



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 7 out of 10

QUESTION 2 (direct questions) [10 marks]

Question 2.1 [maximum 2 marks]

Explain what the term "international insolvency law" means.

I note Wessels' definition quoted in the guidance notes, however in my view, arguably, there is no such thing as "international insolvency law" due to the fact that there is no single law or set of rules that countries are obliged to adopt when it comes to insolvency (international or domestic). That said, international insolvency law may be conceptualised (at least in part) by reference to: (i) various treaties which seek to support the operation of insolvency processes across proximate jurisdictions (e.g. in Europe and Latin America); and (ii) the UNCITRAL Model Law on Cross-Border Insolvency (the UNCITRAL Model Law), which is available to any country to adopt (in full or as amended) into domestic law. According to Mevorach, "the [UNCITRAL] Model Law is in fact on the road to universalism"¹ as regards international insolvency.

¹ "On the Road to Universalism: A Comparative and Empirical Study of the UNCITRAL Model Law on Cross-Border Insolvency", Irit Mevorach, Cambridge University Press, 19 December 2011

Question 2.2 [maximum 5 marks]

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

Universality envisages the administration of all matters related to a debtor's insolvency process (including assets / rights / liabilities, etc.) worldwide being channelled through a single jurisdiction, to the exclusion of others. Accordingly, one set of courts (in the relevant jurisdiction) would be seised of the matter of the debtor's insolvency or bankruptcy proceedings and theoretically, it would not be possible to commence proceedings or execute judgments in other jurisdictions. Similarly, there would be one appointment to be taken by an officeholder (noting that some appointments may be joint / panel) in the relevant jurisdiction, and the officeholder would consider and deal with the interests of all creditors, worldwide. Territoriality envisages compartmentalised insolvency proceedings in each jurisdiction where a debtor has assets, with an officeholder appointed in each jurisdiction to consider and deal only with assets / rights / liabilities, etc. in that jurisdiction. Accordingly, foreign creditors (with qualifying interests / rights) would potentially need to seek recourse in various jurisdictions, depending on where the relevant asset / insolvency proceeding was taking place, and could end up in a situation where they are pursuing a claim against a debtor (with entities in different jurisdictions) considered insolvent in one jurisdiction but not in another.

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.

In recent years, three prominent jurisdictions in the Middle East have amended their bankruptcy or insolvency laws so as to make the new regimes better aligned with more developed jurisdictions and with international practice, and to address cross-border insolvency matters.

1. The United Arab Emirates (UAE):

a. Dubai International Financial Centre (DIFC): Article 117(3) of the DIFC Insolvency Law 2019 incorporates (as Schedule 4 to the Law) the UNCITRAL Model Law, with certain modifications for application in the DIFC.

<https://www.cambridge.org/core/journals/european-business-organization-law-review-ebor/article/abs/on-the-road-to-universalism-a-comparative-and-empirical-study-of-the-uncitral-model-law-on-crossborder-insolvency/4847C46F1314F54FF028DA37053D621F> accessed 8 October 2023

b. Abu Dhabi Global Market (ADGM): Article 271 of the ADGM Insolvency Regulations 2022 incorporates (as Schedule 10 to the Regulations) the UNCITRAL Model Law on Cross-Border Insolvency, with certain modifications for application in the ADGM.

c. Outside of the DIFC and the ADGM, the UAE's Federal Bankruptcy Law 2016 is currently undergoing revision. However, it is yet to be confirmed whether the UNCITRAL Model Law will form part of the new Federal law and related regulations.

2. Bahrain: The Bahrain Bankruptcy Law 2018 contains provisions on cross-border insolvency. According to an article published by Al Tamimi & Co in February 2019, such provisions will be interpreted in accordance with the guidelines of the UNCITRAL Model Law on Cross-Border Insolvency.² I also note that Bahrain has adopted the Guidelines for Communication and Cooperation between Courts in Cross-Border Insolvency Matters" also known as the 'JIN Guidelines'.

3. Saudi Arabia: The Saudi Arabian Bankruptcy Law was issued in 2019, with the accompanying Rules of Cross-Border Bankruptcy Proceedings 2022 serving to enact provisions that are based on the UNCITRAL Model Law on Cross-Border Insolvency.

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 processes may have various objectives, depending on the process. For example, the objective of liquidation is to liquidate, and therefore realise, all assets of either an individual or a corporate for the benefit of creditors. However, the end result for a corporate will be dissolution, whereas you cannot dissolve an individual (historical practices aside).

One of the primary objectives of insolvency for individuals is protection from harassment from creditors. This has to be balanced against ensuring that creditors are satisfied to the fullest extent possible, whilst allowing an individual to maintain a certain standard of living and to ultimately, make a 'fresh start' following the completion of procedures. Accordingly, specific rules operate to exclude certain assets from an individual's pool of assets to be liquidated and the proceeds distributed amongst creditors. Such exclusions are not generally found in corporate insolvency regimes (although can be agreed in consensual, informal proceedings).

² "Bahrain Introduces New Insolvency Regime", Siddharth Goud (Al Tamimi & Co), February 2019
<https://www.tamimi.com/law-update-articles/the-new-difc-insolvency-law/> accessed 30 September 2023

A pro-debtor objective for individuals, e.g. the availability of a 'fresh start' (including, for example, an individual's credit rating being no longer affected after a certain number of years) may not necessarily be appropriate post corporate insolvencies, where policy considerations may mean a more pro-creditor approach to mitigate avoidance of obligations and to support the prevention of fraud.

It would be beneficial for you to consider the corporate objective, where possible, to preserve the business, or viable parts thereof and where personal liability has been abused, to impose personal liability on the responsible persons.

2.5

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.

Terminology can have different meanings and impacts in different jurisdictions, e.g. 'secured creditor', 'security interest', 'security rights', and one of the major difficulties encountered when dealing with insolvency law in a cross-border context is how to deal with security (referred to in the guidance notes as 'real security'). The difficulty stems from the fact that the different forms of security available to a creditor are invariably founded in domestic law. The primary issue is that not all jurisdictions recognise all the different types of security or the priorities afforded by such in foreign jurisdictions. An example is floating charges, which afford priority on distribution in an English insolvency (or other common law-based insolvency processes) but are generally not recognised as a concept in the USA (or other civil law-based insolvency processes).

Other difficulties may be encountered by differing meanings of 'liquidation' and 'reorganisation' and rules on the trigger for insolvency and the date on which a debtor is placed into a formal process. For example, a global enterprise debtor may be considered insolvent in one jurisdiction, but not in another.

Further detail would be beneficial. For example, consideration of Westbrook's 9 key issues.
2.5

Question 3.3 [maximum 5 marks]

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

As I have noted above, various treaties which seek to support the operation of insolvency processes across proximate jurisdictions (e.g. in Europe and Latin America), and the UNCITRAL Model Law is being adopted by many countries that are reviewing and amending or re-enacting their domestic insolvency laws. However, the purpose of the UNCITRAL Model Law is "encouraging cooperation and coordination between

jurisdictions, rather than attempting the unification of substantive insolvency law”,³ which, in my view, is a more realistic objective than seeking to harmonise domestic insolvency laws on a global scale. The harmonisation of insolvency processes on a global scale would be impossible, because whilst the primary objective of any insolvency processes is to rescue or liquidate a debtor for the benefit of creditors, all matters that proceed any insolvency process are defined by a plethora of domestic laws that differ from jurisdiction to jurisdiction, e.g. the structure of companies, of lending, borrowing and the taking and perfecting of security. Then, at the point of insolvency, there may be differing triggers, different options as regards processes, differing timing considerations, priorities, orders of distribution, etc. Insolvency is not a ‘one size fits all’ and in my view, the promotion of cooperation, recognition and coordination amongst jurisdictions is a more realistic aim that therefore has a better chance of making a positive impact on the current difficulties that we see in terms of cross-border (or international) insolvencies.

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.

2

Marks awarded 7 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

³ UNCITRAL website: https://uncitral.un.org/en/texts/insolvency/modellaw/cross-border_insolvency accessed 8 October 2023

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.

Article 15(1) of the UNCITRAL Model Law on Cross-border Insolvency (MLCBI) provides: "[a] foreign representative may apply to the court for recognition of the foreign proceeding in which the foreign representative has been appointed." Article 4 of the MLCBI provides: "The functions referred to in this Law relating to recognition of foreign proceedings and cooperation with foreign courts shall be performed by [the Utopia Court]." Article 9 provides: "A foreign representative is entitled to apply directly to a court in this State."

Accordingly, subject to the below, the liquidator may apply to the Courts of Utopia for recognition of the Erewhon liquidation proceedings and therefore the recognition of any moratorium imposed and a resultant stay of the Utopia court proceedings.

In preparing such application, the liquidator would need to consider whether the insolvency proceedings in Erewhon are a 'foreign main proceeding' or a 'foreign non-main proceeding' under the MLCBI. Nadir's centre of main interests (COMI) is in Utopia (having recently moved from Erewhon) and accordingly, subject to the below, the Erewhon liquidation proceedings may be considered a foreign non-main proceeding. However, Nadir has to be considered to have an 'establishment' in Erewhon pursuant to the meaning prescribed at Article 2(f) of the MLCBI. In order to establish this, I require further information as regards Nadir's operations in Erewhon.

I would advise the liquidator to take advice on whether the redomiciliation of Nadir's COMI from Erewhon to Utopia may have been an abuse of process in circumstances where it appears that Nadir may have been indebted to creditors in Erewhon at the time, and what remedies / recourse may be available to him/her (for and on behalf of the creditors) in the circumstances.

5

Question 4.2 [maximum 2 marks]

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

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

(a) Yes, because if Apex had filed winding-up proceedings in Utopia (rather than a debt claim), the pending Utopia winding-up proceedings would be considered

(for the Erewhon liquidator's purposes) as a foreign main proceeding. Article 17 of the MLCBI requires the foreign proceeding to be current or pending at the time of the recognition decision.

(b) Yes, for the reasons set out above; it makes no difference under the MLCBI that the winding-up proceedings are current rather than pending.

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

.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 is incorporated and has its head office in the DIFC in the United Arab Emirates (UAE). As explained above, the DIFC is a financial free zone which is a separate jurisdiction to 'onshore' Dubai / the UAE. Pursuant to Article 117(3) and Schedule 4 of the DIFC Insolvency Law 2019, the DIFC incorporates the MLCBI into its insolvency law, with certain modifications for application in the DIFC.

International insolvency issues:

- 1. Issue 1: Choice of forum and the potential for parallel insolvency proceedings. Although the following considers an intra-UAE issue, it is a pertinent consideration for issues that may arise between different jurisdictions (or 'states') in the circumstances: The UAE Federal Bankruptcy Law 2015 which operates in 'onshore' UAE / Dubai does not deal with cross-border matters, and does not incorporate the MLCBI. Accordingly, where the debtor has operations in both the DIFC and in onshore Dubai, there may be a 'race' to commence so as to seek to utilise one insolvency / bankruptcy system over the other. Although the process for recognising and enforcing DIFC Courts' judgments in onshore Dubai (and vice versa) is straight-forward, and although the DIFC has adopted the MLCBI, the concept of the onshore Dubai Courts recognising a***

DIFC insolvency proceeding (and vice versa) is much less familiar and may result in circumstances where there are parallel insolvency proceedings for the same group corporate in both the DIFC and in onshore Dubai. It may also mean that the insolvency representative (IR) may be dealing with various claims in the Dubai (or other onshore UAE) Courts which would not be subject to any moratorium imposed as a result of the DIFC proceedings given that the onshore UAE courts are unlikely to recognise the DIFC insolvency proceedings. This goes to issues including that of co-ordinated claims procedures, identified as one of the nine key issues in cross-border insolvency by Westbrook.

- 2. Issue 2: Determination of “foreign proceedings”. In the context of the above, one of the issues that the IR may face is determining what constitutes a “foreign proceeding”. This categorisation is important for a number of reasons, including in the context of rights of foreign creditors, recognition and relief. First, the IR must consider whether onshore Dubai insolvency proceedings can properly be considered a “foreign proceeding” because Dubai and the DIFC are both located within the UAE and it is trite law that the DIFC Courts, for example, are considered Courts of Dubai and Courts of the UAE - so, insolvency proceedings being heard in both onshore Dubai and in the DIFC should be assessed in this context. This will require the IR to track through the meaning of “foreign proceeding” using the DIFC Insolvency Law. Pursuant to the DIFC Insolvency Law, a “Foreign Company” has the meaning given to it in the DIFC Companies Law. The DIFC Companies Law prescribes that a Foreign Company is a body corporate incorporated in any jurisdiction other than the DIFC. Accordingly, a corporate incorporated in onshore Dubai would be considered a Foreign Company for the purposes of the DIFC Insolvency Law and therefore the operation of MLCBI, as incorporated by Schedule 4. Therefore the IR could, in the DIFC, apply the MLCBI (with certain modifications for application in the DIFC) in dealing with cross-border issues as between the DIFC and Dubai and as between DIFC and any other foreign jurisdiction in which the debtor had operations.*
- 3. Issue 3: Creditor rights. The DIFC debtor may own assets which are located in onshore UAE (i.e. outside of the DIFC). For example, a DIFC-based debtor owns property in onshore Dubai. That property is mortgaged to a bank. Although the DIFC Insolvency Law deals with the rights and participation of secured creditors, the bank may seek to enforce its security directly, via the onshore Dubai Courts by filing a ‘mortgage case’ in order to have the property sold at auction. The Dubai Courts would hear and execute that claim without reference to the IR or the DIFC insolvency proceedings. Whilst a secured creditor ranks at the top of the distribution list on liquidation and may be expected to exercise self-help remedies, any such proceedings would result in the IR incurring time and costs dealing with the matter. Further, any surplus sale proceedings would be paid into the Dubai Courts’ Treasury and would therefore be at risk of distribution to other judgment creditors, creating an effective preference for*

unsecured creditors. This is also a risk where the debtor owns property / assets in any other non-MLCBI jurisdiction.

4. *Issue 4: Recognition of the DIFC insolvency proceedings by foreign courts. Where the foreign jurisdiction is a party to the MLCBI, recognition should be straight-forward. However, where the foreign states are not party to the MLCBI, not only will recognition be more challenging (or indeed, fail), there is often confusion over what the DIFC is and its status. This may create additional difficulties for the IR when dealing with jurisdictions in which the debtor has operations that are not party to the MLCBI. It may be assistive if the foreign jurisdiction has a Memorandum of Guidance or Understanding with the DIFC Courts, e.g. China, so that it should, at least, recognise the DIFC as a jurisdiction in its own right.*

For an approach more closely applied to the facts, see the 'Model' Answer for four key international insolvency issues raised by the facts and facing the insolvency representative in this scenario.

6.5

Marks awarded 12 out of 15

* End of Assessment *

TOTAL MARKS 34.5/50

A good paper that correctly identifies many of the issues raised and satisfactorily substantiates several answers.