



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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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.

[Starting from the position that there is there is no sole set of worldwide insolvency rules, Wessels defines international insolvency law as that part of the law that:

*"[i]s commonly described in international literature as a 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 given case."*¹

However, definitions of "international insolvency law" supplied by other scholars, such as Fletcher, lay bare the limitations which Wessels concedes with his definition because of its connection to the existence of a national/domestic legal framework of insolvency law.^{2]}

There is scope to elaborate in your own personal words.

1.5

Question 2.2 [maximum 5 marks]

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

[On the one hand, *universality* or *universalism* is a cross-border insolvency concept that permits more than one insolvency proceeding pending or originating in different a State to be dealt with under the provisions of one insolvency law, e.g., in the State where the debtor has its centre of main interests (**COMI**). This entails that the law of the "main proceeding" takes to

¹ B Wessels, *International Insolvency Law* (Kluwer, 20026), p 1.

² B Wessels, *International Insolvency Law* (Kluwer, 20026), p 1.

having global effect, even outside the territorial jurisdiction of the State where the "main proceeding" has been commenced. *Universalism* calls for "unity of proceedings" allowing the law of the State where the "main proceeding" is commenced (i.e., the *lex concursus*) to control the insolvency matter.

On the other, *territoriality* or *territorialism* is a concept in cross-border insolvency that stipulates that the consequences of insolvency proceedings will only apply to the State where insolvency proceedings have been commenced and can lead to a multiplicity of insolvency proceedings, that is, involving the insolvency laws of more than one State.

Note, however, that the hybrid notion of "*modified universalism*" has emerged as a consequence of a global consensus concerning universalism not having been (and probably never to) be reached and many States remaining closer to an approach based on territoriality. In circumstances where *modified universalism* is adopted, the "main proceeding", commenced in the State where the COMI has been determined, is supported by secondary or ancillary proceedings in another State. In those cases, the courts dealing with the respective proceedings are meant to engage in mutual co-operation.) Furthermore, in *co-operative territorialism*, every State has jurisdiction over the assets in its jurisdiction; where assets are located in more than one State, courts should communicate with each other.]

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.

3.5

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 UAE introduced Federal Law by Decree No. (9) of 2016 on Bankruptcy and Federal Law by Decree No. (19) of 2019 on Insolvency. 2021 saw an increase in number of bankruptcy and restructuring cases in UAE courts in 2021 mainly in the education, healthcare, and trading sectors, and largely driven by significantly decreased cash flows, accounting mismanagement as well as financial fraud and the impact of the COVID-19 pandemic that led to a global financial crisis, which, resulted in a number of companies/debtors filing for bankruptcy. In light of the increase in the number of bankruptcy filings and decided cases, the Federal Decree Law No. (9) of 2016 on Bankruptcy was recently amended by Federal Decree Law No. (23) of 2019 Amending Certain Provisions of Federal Decree-Law No (9) of 2016 on Bankruptcy, stipulating the conditions under which directors or managers of an insolvent company can be held liable.

In 2018, the Kingdom of Saudi Arabia approved landmark domestic bankruptcy law. The new Saudi bankruptcy law (which is akin to an insolvency law in other jurisdictions) came into force in February 2018, followed in September by a set of implementing regulations. It established the framework for the domestic administration of restructuring and liquidation procedures, through the Saudi Commercial Courts and the newly formed Bankruptcy Commission as well as setting out a number of well-defined restructuring and liquidation procedures to which companies may be subject.

In 2019, The Dubai International Financial Centre (**DIFC**) introduced a new Insolvency Law (Law No. 1 of 2019) (enacted on 30 May 2019 and came into force on 6 June 2019) aimed at enhancing and facilitating a more efficient and effective bankruptcy regime within the free zone.]

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.

[One of the main differences regarding the objectives of insolvency for individuals and corporations relates to the notion of exempt or excluded assets which will only apply to insolvent individuals. This entails that some systems allow for insolvent individuals to hold on to some of the assets (such as essential household goods) needed to maintain them and their dependents.³ Moreover, it should be self-evident that individual bankruptcy (involving a natural person)⁴ is rather different from corporate insolvency (involving legal persona such companies or corporations, in that individuals are not "dissolved" following bankruptcy in the same way a company is dissolved once its affairs are wound up.

Furthermore, other key differences regarding the aims of insolvency for individuals and corporations (as distinguished by Sealy and Hooley⁵) are as follows:

The aims of insolvency for individuals include to:

- protect debtors from harassment by their creditors;
- enable debtors to make a new start, especially in less culpable cases, e.g., where insolvency has not been brought about by the debtor's actions or conduct; and
- reduce overall indebtedness by ensuring contributions from present and future income are made to the estate while simultaneously taking into consideration the debtor's personal circumstances.

The aims of insolvency for corporations are to:

- preserve (where possible) the business or viable parts of the business as a going concern, if not necessarily the company; and
- impose personal liability on responsible persons (in cases where personal liability has been abused).]

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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.

[Firstly, the notable lack of a worldwide system of insolvency law and of a global court with jurisdiction to hear insolvency matters gives rise to obvious difficulties. While all States that have a developed and/or mature legal systems also have some type of bankruptcy and/or insolvency systems, there is a variety of discrepancies in approaches, insolvency dispensations, and policy as well as procedural and substantive law or rules. Different States have different insolvency laws and policies toward insolvency and apply different cross-border insolvency rules. Furthermore, as there are a number of significant forms of real security in various States, this type of security remains one of the most complex facets to deal with in cross-border insolvency contexts. By way of example, the notion of a floating charge is

³ Fletcher, *The Law of Insolvency*, London (Sweet and Maxwell, 5th ed., 2017), Ch. 1.

⁴ Cf. World Bank, *Report on the Treatment of the Insolvency of Natural Persons*, 2012.

⁵ See M A Clarke et al, *Commercial Law* (OUP, 2017), chap. 28.

commonplace in English law-based States, but in civil law-based States this form of security is generally unknown.

Secondly, the lack of common insolvency terminology presents a difficulty at the very outset in addressing cross-border insolvency cases. For example, we note the difficulties of defining the term "insolvency" at the international level (as noted by Friman)⁶ with the consequence that international conventions and other instrument do not attempt to define properly that term and instead focus on defining "insolvency proceedings" (including or excluding exhaustive lists of potentially covered proceedings) which are to some extent easier to define even though some confusion as to the language persists.

Thirdly, Fletcher asks three extremely relevant questions in his attempt to consolidate the "cross-border" aspects and the "insolvency" aspects and they are as follows:

- (1) in which jurisdictions may insolvency proceedings be commenced (i.e., the choice of forum to exercise jurisdiction in the matter);
- (2) what State's law should be applied in respect of different aspects of the case (i.e., the choice of law to apply to the matter); and
- (3) what international effects will be accorded to proceedings conducted at a particular forum (including issues of enforcement) (i.e., the recognition and effect accorded to foreign proceedings in the matter)?

In answer to these questions asked by Fletcher, insolvency proceedings could potentially be commenced concurrently in more than one State, each of those states would apply its own domestic laws (including its own choice-of-law rules), and no or very limited extraterritorial effects would be granted to foreign proceedings; and thus, offering an insight into the difficulties that may be encountered when trying to encourage co-operation and co-ordination between different states.

Fourthly, Omar states that "[a]part from the general situation in the conflict of laws, differences in domestic norms have a particular impact on the position of creditors and the priorities they assert in insolvency. Where the debtors face creditors pressing their claims in more than one State, this will inevitably raise issues of conflict of laws. The conflict may itself be made more complex by the presence of qualifications, including the presence of security, set-off and netting arrangements, retention of title and other means of protecting title available to creditors in national laws".⁷

Finally, following nine key issues in cross-border insolvency cases have been identified by Westbrook (who is a dedicated proponent of *universalism*): (1) standing for (recognition of) foreign representatives; (2) moratoria on creditor actions; (3) creditor participation; (4) executionary contracts; (5) co-ordinated claims procedures; (6) priorities and preferences; (7) avoidance provision powers; (8) discharges; and (9) conflict of law issues.⁸

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Question 3.3 [maximum 5 marks]

⁶ I F Fletcher, *Insolvency in Private International Law - National and International Approaches* (Oxford: OUP, 2nd ed, 2005), pp 3- 5.

⁷ PJ Omar, "The Landscape of International Insolvency", (2002), 11, //R 173, p 175.

⁸ 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.

[Various regional groupings of States have ratified or acceded to treaties or conventions which import into their domestic insolvency laws principles to resolve insolvency issues that have a nexus with another State. A rare example of a successful multilateral step taken in the 21st century to promote harmonisation of domestic insolvency laws can be seen in the Scandinavian multilateral treaty of the Nordic Convention (1933).

After many years of unsuccessful European efforts to achieve multilateral international insolvency conventions, in 1990 the Council of Europe concluded a Convention on Certain International Aspects of Bankruptcy (known as the Istanbul Convention, Council of Europe Treaty Series Number 136); and although it was only signed by eight member States and was not ratified by a sufficient number of States for it to come into force, it nonetheless did have a significant influence on the development of a European Union response to issues of international insolvencies among EU members States.

The European Insolvency Regulation (EIR) (2000) achieved more success and influenced wider multilateral developments in international insolvency law (see in particular Articles 7 to 18). This was reviewed and amended resulting in the current multilateral "instrument" on international insolvencies, that is, the EU Regulation (EU) 2015/848 of the European Parliament and Council of 20 May 2015 on Insolvency Proceedings (Recast) (**EIR Recast**). A further recent amendment to the EIR Recast by way of Regulation 2021/2260 of 15 December 2021 replaced Annexures A and B and came into effect for most EU member States in January 2022.

Further, inter-governmental bodies have also been promoting "soft law" options which have been perceived as being more successful than "hard law" solutions to international insolvency law issues. Similarly, multilateral commercial or professional bodies such as the International Bar Association (**IBA**) as well as bodies specialising in insolvency practice with diverse professional memberships (such as INSOL International) have been working on a range of proposed solutions.

For example, the adoption of the Model Treaty on Bankruptcy at the 1925 conference was an early initiative of the Hague Conference on Private International Law (the Hague Conference) (established in the 19th century to work towards the progressive unification of private international law). Even though the Model Treaty was never ratified, it contributed to international considerations regulating international insolvency, e.g., it gave jurisdiction in respect of a corporation to the court where the statutory registered seat was located "provided that it be neither fraudulent or fictitious".

An example of the Hague Conference's modern-day coordination with the United Nations Commission on International Trade Law (**UNCITRAL**) can be seen in the joint preparation of the UNCITRAL *Legislative Guide on Insolvency Law* (2004). This is intended "to be used as a reference by national authorities and legislative bodies when preparing new laws and regulations or reviewing the adequacy of laws and regulations".⁹ It was expanded in later years, addressing insolvency of enterprise groups in Part Three and directors' obligations in the period approaching insolvency in Part Four, and specifically on international insolvency, Part One Recommendation 5 states "The insolvency law should include a modern, harmonized and fair framework to address effectively instances of cross-border insolvency. Enactment of the UNICTRAL Model Law on Cross-Border Insolvency is recommended".

⁹ https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/05-80722_ebook.pdf, accessed 14 October 2023.

Arguably the most successful "soft law" approach to date can be seen in UNCITRAL's development in the mid-1990s of a Model Law on Cross-Border Insolvency (**MLCBI**), which is neither a treaty nor convention, but rather draft legislation that UNCITRAL recommended members States to adopt (with or without modification); and the MLCBI is gathering momentum as an influential response to international insolvency law, thanks to the number, economic dimension, and geographic reach of States now adopting it.

Some States have amended their domestic insolvency laws to address international insolvency issues via provisions for the recognition and enforcement or the effects of a foreign insolvency proceedings, while some State have also provided for co-operation and co-ordination where there are concurrent proceedings.

If the first draft of an EC Convention on Bankruptcy and Related Matters in 1970 had been adopted, it would have required contracting States to enact a "Uniform Law" into domestic law, while permitting States to make reservations on their incorporation (pursuant to Article 76). However, subsequent draft European insolvency conventions did not attempt to achieve uniform laws, other than in so far as they related to international issues such a jurisdiction, choice of law, and recognition and enforcement.

In 1997, the IBA started drafting a Model Bankruptcy Code which any State could consider when developing their domestic insolvency laws. Notwithstanding, this project did not get off the ground and the IBA instead contributed to the development of the project that would result in UNCITRAL's *Legislative Guide* (which the IBA subsequently endorsed).

In the early 2000s, the World Bank produced guidelines on the regulation of Insolvency: *Principles for Effective Insolvency and Creditor/Debtor Regimes*. These have been revised in 2005, 2011, 2015 and 2021. They gain significance in the context that International Monetary Fund (**IMF**) and the World Bank may occasionally require bankruptcy reforms in developing countries as a condition of loan support, referring countries to the 2004 *Legislative Guide* and the Principles, thus promoting convergence of insolvency law.

The European Union is also pushing for greater uniformity in the domestic insolvency laws of its member States with the European Parliament publishing a report in 2010 on the Harmonisation of Insolvency Law at EU Level. The report identified a number of areas of insolvency law where EU-level harmonisation is considered to be worthwhile and attainable, namely: (1) a possible common test of insolvency as a requirement of a formal insolvency process; (2) formal aspects of lodging and dealing with claims in a formal insolvency; (3) certain aspects of the manner in which reorganisation plans are adopted and their contents; (4) rules relating to so-called detrimental acts; (5) interrelationship between contractual rights of termination and insolvency; and (6) directors responsibilities.

Moreover, the European Commission's Action Plan on Building a Capital Markets Union (CMU) (30 September 2015) stated "Convergence of insolvency and restructuring proceedings would facilitate greater legal certainty for cross-border investors and encourage the timely restructuring of viable companies in financial distress".

Such moves to harmonise domestic insolvency laws can reduce the significance of insolvencies crossing State borders and the need of regulates or courts to resolve international insolvency issues. While the proposition that harmonisation would offer a solution seems obvious, the extent to which such harmonisation is feasible and on the horizon is debatable.¹⁰

¹⁰ **Compare Westbrook, "Global Insolvency Proceedings for a Global Market", pp 2291 - 2298 (for a universalist, more positive outlook), and LM LoPucki, "Cooperation in International**

Others have argued that given that fundamental difference between legal systems and the laws of countries are both the root problem of cross-border insolvencies and the major obstacle to their solution, the goal of harmonisation must continue to be pursued.¹¹

By contrast, more successful strategies to address international insolvency issues appear to have come from uniform laws on recognition of insolvency proceedings and insolvency representatives. For example, in 1989 the IBA spearheaded an early multilateral attempt to achieve uniform recognition laws when it developed a Model International Insolvency Cooperation Act (1989) (**MIICA**) and recommended the enactment of this draft model statute as domestic legislation. However, no jurisdiction adopted MIICA as domestic legislation. In 1996, the IBA promoted a Cross-Border Insolvency Concordat (instead of recommending domestic legislation to be adopted by States) that was directed at assisting practitioners. However, it was of limited merit in achieving uniform recognition of laws because it did not prescribe a principal forum or seat for insolvency proceedings, only referring to the debtor's "centre of management control".

In the interim, UNCITRAL in 1997 completed the MLCBI, which proposed the uniform recognition of laws, using concepts derived from the EU Insolvency Regulation and promoted co-operation and co-ordination. Some other examples of international instruments promoting co-operation and co-ordination include: (1) the European Guidelines on Communication and Cooperation (2007); (2) ALI – III Global Principles for Cooperation in International Insolvency Cases and Global Guidelines Applicable to Court-to-Court Communication in Cross-Border Cases (2012); (3) EU JudgeCo Principle and EU Cross-Border Insolvency JudgeCo Guidelines (2015); (4) Judicial Insolvency Network (**JIN**), Guidelines for Communication and Cooperation between Courts in Cross-Border Insolvency Matters (2016).]

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

4

Marks awarded 14 out of 15

QUESTION 4 (fact-based application-type question) [15 marks in total]

Nadir Pty Ltd (Nadir) is a company registered in Utopia. Originally it was incorporated in the neighbouring country of Erewhon before moving its registration and head office to Utopia one month ago. Apex Pty Ltd (Apex) is incorporated and has its head office in Erewhon. Apex and Nadir enter into a contract by exchange of emails between their head offices for Apex to supply goods to Nadir in Utopia. Nadir has failed to pay for the goods which have been delivered in accordance with the contract. Apex issues court proceedings against Nadir in Utopia for monies owing for the goods sold and delivered.

Meanwhile, Nadir also owes monies to creditors in Erewhon. One Erewhon creditor obtains a court winding-up order against Nadir in Erewhon and a liquidator is also appointed by that court.

If you require additional information to answer the questions that follow, briefly state what information it is you require and why it is relevant.

Insolvency: A Post-Universalist Approach", (1999) 84 Cornell Law Review 696, pp 6696 - 762 (for a territorialist, more pessimistic view).

¹¹ D McKenzie, "International Solutions to International Insolvency: An Insoluble Problem?", (1997) 26(3), University of Baltimore Law Review 15, pp 15 - 29.

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.

[We would advise the Erewhon liquidator that the potential relevance of the Cross-border Insolvency Act of Utopia which has adopted/domesticated the UNCITRAL Model Law on Cross-border Insolvency is as follows:

One key element of the UNCITRAL MLCBI is that its provisions give the liquidator appointed by the court in Erewhon (and in these circumstances acts as a representative of foreign insolvency proceedings) and creditors in Erewhon a right of access to the courts of Utopia (i.e., an enacting State) to seek assistance and authorize representatives of local proceedings being conducted in Utopia to seek assistance elsewhere.

Secondly, one of the key objectives of the MLCBI is to establish simplified procedures for recognition of qualifying foreign proceedings in order to avoid time-consuming legalisation or other processes that often apply and to provide certainty with respect to the decision to recognize. Provided it satisfies specified requirements, the court winding-up order against Nadir obtained by one of the Erewhon creditors and the liquidator appointed by the same court would constitute a qualifying foreign proceeding which should be recognized by the court in Utopia (ie the court in which Apex issued proceedings against Nadir for monies owing for the goods sold and delivered) as either a main proceeding, taking place where the debtor Nadir had its centre of main interests at the date of commencement of the foreign proceeding or a non-main proceeding, taking place where the debtor Nadir has an establishment.

Please note that to provide fuller advice here we would require further information, in particular: (i) when Apex and Nadir entered into a contract by exchange of emails between their head offices for Apex to supply goods to Nadir in Utopia; (ii) when Nadir received delivery of the goods from Apex in accordance with the contract; and (iii) whether both or either of these events happened before Nadir moved its registration and head office to Utopia one month ago. Similarly, we would need to know more details of the debt/monies owed by Nadir to creditors in Erewhon.

The principal among several effects of the Utopia court's recognition of foreign proceedings in Erewhon under the MLCBI is the relief that it has to accord to assist the Erewhon proceedings. A basic principle of the MLCBI is that the relief considered necessary for the orderly and fair conduct of cross-border insolvencies should be available to assist foreign proceedings in Erewhon. By specifying the relief that is available, the MLCBI neither imports the consequences of Erewhon's foreign law into the insolvency system of Utopia (ie the enacting State) nor applies to the foreign proceedings in Erewhon the relief that would be available under the law of Utopia. Key elements of the relief available include interim relief at the discretion of the Utopian court between the making of an application for recognition and the decision on that application, an automatic stay upon recognition of main proceedings and relief at the discretion of the Utopia court for both main and non-main proceedings following recognition.

Lastly, another of the key principles of the MLCBI is that where (like here) it has been adopted, its provisions facilitate cooperation among the courts of in our case Utopia and Erewhon where Nadir's assets are located and coordination of concurrent proceedings concerning the debtor,

Nadir. On our facts, the MLCBI places an obligation on both the local court and insolvency representatives in Utopia to communicate and cooperate to the maximum extent possible with the (foreign) courts and liquidators in Erewhon.

The Chapter IV of Model Law as drafted 'mandates' (NB rather than 'authorises' because we are told that Utopia has adopted it as drafted) the local Utopian court and insolvency representatives to cooperate with the Erewhon courts or liquidators either directly or through representatives.

It provides examples of appropriate means of cooperation including the approval or implementation by courts of agreements concerning the coordination of proceedings (under Articles 25 and 26), which has increasingly been implemented via the use of Protocols or Cross-Border Insolvency Agreements that may be approved by the relevant courts.

The MLCBI is significant for its 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.)

(Other further information that may be useful is whether Erewhon has a Cross-border Insolvency Act and whether it has adopted UNCITRAL Model Law on Cross-border Insolvency.)] **There is no need for reciprocity**

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.

[Under scenario (a) and subject to whether Apex had filed such proceedings in Utopia or Erewhon (which is unclear), further questions of jurisdiction may arise, that is, whether the court in Utopia can and will hear and determine the matter, which would require examination of the connection with the jurisdiction of Nadir (which only moved to Utopia a month ago and may be viewed as having its COMI in Erewhon) and Apex (whose COMI is Erewhon). Moreover, the Utopia court will have to decide which choice of law to apply to the matter, i.e., Utopia names its local laws relating to insolvency under its Cross-Border Insolvency Act.

Under scenario (b), the court order to wind-up Nadir in Erewhon would potentially be deemed as independent proceedings opened prior to the main proceedings in Utopia, or secondary proceedings opened subsequent the prior Utopia winding-up order. [*Insert further discussion of priority rules*]

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?

[The company is incorporated in England (and Wales). The liquidators (i.e., the insolvency representative) would face, among other, the following issues:

1. Choice of law (and jurisdiction):

Domestic laws on choice of law are also applicable in a winding up by an English court where international elements are involved. In an English winding-up under the Insolvency Act 1986, including of a foreign company, English law applies to matters of procedure and substance.¹² It is possible that reference may be made to a foreign law to establish some matter. For example, while English law may apply to the procedure of lodging a proof of deb, English law may require reference to a foreign law to establish the validity of the actual claim where the claim is for a debt governed by foreign law.¹³

In the context of an English company in liquidation with international elements outside the domain of EIR (Recast) and UNCITRAL MLCBI, an English court will have jurisdiction to wind-up a company formed in other States, and which has carried on business in England but has not complied with requirements to register in England under sections 220-221 of the Insolvency Act 1986 (UK).

2. Liquidators duties vis-à-vis the company's foreign assets and/or foreign creditors:

An English winding-up order of an English company has a particular effect in respect of an international insolvency involving international elements such as in our scenario where the English company has foreign assets (real property or interest in land, other tangible assets and intangible assets) as well as foreign creditors (including taxation / revenue authorities) and directors in several States. The making of an order for the winding-up of a company does not purport to cause the company to be automatically divested of its assets.¹⁴ Even within the British Commonwealth therefore there is no suggestion that the making of a winding-up order has the effect, by itself, of altering the legal title to the company's assets.¹⁵

Instead, the winding-up order is regarded by English law as impressing the company's assets with a trust in favour of those persons interested, whether as creditors or as contributories, in the winding-up. The company is thus divested of beneficial ownership of its assets which must thereafter be applied in discharge of its liabilities in accordance with the statutory scheme embodied in the insolvency legislation.¹⁶ It becomes the duty of the liquidator, as the person

¹² *Fletcher, supra note 3 [30-052-053].*

¹³ *Gibbs & Sons v La Société Industrielle et Commerciale des Métaux (1890) 25 QBD 399.*

¹⁴ *See New Zealand Loan and Mercantile Agency Co Ltd v Morrison [1898] A.C. 349 (PC).*

¹⁵ *Ibid.*

¹⁶ *Oriental Inland Steam Co, Re (1874) L.R. 9 Ch. App. 557; Ayerst v C and K (Construction) Ltd [1976] A.C. 167 (HL). See International Tin Council, Re [1987] Ch. 419 at 446; [1987] 1 All E.R. 890 at 899 per Millett J.*

charged by law with the task of conducting the winding-up, to take into his custody or under his control all the tangible and intangible property to which the company is entitled, and of which it remains the legal owner.¹⁷ The liquidator's ability to so on a practical level will depend on the extent to which the winding up and their appointment as liquidators is recognised in the foreign State(s) in which the assets are situated.

As a matter of law, an English winding-up order is not regarded as being limited in its effect to the company's English assets and affairs. The liquidator is authorized to accept proofs lodged by foreign creditors in respect of the company's liabilities incurred overseas, or governed by foreign law. Thus, in the English winding-up the general principle to be observed is that the company's assets are to be distributed rateably among the whole body of creditors,¹⁸ but subject to any overriding rule of public policy whereby certain categories of claim may be excluded from enforcement in England either by direct or indirect means.¹⁹ Correspondingly, the effects of the order are considered to extend to the company's foreign assets unless the order of the court itself introduces some restrictive limitations upon the liquidator's powers in relation to assets located overseas.²⁰ Such restrictions, though not common nowadays, have been inserted on occasions in anticipation of there being concurrent liquidations of the same company, and in the interests of averting conflict between liquidators appointed in separate jurisdictions.²¹

3. Concurrent proceedings against the English company in foreign jurisdictions / recognition of and cooperation with foreign insolvency proceedings:

England permits recognition of and cooperation with foreign insolvency adjudications or proceedings. The *Cross-Border Insolvency Regulations 2006 (SI 2006/1030)* give effect to the 1997 UNCITRAL MLCBI in Great Britain. The 1997 UNCITRAL MLCBI is designed to provide uniform legislative provisions to deal with the recognition of foreign insolvency proceedings and the coordination of concurrent proceedings.²²

Common law appears to be settled in this regard. In *McGrath v Riddell* [2008] UKHL 21, Lord Hoffman referred to the court's "jurisdiction at common law, under its established practice of giving directions to ancillary liquidators, to direct remittal of the English assets, notwithstanding any difference between the English and foreign systems of distribution" [30]. Lord Scott in *McGrath v Riddell* [2008] UKHL 21 [62] also allowed the appeal, but on the basis of the statutory provision of section 426 of the Insolvency Act 1986 (UK) on cooperation between courts exercising jurisdiction in relation to insolvency and not "from any inherent jurisdiction of the court".

The UK Supreme Court in *Rubin v Eurofinance SA; New Cap Reinsurance Corp (in liquidation) v Grant* [2012] UKSC 46, considered the question of recognition and enforcement of judgments concerning avoidance provisions, and declined to accept there was a *sui generis* category of insolvency orders or judgments subject to special rules, with Lord Collins stating that changes in the settled law of the recognition and enforcement of judgments were a matter

¹⁷ *Fletcher, supra note 3* [30-040].

¹⁸ *Azoff-Don Commercial Bank, Re* [1954] 1 Ch. 315 at 333 per Wynn-Parry J, referring to *Kloebe, Re* (1884) 28 Ch. D. 175 (a bankruptcy case).

¹⁹ For example, claims on behalf of representatives of a foreign state to recover revenues, or penal impositions, which historically have not been enforceable in England: *Delhi Electric Supply and Traction Co Ltd, Re* [1954] Ch. 131 (CA), affirmed sub nom. *Government of India v Taylor* [1955] A.C. 491 (HL).

²⁰ *Fletcher, supra note 3* [30-041].

²¹ *Commercial Bank of South Australia, Re* (1886) 33 Ch. D. 174; *Federal Bank of Australia, Re* [1893] W.N. 77; *Hibernian Merchants Ltd, Re* [1958] 1 Ch. 76.

²² See <https://uk.practicallaw.thomsonreuters.com/8-107-3973>.

for the legislature and that together with the law relating to international insolvency are "not areas which have in recent times been left to be developed by judge-made law" [128]. Lord Collins further held at paragraph 143 that "there is nothing to suggest that [Article 21 of the MLCBI] applies to the recognition and enforcement of foreign judgments against third parties."

Moreover, section 426(5) of the Insolvency Act 1986 (UK) authorises the local court to "apply, in relation to any matters specified in the request, the insolvency law which is applicable by either court in relation to comparable matters falling within its jurisdiction. Conversely, the English court may provide insolvency help to foreign courts under section 146 of the Insolvency Act 1986 (UK).

4. International effects accorded to proceedings conducted in the particular fora:

4.1 Rights, duties, liabilities and limitations of directors and officers of the corporation in England AND in other States:

The liquidation of the company may give rise to certain personal consequences for its (former) directors and officers. For example, there could be personal liability claims against directors or officers of the company in the case of reckless, fraudulent or wrongful trading (the liability for wrongful trading is dealt with in sections 214 and 246ZB of the Insolvency Act 1986 (UK)), or the directors could be subject to disqualification of some kind due to their role in the financial demise of the corporation. For instance, the *Company Directors Disqualification Act 1986 (CDDA 1986)* contains provisions under which a person may be disqualified from acting as a director or taking part in the promotion, formation or management of any company for a period of up to 15 years if the person's conduct as a director of a company which has become insolvent so merits. In some cases, a disqualified person may also be required to compensate creditors who have suffered loss as a result of the person's actions.²³

4.2 Priorities (statutory), including taxation / revenue authorities in arrears:

Legislation usually prescribed preferential or priority claims such as amounts owing to the State like arrear or unpaid taxes. England is among some of the systems that have abolished the so-called "Crown preference" (by way of the Enterprise Act 2002), that is, the priority afforded to revenue authorities, but note that England reintroduced it (via the Finance Act 2020) for insolvencies commencing on or after 1 December 2020.

4.3 The corporation could not be "rehabilitated"

Therefore, if the corporation were liquidated it would under normal circumstances be dissolved upon conclusion of the winding up of its affairs.]

8

Marks awarded 12.5 out of 15

* End of Assessment *

TOTAL MARKS 42.5/50

An excellent paper - a thorough response that addresses the questions asked and substantiates the answers well.

²³ See <https://uk.practicallaw.thomsonreuters.com/8-107-3973>.