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**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 2022.

**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 2022**. The assessment submission portal will close at **23:00 (11 pm) BST (GMT +1) on 15 October 2022**. 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.

1. This statement is true since all countries have implemented the UNCITRAL Model Law on Cross-Border Insolvency.
2. This statement is untrue since there are huge differences in both the approach and insolvency legislation of various jurisdictions.
3. This statement is true since all systems have at least the same general insolvency concepts.
4. 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.

1. This statement is true since this Act introduced imprisonment of debt.
2. This statement is untrue because it dealt with the distributions of the proceeds derived from the proceeds of selling the assets of the estate.
3. This statement is true since it introduced the notion of discharge.
4. 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.

1. This statement is true because UNCITRAL’s model legislative guidelines apply automatically to all member States.
2. This statement is true because all member States supported its automatic implementation in their respective jurisdictions.
3. 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.
4. 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.

1. This statement is true since business rescue is important for socio-economic reasons.
2. This statement is true because liquidation is viewed as a medieval and outdated process.
3. This statement is untrue since there is still a need for both liquidation and rescue procedures in insolvency systems.
4. 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.

1. The statement is untrue, the requirements and principles do differ and pose problems in a cross-border case.
2. 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.
3. This statement is untrue since avoidable dispositions and executory contracts do not pose any problems in a cross-border case.
4. 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?

1. Public International Law.
2. UNCITRAL Legislative Guide on Insolvency Law.
3. World Bank Principles for Effective Insolvency and Creditor Rights Systems.
4. 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?

1. ALI / III Global Guidelines Applicable to Court-to-Court Communication in Cross-Border Cases (2012).
2. EU Cross-Border Insolvency Court-to-Court Communications Guidelines (2014).
3. UNCITRAL Model Law on Cross-border Insolvency (1997).
4. 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?

1. Montevideo Treaty on International Commercial Law (1889).
2. Montevideo Treaty on International Commercial Terrestrial Law (1940).
3. Montevideo Treaty on International Procedural Law (1940).
4. 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?

1. Proceedings to restructure a debtor that is facing the likelihood of insolvency.
2. Definition of “centre of the debtor’s main interests”.
3. A centralised insolvency register of insolvency proceedings opened in member states.
4. 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?

1. The local Court’s jurisdiction over the Debtor.
2. The standing of the foreign Creditor to sue for its debt in the local Court.
3. The foreign liquidator’s standing to request a stay of the local proceedings.
4. The fact that the debt owed to the Creditor is in a foreign currency.

**QUESTION 2 (direct questions) [10 marks]**

**Question 2.1 [maximum 2 marks]**

Explain what the term “international insolvency law” means.

It is a set of rules or regulations that regulates the commencement of insolvency proceedings in one state with the debtors having assets or subsidiaries or creditors operating in another one or multiple states.

Fletcher defines it as follows “International insolvency or Cross- Border insolvency should be considered as a situation in which an insolvency occurs in circumstances which in some way transcend the confines of a single system, so that a single set of domestic insolvency law provision cannot be immediately and exclusively applied without regard to the issues raised by the foreign elements of the case”

The present business operations have gone global, it has given rise to businesses establishing branches, subsidiaries and taking loans in foreign country and this has made domestic law inadequate hence there is a need to establish a clear and unfair rule that will guide the conduct of cross border insolvency operation should it arise.

**Question 2.2 [maximum 5 marks]**

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

Universality and Territoriality are one of the two main approaches or theories that guide in the features of an Insolvency system.

**UNIVERSALITY**

This theory is based on the principle that there should be only one insolvency proceedings

procedure /law that will cover all the debtor’s assets and debts worldwide. This not withstanding the domestic law of foreign country where the assets or creditors situated. This means once a proceeding commences or opens, no other insolvency proceeding should in any form commence. The features of such are as follows

One forum should have a jurisdiction

The chosen state could be where the centre of debtor’s interest is located

The participation of all creditors worldwide is guaranteed with all claims being treated on an equal basis.

For it to be effective as a universal approach, it must address certain issues such as choice of law and priority rule.

It also requires a degree of level of confidence in foreign legal system and insolvency proceedings.

Advantages of Universality

1. It lowers costs of cross-border insolvency proceedings
2. It is regarded as a best approach in satisfying the interest of those involved in cross- border insolvency
3. It resonates well with the globalisation and the business organisations that operate international markets.

Disadvantages of Universality

1. The ‘home” country standard may not be properly or adequately defined hence there is a bit of confusion.
2. It may give room to strategic manipulation by the home state.
3. It may create uncertainty in the domestic markets
4. There may be difficulty in establishing a single state i.e., the home state for the debtors where insolvency proceedings will be exclusively opened.
5. Sometimes it may be politically and practically difficult to achieve.

**TERRITORIALITY**

This is based on the principle that insolvency proceedings may commence in every state/jurisdiction where the debtor holds assets but they, would be limited and restricted to the property within the state where the proceedings commence.

This in effect, there might be multiple insolvency proceedings running concurrently with respect to the same debtor.

Advantage

1. This shows that national interests are being protected before any assets are passed on to foreign state.
2. This addresses local interests and local creditors who act within the domestic market and where only an evaluation of local assets is often made before credit is given.

Disadvantage

It may not give a true picture of both assets and debts of the debtors. Debtors may be declared solvent where assets are located while insolvent where debts are located. This is misleading of the status of the debtors.

**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.

1. The Gulf Cooperation Council (GCC) comprises Bahrain, Kuwait, Oman, Qatar, Saudi Arabia, and United Arab Emirates have worked closely with the World Bank for over 40 years to evolve an insolvency proceeding instruments. In 2009, the first comparative survey was launched as a joint initiative of Hawkamah Institute for Cooperative Governance, World Bank, the OECD, and INSOL International. It was based on World Bank’s Principles for Effective Insolvency and Creditors Rights System .as an indicator of best practice.
2. Some of the Countries in Middle East have reformed their domestic insolvency laws. Such counties as UAE in 2016 and 2019, Saudi Arabia in 2018 and Dubai in 2019
3. Bahrain in 2018 and Dubai International Financial Centre in 2019 adopted UNCITRAL Model Law on Cross- Border Insolvency.

**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.

Individual or Personal Insolvency may be defined as an inability to pay debits as they fall due. In some jurisdiction, a specified amount is stipulated. The creditor issues a demand and if neither with or set aside in accordance with the rules or in some cases execution or other process in respect of a judgement debt.

Corporate Insolvency is the inability of a company to pay its debts as they become due or when its liabilities exceed its assets. It may also be known that the company is in financial distress which caused by persistent liquidity/cash flow problem.

In some jurisdictions, the principles of Individual and corporate Insolvencies may be the same but, in most cases, there are differences due to the very nature of the type of debtors being dealt with.

In some jurisdictions, bankruptcy is attributed to personal insolvency while liquidation is attributed to corporate insolvency.

Individual cannot be wound up or dissolved as in corporate insolvency which would be dissolved after liquidation.

The issue of Estate is a major issue to be considered in Personal, assets such as household are exempted but this is not so in corporate insolvency.

Once an individual has being declared, bankrupt there are some rights and privileges that would be denied. Some duties might also be denied. It may not be possible to nominate or appointed the bankrupt individual to political position or board position of corporate body. The individual might also be denied a capacity to obtain a new credit or holding office of insolvency representative in an insolvency proceeding

In respect of Corporate Insolvency, liquidation may give rise to certain personal consequence of its directors, there may be a personal claim against directors, they may also be barred in holding a board position based on their role in the demise of the failed corporate organisation.

Rehabilitation in the case of Individual will afford debtor to be discharged and the debtor may continue without the pre- bankrupt new burden. The individual may grant a new phase of life.

For a corporate body, it cannot be rehabilitated once it is liquidated. After the liquidation, the company is dissolved, and this will be the end of the matter. The company is declared dead.

Meanwhile an insolvent company may be rehabilitated through rescue mechanisms. The object of corporate rescue is to preserve the business

**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.

Cross-border insolvency cases do arise due to many different reasons among which are the debtors having economic affairs with a foreign country and assets in more than one state.

The implication of this is that insolvency may commenced in more than one state concurrently.

There are numerous challenges or difficulties to be encountered in such a situation. These difficulties are enumerated below.

1. Lack of a single set of insolvency rule applicable globally.
2. Though there are known definitions of insolvency, and this is embedded in every domestic law, at international level, there may be a difficulty in agreeing the definition of insolvency.
3. There are fundamental differences between the legal systems and the domestic laws of countries involved in the cross-border insolvencies., there is a need for harmonisation of the domestic laws.
4. There is a question in which jurisdictions insolvency proceedings may be opened?
5. What country’s law should be applied in respect aspects of the case? and
6. What international effects will be accorded to proceedings conducted at a particular forum?

**Question 3.3 [maximum 5 marks]**

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

The following multilateral organisations have played and continue playing key roles in harmonisation of domestic insolvency laws.

European Union

United Nations Commission on International Trade Law (UNCITRAL)

International Bar Association (IBA)

World Bank

INSOL International

The steps taken so far

If the first draft of EC convention on Bankruptcy and Related Matters in 1970 had been adopted which required contracting states to enact a ‘uniform law into domestic law, this would have been a major plus in resolving the issue. Notwithstanding the subsequent drafts though did not attempt to achieve a uniform law but it addresses issues such as jurisdiction, choice of law and recognition and enforcement.

IBA commenced the drafting of a Model Bankruptcy Code to be available for any state to consider when developing the domestic insolvency laws and later contributed significantly to the development of UNCITRAL project which resulted in the Legislative guide.

In 2004, UNCITRAL promulgated a legislative guide on insolvency Law, which 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 existing laws and regulations. It addresses a wide range of aspects of insolvency laws, and this has been expanded over the years. It has gone ahead to enact UNCITRAL model aw on Cross- Border Insolvency.

World Bank has also gone ahead to produce a guideline on the regulation of insolvency entitled principles for effective insolvency and creditors / Debtors’ regime.

The combination of UNCITRAL Legislative Guide together with the World Bank is known as “The Insolvency Standard “

. This is regarded as the international best practice standard for Insolvency regime.

**IMPACT ON ADDRESSING INSOLVENCY ISSUES**

Businesses are going global and there is a lot of regional economic integration going. Africa has launched regional free trade area agreement this means that a lot of intra-regional trade will be taking place. Each other region has one form of regional trade collaboration. This exposes more corporates to cross border trading hence insolvency. There is a need for a strong and effective regime as a means of preventing or limiting financial crises and facilitates an orderly workouts.

This also helps business managers to take early steps to address corporate failures.

The idea of adaption of International Insolvency Standards will have a great impact on international trade which helps in preserving employment, reduce costs of business and increase availability of credit.

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

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

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

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

**Question 4.1 [maximum 5 marks]**

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

One of the key principles of UNCITRA Model Law on Cross-border insolvency is cooperation and coordination.

Since Utopia has adopted the Model Law, this law will mandate the utopia court to cooperate with Erewhon Court and the Erewhon liquidator. Erewhon will apply for the enforcement of court judgement of Erewhon’s court.

**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?

1. Apex had filed proceedings to wind-up Nadir, but the matter had not yet been heard.
2. Apex had obtained a court order to wind-up Nadir in Utopia prior to the Erewhon winding-up order.
3. The issue is where the insolvency proceeding commences, since it has not been heard in Utopia, the decision in Erewhon will still subsist.
4. If a court order has been obtained before the Erewhon. The order in Utopia will subsist.

**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?

Nigeria as a country.

The four issues are:

Harmonisation of domestic laws

Uniform choice of law rules

Uniform recognition laws

Cooperation and Coordination to provide recognition and enforcement.

**\* End of Assessment \***