



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.***

***Whereas there is no "one size fits all" solution for legislation on insolvency that can be applied across all states and countries, it is necessary for the states to agree, based on their respective legal rules and specific laws, a uniform and unified approach to deal with debtors (insolvents) in multiple jurisdictions.***

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Question 2.2 [maximum 5 marks]

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

***Supporters of universalism promote a single insolvency process or proceedings which entails all the debts and all the assets of the debtor, regardless of where located. If insolvency proceedings have commenced in a chosen state, it will be impossible for a creditor to commence any other insolvency proceedings and or legal action pertaining***

*to pursuing the debtor in a process to realise of assets and ensure a recovery, in another state. It is very idealistic to believe all creditors can participate in one, all-encompassing insolvency proceeding with all claims dealt similarly. This concept is premised on trust in foreign legal systems and foreign insolvency proceedings. The challenges it poses relates to a decision of the governing law and rules of ranking and priority treatment and could potentially be a situation which the debtor abuse.*

*In stark contrast the supporters of territorialism found their views on commencing insolvency proceedings in every jurisdiction where assets of the debtor are located, with a limitation that each insolvency proceedings can only deal with property in each specific jurisdiction. This will prevent creditors from submitting claims in these other jurisdictions despite multiple insolvency proceedings instituted at the same time. Such a stance will secure the interest of local creditors only, ensuring their claims are satisfied before assets are shared beyond the local boarder. The biggest downside to this concept is a situation where the debtor is declared insolvent in state A, where the debt sits but is considered solvent in state B where the debtors' assets are leaving the creditor with no access to the recover from the assets.*

Also, note, these theories involve two key aspects of private international law - recognition and effect as well as jurisdiction:

For example, with universalism, (1) the jurisdictional aspect requires all States to agree on the place for the one set of insolvency proceedings in respect of the debtor and, to be successful, (2) recognition and effect requires that other States recognise that one set insolvency proceedings 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.**

- a. *United Arab Emirates revised its domestic insolvency laws in 2016 and 2019 passing the Federal Law by Decree No. (9) of 2016 on Bankruptcy and Federal Decree Law No. (19) of 2019 on Insolvency;*
- b. *In 2018 Saudi Arabia reformed its domestic insolvency laws by approving a new bankruptcy law in an attempt to attract foreign investment by simplifying its process of unwinding insolvent companies ; and*
- c. *Dubai International Finance Centre (DIFC) transformed its domestic insolvency laws by promulgating the Insolvency Law No.1 of 2019.*

3

Marks awarded 8.5 out of 10

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

Question 3.1 [maximum 5 marks]



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

*Insolvency or bankruptcy proceedings for individuals aim to achieve the following objectives which not only protect the interest of the creditors but also the individual as an insolvent:*

- *secured creditors treating the debtor and other classes of creditors fairly;*
- *pari passu (equal) distribution of dividends amongst creditors and recognising the ranking of priority that secured creditors enjoy versus concurrent creditors;*
- *allowing a process / investigation by a presiding officer to understand the underlying causes of the demise of the individual's affairs;*
- *as part of the investigation to consider any transaction that could be classified as "voidable dispositions" where the insolvent preferred certain creditors or prejudiced other creditor in relation to the sale / transfer of assets;*
- *to shield the individual from disgruntled creditors;*
- *to reduce the indebtedness by allowing the insolvent to contribute new income / funds to the insolvent estate; and*
- *this could pave the way for the insolvent to be rehabilitated.*

*For corporations there are similar objective as outlined in bullets 1 - 4 below. In addition, thereto the following objectives apply to corporations only:*

- *secured creditors treating the debtor and other classes of creditors fairly;*
- *pari passu (proportionate to debt / equal) distribution of dividends amongst creditors and recognising the ranking of priority that secured creditors enjoy versus concurrent creditors;*
- *allowing a process / investigation by a presiding officer to understand the underlying causes of the demise of the individual's affairs;*
- *as part of the investigation to consider any transaction that could be classified as "voidable dispositions" where the insolvent preferred certain creditors or prejudiced other creditor in relation to the sale / transfer of assets;*
- *ensuring the business or parts thereof is rescued for socio-economic reasons, not only job preservation; and*
- *to investigate the abuse or neglect of powers of directors with a view to hold individuals (directors) accountable for any misconduct.*

There is some scope to elaborate for example with respect to exempt assets

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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.**

*From the onset the mere definition of "insolvency" is problematic as there are different interpretations in the various jurisdictions. There is a distinction between factual (balance sheet) insolvency and commercial (inability to pay debts as they fall due)*

*insolvency. Whereas “insolvency proceedings” seem to refer to actual proceedings / commencement of legal process there is a better understand of the terminology.*

*As a supporter of universality, Westbrook<sup>1</sup> acknowledges the challenges facing cross-border insolvencies with reference to the legal systems of multiple jurisdictions:*

- *recognition / acknowledging the foreign representative;*
- *stay on actions by creditors (moratorium);*
- *level of involvement / participation by creditors;*
- *uncompleted contracts that the insolvency representative (practitioner) need to consider for purposes of giving effect thereto;*
- *procedures in relation to submitting claims;*
- *ranking preferences and priority of creditors (different classes)*
- *avoidance provision powers;*
- *possibility of rehabilitation (discharge); and*
- *conflict of law issues.*

5

Question 3.3 [maximum 5 marks]

***What multilateral steps have been taken in the 21<sup>st</sup> century to promote harmonisation of domestic insolvency laws? In your opinion, how much impact are these likely to have in addressing international insolvency issues? Include reasons for your opinion.***

*Nation states such as the European Union agreeing convention to address international insolvency proceedings. Furthermore, inter-governmental bodies like UNCITRAL published the UNCITRAL Legislative Guide on Insolvency Laws, in 2004. Multilateral commercial or professional bodies including International Bar Association (IBA) and INSOL International have been actively and genuinely proposing solutions on -*

- *harmonising domestic insolvency laws;*
- *uniform choice of law principles*
- *uniform recognition laws; and*
- *promoting recognition and enforcement between courts and representatives.*

*The World Bank in 2000 also published guidelines on insolvency, Principles for Effective Insolvency and Creditor / Debtor Regimes which have been revised as recently as April 2021.*

*The European Parliament published a report on Harmonisation of Insolvency Law at EU Level<sup>2</sup> highlighting certain areas of insolvency law where harmonisation is envisaged:*

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<sup>1</sup> See J L 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.

<sup>2</sup> [https://www.eesc.europa.eu/sites/default/files/resources/docs/ipol-juri\\_nt2010419633\\_en.pdf](https://www.eesc.europa.eu/sites/default/files/resources/docs/ipol-juri_nt2010419633_en.pdf)

- *shared test for insolvency to determine formal insolvency processes;*
- *aspects of submitting and dealing claims in a formal process;*
- *aspects of re-organisation plans and the adoption of same;*
- *rules regarding “detrimental acts”;*
- *inter-relationship of contractual rights of termination and insolvency; and*
- *directors responsibilities (duties).*
- *Intellectual Property (2010).*

*International Lawyers Association (UIA) proposed an international convention for international insolvency law in 2009 - most importantly to:*

- *Affording insolvency practitioner access to foreign courts;*
- *Acknowledging / recognising foreign insolvency proceedings; and*
- *Insolvency practitioners and courts engaging and working together.*

*Recently the International Insolvency Institute (III) enhanced the UIA proposal (above) on the choice of governing law in cross -border insolvency and bankruptcy matters.*

*The Judicial Insolvency Network (JIN) contributed to publication of Guideline for Communication and Cooperation between Courts in Cross-Border Insolvency Matters (JIN Guidelines) with their main focus to enhance success of concurrent proceedings in any internal insolvency proceedings. Working together with the judiciary in other jurisdictions. These JIN Guidelines have been accepted and is being implemented by courts in countries in the Americas, Asia and the United Kingdom*

*Form the various suggestions made and support lobbied for a unified application of the*

*UNCITRAL Model Law on Cross-Border Insolvency (MLCBI) across all aspects of insolvency law as outlined, it is evident that more and more states are aware of the dire need for a unified set of rules on internal insolvency law and most importantly to co-operate and co-ordinate in international insolvency matters.*

*The overwhelming support from multiple jurisdictions for all the UNCITRAL texts and laws, is a reflection of an awareness of the good work and platform provided by UNCITRAL, considered the grandfather of codifying cross-border insolvency proceedings. The states supporting these proposals, do not necessarily have the same legal system and therefore it is encouraging to see them agreeing on these principles. I am of the view that legislators will have to realise that the world has become a global village in terms of commercial trade and transaction. Borders are merely landmarks and in order for states to benefit from opportunities for investment, trade and international relations, we will all have to agree sound, practical and uniform rules of law for insolvency proceedings.*

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

**3.5**

**Marks awarded 12.5 out of 15**

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

**A**

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

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

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

Question 4.1 [maximum 5 marks]

***Assume the UNCITRAL Model Law on Cross-border Insolvency has been adopted by Utopia without modification, except as required to domesticate it. For example, the Cross-border Insolvency Act of Utopia names its local laws relating to insolvency and its competent court under the Act. The Erewhon liquidator's investigations detect that Apex is suing Nadir in Utopia. The liquidator would like to stop Apex court action against Nadir in Utopia. Advise the Erewhon liquidator on the potential relevance of the Cross-border Insolvency Act of Utopia.***

*The UNCITRAL Model Law on Cross-border Insolvency (MLCBI) is premised on co-operation and co-ordination. Accordingly, the Erewhon liquidator will have to engage with the Apex court to see to it that creditors enjoy maximum benefits under the insolvency proceedings.*

*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.)*

*A fundamental principle on the commencement of insolvency proceedings, is the stay on actions by creditors against the debtor. Whereas insolvency or bankruptcy refers to a collective process where the liquidator act in the interest and to the benefit of all creditors, the creditor single-handedly taking action against the debtor will have to stop his action to ensure the collective insolvency proceedings are indeed effective and not scuppered. This stay of action is called a moratorium against individual debt enforcement proceedings.*

*Save for the effectiveness of the insolvency proceedings, the moratorium under the UNCITRAL Legislative Guide on Insolvency Laws, aims to ensure that all distributions*

*to creditors are done on a proportionate basis out of the available assets basis, treating all creditors equally unless a creditor is secure, which will then impact the priority and ranking in a payment waterfall.*

The question requires candidates to apply the relevant MLCBI articles to the facts provided.

3

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) Yes - no stay possible as insolvency proceedings have commenced. Date of issuance or filing of an application for unwinding up Nadir constitutes that the action is alive and have commenced. That entails that despite an order there would be a concurrent or parallel insolvency proceeding in Utopia. Under the UNCITRAL Model Law on Cross-border Insolvency (MLCBI) co-operation and co-ordination is extremely important. The Erewhon liquidator then would have to engage with the Utopia Court (no liquidator yet) to establish agreement on best practice under the MLCBI and to solutions the two cross-border insolvency processes instituted in two courts.*

*(b) Yes - no stay possible as insolvency proceedings have commenced. Where a court have been obtained there will most likely already be a liquidator appointed for the Utopia insolvency proceedings. As stated above, it is imperative that the liquidators in both states will engage to agree the best solution and practice to ensure creditors enjoy maximum benefits under the insolvency proceedings and that all parties are treated fairly.*

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

0.5

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 corporate debtor (company) is incorporated in the United Kingdom. Due to its business operations across multiple states (jurisdictions), having assets in multiple states (jurisdictions) and with creditors and directors in several states, the liquidator will face cross-border challenges. There are no uniform set of rules that applies to insolvency proceedings. Domestic corporate insolvency laws are not adequate to deal cross-border situations and due to these limitations, there can be a conflict of law.*

*International law will be applicable and this requires the liquidator to ask the following questions:*

- **Forum that will have jurisdiction in the matter -**  
*If a court can hear and determine the matter especially in this instance where the company has assets and offices in other states. It is critical to establish the court with jurisdiction over the matter. During local insolvency proceedings other disputed matters may surface and could entail foreign elements i.e., assets in other states. Similarly, during of foreign insolvency proceedings, issues may be brought before the local (domestic) court who then needs to confirm the effect on the foreign proceedings and whether local court can hear the matter.*

*The English court has jurisdiction to wind up a foreign debtor incorporated under the law of another country. It must be determined if an English winding-up order of an English company will find application in international insolvency proceedings where there are foreign assets of foreign creditors. Since the liquidator must take control of all the assets and property of the company, it will depend upon the recognition of (i) the winding up order and (ii) the appointment of the liquidator in the foreign state where the assets are located.*

- **Recognition of foreign proceeding and the effects in terms of enforceability**  
*A foreign judgment on the same subject matter implies private international law applies.*  
*If there is a foreign judgement there could be unwillingness to recognise the foreign claims (e.g., tax) - based on domestic law and public policy or to shield claims of local creditors. This has the effect of the multiple states having competing claims for the debtor's assets. A foreign judgment poses the questions on (i) the effect of the judgement and (ii) the execution thereof. The*

*UNCITRAL Model Law on Recognition and Enforcement was developed because of this difference in the nature of the judgment.*

- *Applicable governing law*  
*If the local court decided to hear the matter, they must agree the law that will apply. Different law systems will apply different approaches to this question. England's common law determines that the law of the court applies unless a party invokes the choice of law issue which will only be when it is beneficial for the party to apply the foreign law. Proof of foreign law is a question of fact opposed to civil law systems where foreign law is a question of the law to be applied.*
- *England has adopted the UNCITRAL Model Law on Cross-border Insolvency (MLCBI) which allows for co-operation and co-ordination in concurrent and parallel foreign insolvency proceedings. Accordingly, courts and liquidators must engage and co-operate to ensure the company's estate is administered efficiently in order to maximise returns to creditors. This mandate to engage is progressively applied via the Protocols or Cross-Border Insolvency Agreements, which is then approved by the relevant courts<sup>3</sup>.*
- *In a recent case *McGrath v Riddell*<sup>4</sup> the Lord Hoffmann at paragraph 30 stated"*

*"[t] primary rule of private international law....applicable to this case is the principle of (modified) universalism, which has been the golden thread running through English cross-border insolvency law since the eighteenth century. That principle requires that English courts should, so far as is consistent with justice and UK public policy, co-operate with the courts in the country of the principal liquidation to ensure that all the company's assets are distributed to its creditors under a single system of distribution."*

*The liquidator in a local (domestic) liquidation had to surrender assets in the local liquidation to the foreign liquidator for distribution under foreign laws.*

**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 8 out of 15**

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<sup>3</sup> UNCITRAL itself developed a Practice Guide on Cross-Border Insolvency Agreements (2009) to provide a potential framework for co-operation under the MLCBI.

<sup>4</sup> [2008] UKHL 21.

**\* End of Assessment \***

**TOTAL MARKS 38/50**

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