 of the Russia (Sanctions) (EU Exit) Regulations 2019 as modified by Article 2 and paragraph 38 of schedule 2 to The Russia (Sanctions) Overseas Territories) Order 2020
[37]https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1179995/INT-2023-3263556_GL.pdf