



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: 9 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 describes the situation where the domestic laws of a State cannot be immediately and exclusively applied without consideration of the implications of any foreign elements, which may have an impact on a case. These foreign elements arise where a financially distressed debtor has assets or creditors, and also economic affairs and contractual obligations, in more than one State.

Whilst different States adopt different approaches, unless there is some form of co-ordination and co-operation between the States, problems can arise whereby concurrent insolvency proceedings are potentially brought against the same debtor in different States.

2

Question 2.2 [maximum 5 marks]

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

Universalism is the theory that there should only be one set of insolvency proceedings to deal with the debtor's assets and creditors in all jurisdictions, preventing further proceedings being brought elsewhere. This differs from territorialism, which is the theory that multiple insolvency proceedings can be commenced in each state where the debtor holds assets. This would mean each state would deal only with the assets within their state, whereas universalism would deal with the assets in all jurisdictions under the one set of proceedings.

Whilst universalism relates well to globalisation, territorialism focuses on domestic interests. Territorialism can benefit local creditors who may face practical and economic difficulties in participating in cross-border insolvency, whereas a universalist approach may be favourable to large multinational corporations.

There can be difficulties with establishing where insolvency proceedings should be brought under a universalist approach, as it would likely be based on the debtor's centre of main interests. For most multi-nationals, more than one State could claim to be the centre of main interest, for example if the debtor's main business is primarily conducted in one State, but the location of their assets and creditors is in another. This is not a problem with territorialism, as each State only deals with the assets and creditors within their jurisdiction, so there is no need to establish a debtor's centre of main interests.

This in turn leads to a lack of predictability in a universalist approach, which it could be argued isn't a concern when taking approach of territorialism. With territorialism, there is no uncertainty on the laws that will be applied in insolvency proceedings brought within that State, whereas with universalism it depends on the centre of main interests, therefore the systems and laws in place could be vastly different from one State to another.

Universalism may seem slightly idealistic, as it requires trust in the foreign legal systems and States to conform to the international insolvency proceedings and enforce the orders of the Court in the state where the proceedings take place, therefore surrendering their sovereignty. Territorialism, however, is more chaotic in that it potentially consists of multiple concurrent proceedings taking place with little or no co-operation or co-ordination being imposed on the various States.

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.

The United Arab Emirates (UAE) has made widespread reforms to its domestic restructuring procedures in recent years. The Corporate Bankruptcy Law (Law no. 9 of 2016) applies to UAE corporate entities, allowing an insolvent debtor to restructure a company or proceed to liquidation if the Court considers restructuring will not be possible. Following amendments, the Insolvency Law came into force in early 2020 (Law no. 19 of 2019) which applies to individual insolvency procedures and is intended to provide protections to individual debtors who are experiencing financial distress, including the option of a voluntary settlement process, as well as streamlined insolvency procedures that can be initiated by the Courts, the debtor or their creditors. Further changes were made in 2020 (Law no. 21 of 2020) in response to the CoVid 19 pandemic, introducing a new Chapter 15 to Part four, Bankruptcy Proceedings during the Emergency Financial Crisis, which allows a debtor to be released from certain obligations if their insolvency is due to an Emergency Financial Crisis.

In 2018, the Kingdom of Bahrain (Bahrain) brought in the Reorganisation and Bankruptcy Law, Bahrain Law No. 22/2018 (Bankruptcy Law). This law applies to companies or trading individuals, but excludes a debtor's personal, family and consumer debts. Inspired by the UNCITRAL Model Law on Cross Border Insolvency (UNCITRAL Model Law), this Bankruptcy Law adopts the principle of cross-border insolvency which was not previously available. It has a focus on encouraging corporate reorganisation over liquidation, with 'debtor friendly' tools such as moratoriums of enforcement proceedings, sale of assets from the bankrupt estate, allowing the debtor's business to continue as a going concern and implementing reorganisation plans.

Various other States within the Middle East have also adopted the UNCITRAL Model Law over recent years, such as Israel and Jordan in 2018. The most recent State is Saudi Arabia in 2022, becoming the 56th State to enact legislation based on this model law. The

issuance of the Rules of Cross-Border Bankruptcy Proceedings has led to a harmonization of Saudi's insolvency rules and provides a clear framework for the recognition and enforcement of foreign insolvency proceedings. They also provide judicial assistance to foreign officeholders by granting certain powers to the Saudi courts, such as the ability to enforce foreign judgments, freeze the debtor's assets, and allowing them to give a foreign officeholder control over a debtor's Saudi assets and distribution of proceeds.

3

Marks awarded 10 out of 10

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

Question 3.1 [maximum 5 marks]

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

Although there may be some similarities in the approaches available in individual and corporate insolvency, the objectives for these can be different.

Some insolvency systems allow for a notion of discharge, or a 'fresh start', for financially distressed individuals. This approach allows the insolvent debtor a discharge of their unpaid debt at the end of the insolvency proceedings. The debtor is then able to continue without this burden of debt, therefore making a fresh start. One of the objectives of this option in insolvency systems is to encourage the debtors to try again and therefore promote entrepreneurship, which is important for economic growth, providing access to goods and services, and also promoting social change. Although corporations can receive a discharge of debt, the difference lies in that once insolvency proceedings are completed and the corporation has been liquidated, they will be dissolved and unable to continue business.

Another option available to insolvent individuals in some systems is the option of formal repayment plans, to provide an alternative to formal insolvency/bankruptcy proceedings. This allows the debtor to enter into a formal repayment plan, negotiated between the debtor and their creditors (sometimes by an insolvency practitioner) and approved by the Court, to make regular payments which will be distributed amongst the creditors. This option can give more control over a debtor's assets than bankruptcy, allowing an effective route out of debt problems with improved returns for creditors. Another reason for this could be to help protect the insolvent debtor from harassment from creditors.

There are some avenues for relief that are available to corporations, but not individuals, known as corporate rescue. Corporate rescue is sometimes considered preferable to formal insolvency proceedings where possible, as an attempt to preserve the business (or the viable parts) of the financially distressed debtor. These can be informal, where an out of court agreement is reached, and can include provisions such as extension of payments, discharge of some of the debt and debt for equity swaps. There are also formal statutory corporate rescue options available, which can involve actions such as an automatic stay/moratorium, appointment of an independent officeholder to take over from existing management, and the development of a rescue plan. The objective for corporate rescue is a focus on recovery of the company, as opposed to a realisation of its assets, allowing jobs to be preserved which can be better for the economy. It is also preferred to formal insolvency proceedings as a business sold as a going concern is more likely to get a better price than selling assets off, so it is beneficial to try and recover the company where possible.

For individuals, there is the notion of exempt or excluded assets for individuals, which is not available for corporations. This is the notion that when establishing what comprises the estate for the purpose of insolvency proceedings, some assets are excluded or exempt for

individuals, allowing the insolvent debtor to keep some assets to allow them to maintain themselves. This includes anything the debtor would use personally in their employment, business or vocation (such as tools and equipment), but also anything to maintain the domestic needs of themselves or their families. This is not an option available for corporations, and all assets established as part of the estate are traced and collected so they can be distributed amongst the creditors.

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.

One of the main difficulties encountered when dealing with cross-border insolvency proceedings is how to co-ordinate multiple concurrent insolvency proceedings involving creditors and assets across different states involving one debtor. Before proceedings begin, you have to consider what insolvency proceedings can be brought, by who and in what jurisdiction. For this, you would need to establish all jurisdictions where the debtor has creditors, assets or conducts business, and consider what legislation is in force in those jurisdictions for cross border insolvency proceedings, if any. You also have to consider also what the consequences would be of proceedings in the different jurisdictions that the debtor has interests. All of these different elements make for complicated proceedings.

Something that makes this more difficult is that that standard of insolvency laws in some states can be low, with no formal procedure for insolvency proceedings being in place or with a procedure that is not suited to modern day trade and investment. Insolvency proceedings can be complicated, requiring procedural and substantive law. Not all States will have adopted guidance such as the UNCITRAL Model Law on Cross Border Insolvency (1997), so some jurisdictions may not have insolvency legislation that allows for cross border insolvency proceedings.

The approaches to insolvency may differ between jurisdictions, for example one jurisdiction involved may adopt a universalist approach, allowing for multiple insolvency proceedings to be dealt with under the provisions of one state's insolvency laws, usually where is established as the debtor's centre of main interests. This will prove difficult however if one of the other jurisdictions adopts an approach of territorialism, working on the premise that proceedings should be limited to just dealing with the assets within the state where proceedings are started. These approaches are diametrically opposed, and therefore difficulties could arise.

Different states may also have different views as to whether they should prioritise the interests of the debtor or the creditor. In a pro-debtor system, you may see methods designed to promote the debtor's ability to continue business, such as discharges of debt, re-payment plans and allowing exempt assets. Other states have a pro-creditor system, whereby they prioritise the interests of the creditor in recovering their assets.

There are also many points where jurisdictions may have different approaches, for example in establishing where a debtor's centre of main interests is, different processes for distribution of assets between creditors, different rankings and rights of creditors and rules regarding prioritisation and treatment of claims.

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

4

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.

The 21st century has seen numerous multilateral steps taken to promote harmonisation of domestic insolvency laws.

One of these steps is the UNCITRAL Legislative Guide on Insolvency Law¹ (UNCITRAL Guide) which was introduced in 2004. This guide provides key objectives and principles that should be taken into consideration not only for States when reviewing and reforming their existing laws and regulations, but also when formulating new laws and regulations. As stated on the UNCITRAL's website, the "advice provided aims at achieving a balance between the need to address a debtor's financial difficulty as quickly and efficiently as possible; the interests of the various parties directly concerned with that financial difficulty, principally creditors and other stakeholders in the debtor's business; and public policy concerns, such as employment and taxation"².

The World Bank's Principles for Effective Insolvency and Creditor/Debtor Regimes (the Principles) were most recently revised in 2021³. The original Principles were developed in 2001 in response to a need for internationally recognised standards to evaluate the effectiveness of insolvency systems. The World Bank has worked with UNCITRAL to ensure there is consistency between the World Bank's Principles and UNCITRAL's Guide, to ensure they are consistent in their approach and to further harmonise the guidance being given State's for evaluating and reforming their domestic insolvency law systems. The Principles are designed to be flexible. States are therefore given flexibility on policy decisions, whilst being encouraged to adopt practices that have been widely recognised as good practices internationally. One of the main focuses of the Principles is to develop more effective restructuring procedures, but there is also a focus on alternatives for restructuring of small and medium sized enterprises.

The European Union (EU) is taking steps to promote harmonisation of domestic insolvency laws of EU member states. In 2010, a report on Harmonisation of Insolvency Laws at EU Level⁴ was published by the European Parliament. This Report looked at the disparities between different EU Member State laws and how these can cause obstacles and difficulties with cross-border activities in the EU. The Report considered each of the disparities found, and in turn considered steps that could be taken to harmonise each one.

In December 2022, the EU demonstrated its intention to further harmonise domestic insolvency laws with the Proposal for a Directive on the harmonisation of certain aspects of insolvency law⁵. Although not in force yet, this proposal aims to enhance and harmonise the

¹ Legislative Guide on Insolvency Law <<https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/05-80722_ebook.pdf>>, accessed 23 September 2023

² UNCITRAL Legislative Guide on Insolvency Law <<https://uncitral.un.org/en/texts/insolvency/legislativeguides/insolvency_law>>, accessed 8 October 2023

³ The World Bank's Principles for Effective Insolvency and Creditor/Debtor Regimes <<<https://documents1.worldbank.org/curated/en/391341619072648570/pdf/Principles-for-Effective-Insolvency-and-Creditor-and-Debtor-Regimes.pdf>>>, accessed 1 October 2023

⁴ Harmonisation of Insolvency Law at EU Level (2010) <<https://www.eesc.europa.eu/sites/default/files/resources/docs/ipol-juri_nt2010419633_en.pdf>>, accessed 1 October 2023

⁵ Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL harmonising certain aspects of insolvency law, COM/2022/702 <<<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM%3A2022%3A0702%3AFIN>>>, accessed 1 October 2023

recovery of assets, to improve the efficiency of proceedings and provide predictable and fair distribution of recovered assets amongst creditors.

In my opinion, these steps should have a positive impact in addressing international insolvency issues, similarly to how previous multilateral steps taken have. The UNCITRAL Model Law on Cross-Border Insolvency (UNCITRAL Model Law) issued in 1997 has been adopted into the domestic legislation of 59 States⁶. Some of the states that have adopted the UNCITRAL Model Law include the United States, United Kingdom, Japan and Canada, which have some of the largest economies in the world⁷ and produce a large volume of cross border trade. This is quite an impact, allowing for co-ordination and co-operation between different jurisdictions that might not have been achieved without it. If the steps taken in the 21st century can have a similar impact, it would greatly help in resolving the issues that can be arise in cross border insolvency proceedings.

While adoption of the MLCBI may harmonise various domestic insolvency laws in so far as they address international insolvency issues, the question addresses more broadly the harmonisation of domestic insolvency laws in general. See the 'model' answer on this sub-question.

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

4

Marks awarded 12 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

⁶ Status: UNCITRAL Model Law on Cross-Border Insolvency (1997)

<<https://uncitral.un.org/en/texts/insolvency/modellaw/cross-border_insolvency/status>>, accessed 8 October 2023

⁷International Monetary Fund, "GDP current prices",

<<<https://www.imf.org/external/datamapper/NGDPD@WEO/OEMDC/ADVEC/WEOWORLD>>>, accessed 8 October 2023

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 has adopted the UNCITRAL Model Law on Cross Border Insolvency (Model Law)⁸ by way of the Cross-border Insolvency Act, which we do not have sight of, we will reference the Model Law in our advice.

Before considering what relief you (the Erewhon liquidator) could potentially seek in Utopia, we would need to consider Article 2 of the Model Law, which defines the following terms:

- (a) "Foreign proceeding" means a collective judicial or administrative proceeding in a foreign State, including an interim proceeding, pursuant to a law relating to insolvency in which proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganization or liquidation;
- (b) "Foreign main proceeding" means a foreign proceeding taking place in the State where the debtor has the centre of its main interests;
- (c) "Foreign non-main proceeding" means a foreign proceeding, other than a foreign main proceeding, taking place in a State where the debtor has an establishment within the meaning of subparagraph (f) of this article;
- (d) "Foreign representative" means a person or body, including one appointed on an interim basis, authorized in a foreign proceeding to administer the reorganization or the liquidation of the debtor's assets or affairs or to act as a representative of the foreign proceeding;
- (e) "Foreign court" means a judicial or other authority competent to control or supervise a foreign proceeding;
- (f) "Establishment" means any place of operations where the debtor carries out a non-transitory economic activity with human means and goods or services.⁹

There is no definition of Centre of Main Interests is (COMI) in the Model Law, however Article 16.3 states that "[i]n the absence of proof to the contrary, the debtor's registered office, or habitual residence in the case of an individual, is presumed to be the centre of the debtor's main interests"¹⁰. Given that Nadir has moved its registration and head office to Utopia, we can presume this is their COMI. This would be further supported by the fact that conduct business in Utopia, as we know that Apex had the contract to supply goods to Nadir in Utopia.

Unfortunately, we have not been given any information to suggest that Nadir maintains an 'establishment' in Erewhon, as defined in Article 2 (f). This affects whether the court in Utopia would recognise the foreign proceedings under Article 17 as without an establishment, it falls outside the definition for a foreign non-main proceedings. The Court in Utopia would therefore not be required to recognise the proceedings, nor would they be required to grant any relief. For the purpose of this advice, we will presume they do maintain an 'establishment' in Erewhon.

Bearing the above in mind, the proceedings in Erewhon would be considered foreign non-main proceedings. You would need to apply for recognition of the foreign proceedings under the Act, which in the Model Law is set out in Chapter III, Article 15. Under Article 15, "[a] foreign representative may apply to the court for recognition of the foreign proceeding in which the foreign representative has been appointed"¹¹. This application must be accompanied by:

⁸ Legislative Guide on Insolvency Law <<https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/05-80722_ebook.pdf>>, accessed 8 October 2023

⁹ *Idem* Article 2

¹⁰ *Idem* Article 16.3

¹¹ *Idem* Article 15

- (a) A certified copy of the decision commencing the foreign proceeding and appointing the foreign representative; or
- (b) A certificate from the foreign court affirming the existence of the foreign proceeding and of the appointment of the foreign representative; or
- (c) In the absence of evidence referred to in subparagraphs (a) and (b), any other evidence acceptable to the court of the existence of the foreign proceeding and of the appointment of the foreign representative.

As we know you fall within the definition of a foreign representative under Article 2 (d) and you were appointed by a foreign court as defined in article 2 (e), we will assume you have evidence of your appointment and the proceedings in Erewhon.

If this application was successful, and the Utopian court's granted recognition of the Erewhon proceeding, you would be seeking relief under Article 21 (a), "[s]taying the commencement or continuation of individual actions or individual proceedings concerning the debtor's assets, rights, obligations or liabilities"¹².

Whilst waiting for the Article 15 application for recognition to be decided upon, you may want to request urgent relief to protect the assets or interests of creditors under Article 19, which could provide relief of a provisional nature including:

- (a) Staying execution against the debtor's assets;
- (b) Entrusting the administration or realization of all or part of the debtor's assets located in this State to the foreign representative or another person designated by the court, in order to protect and preserve the value of assets that, by their nature or because of other circumstances, are perishable, susceptible to devaluation or otherwise in jeopardy;
- (c) Any relief mentioned in paragraph 1 (c), (d) and (g) of article 21.¹³

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Question 4.2 [maximum 2 marks]

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

- (a) Apex had filed proceedings to wind-up Nadir, but the matter had not yet been heard.
- (b) Apex had obtained a court order to wind-up Nadir in Utopia prior to the Erewhon winding-up order.

(a) If the Erewhon liquidator was successful in their application for relief under Article 21 (a), this would not make a difference to the advice provided above, as Apex's proceedings would be stayed. However, Apex may have more success in receiving relief under the Act, as they could argue that the company's COMI is in Nadir, given that their registration and head office is in Nadir. If the Utopian court was to agree that Utopia is the COMI, it is more likely that the proceedings in Erewhon would be stayed pending the proceedings to wind up Nadir in Utopia. Under Article 29, the Utopian court shall still see cooperation and coordination with the foreign proceedings, and may still grant relief under Article 21 as long as it is 'consistent with the proceeding in this State'.

¹² *Idem* Article 21

¹³ *Idem* Article 19

(b) If Apex has already obtained a court order to wind up Nadir in Utopia, they could seek relief in Erewhon to prevent the Erewhon liquidator commencing or continuing their proceedings. If Erewhon has also adopted the model law into their legislation, relief could be sought by the Utopian liquidator under Article 20, given that Nadir's COMI is likely to be considered to be in Utopia and the Utopian proceedings would therefore be considered foreign main proceedings. We don't, however, know whether Erewhon has adopted the Model Law into their legislation, and therefore would not be able to advise without this information and without seeing Erewhon's legislation.

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?

If the company was incorporated in the United States (US), we would need to look at the United States Bankruptcy Code (title 11, United States Code)¹⁴.

The insolvency representative would first need to decide whether to file under Chapter 7 or Chapter 11 of the Bankruptcy Code. Chapter 7 is known as liquidation bankruptcy is used more by individuals but also small business owners. Chapter 11 is more focussed on the reorganisation and restructuring of a business to resolve the debtor's financial problems, whilst keeping the business operating. If there are international elements, then we would need to look at Chapter 15¹⁵. The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 brought in Chapter 15, which adopted the UNCITRAL Model Law on Cross-Border Insolvency in 2003.

If insolvency proceedings have been brought in the US, this shows that the company is in some form of financial difficulty, and therefore further proceedings may be brought in different States by different courts e.g. where the company conducts its business or where there are assets and creditors. If this was the case, a foreign insolvency representative could seek relief under Chapter 15 by petitioning for recognition of the foreign proceeding. The US court would then need to establish where the company's Centre of Main Interests (COMI) is. If the COMI was found to be in the same State as the foreign proceedings, the foreign representative would be entitled to relief within the US such as an automatic stay (section 1520 of Chapter 15, which

¹⁴United States Bankruptcy Code (title 11, United States Code)

<<<https://uscode.house.gov/view.xhtml?path=/prelim@title11&edition=prelim>>>, accessed 14 October 2023

¹⁵ CHAPTER 15—ANCILLARY AND OTHER CROSS-BORDER CASES,

<<<https://uscode.house.gov/view.xhtml?path=/prelim@title11/chapter15&edition=prelim>>>, accessed 14 October 2023

grants the same relief as section 362 of Chapter 11 proceedings). This would prevent the US insolvency representative in continuing with their insolvency proceedings.

Chapter 15 does not define COMI, but there is the presumption that a debtor's COMI in section 1516 (c) where it states that "[i]n the absence of evidence to the contrary, the debtor's registered office... is presumed to be the center of the debtor's main interests". We know that the company is incorporated and has its head office in the US, however we also know that the company operates its business in a number of different states, and has creditors, assets and directors in different States, so we can't necessarily follow the presumption in section 1516 (c). In the case of Karhoo Inc., Case No. 16-13545 (Bankr. S.D.N.Y. 2016)¹⁶, although the company was incorporated in the US, the US court deviated from the presumed COMI and decided that as the main operations were conducted in the UK, the company's COMI was in the UK¹⁷.

Another problem the US insolvency representative may have is in seeking recognition and relief in other jurisdictions. We know that the company has creditors in other States, as well as assets including property. The creditors of the debtor must be willing or able to be subjected to the US court's jurisdiction, for fear of penalties or sanctions, however some foreign States may not recognise US orders in their jurisdiction, therefore they would not be enforceable against these foreign creditors. Also, whilst the US Court may have jurisdiction over the assets of a company as part of the estate, a decision of a US court in bankruptcy proceedings over assets located abroad may not be enforceable or recognised in that State's court.

The insolvency representative may also need to consider the tax authorities that are creditors, and whether they should be paid before the proceedings begin. Many authorities impose a personal liability on the directors or officers of a company, and the automatic stay granted under section 362 may not extend to tax authorities. They may therefore attempt to collect from responsible persons. The insolvency representative may therefore need to consider where these tax authority creditors are based, and whether to pay these creditors before proceedings begin.

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.

4.5

Marks awarded 10.5 out of 15

*** End of Assessment ***

TOTAL MARKS 41.5/50

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

¹⁶ Karhoo Inc., Case No. 16-13545 (Bankr. S.D.N.Y. 2016)

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¹⁷ Ashfords: In re Karhoo Inc, No 16-13545 (Bankr. S.D.N.Y. 2016)

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