



**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 Course Administration page of the course web pages after the submission date on 15 October 2021.

## **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: 202122-514.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 2021**. The assessment submission portal will close at **23:00 (11 pm) BST (GMT +1) on 15 October 2021**. 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 **9 pages**.

**Commented [DB1]:** Please read and follow the instructions! I had to do this for you!

## **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 6 out of 10

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

##### Question 2.1 [maximum 2 marks]

Explain what the term "international insolvency law" means.

According to B. Wessels, international insolvency law is commonly described in international literature as a body of rules concerning certain insolvency proceedings or measures, which cannot be fully enforced, because the applicable law cannot be executed immediately and exclusively without consideration being given to the international aspect of a given case.

This is an authoritative quote. The answer would be improved if it also included information in your own words to indicate your personal understanding of the explanation also.

1.5

##### Question 2.2 [maximum 5 marks]

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

For universality, there should be a single insolvency proceeding covering all of the debtor's assets and debts worldwide. Once the proceeding is opened, no other insolvency proceedings should be commenced or execution to be taken against the debtor's assets. It is regarded by its proponents as the best approach in satisfying the interests of those involved in cross-border insolvency cases, with lower costs being an additional incentive. The major obstacle would be the difficulty in establishing a single State where the insolvency proceedings is to be exclusively opened.

For territoriality, insolvency proceedings may be commenced in every State / jurisdiction where the debtor holds assets, but that they should be territorially limited and restricted to property within the State where the proceedings are opened. It 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. One major drawback when applying the principle is that a debtor may be declared insolvent in one State but not in another thus creating uncertainty in administration of the case.

5

**Question 2.3 [maximum 3 marks]**

Describe **three** recent examples of developments in the Middle East region to reform domestic insolvency laws or to address international insolvency Issues.

The first regional, comparative survey of insolvency systems in the Middle East and North Africa (MENA) region was launched in 2009 as a joint initiative of the Hawkamah Institute for Corporate Governance, the World Bank, the OECD and INSOL International. It was based on the World Bank's Principles for Effective Insolvency and Creditor Rights Systems (2005) as an indicator of best practice.

In recent years a number of Middle East States have reformed their domestic insolvency laws, such as the UAE in 2016 and 2019, Saudi Arabia in 2018 and Dubai in 2019.

On international insolvency specifically, Bahrain adopted the Model Law on Cross-Border Insolvency in 2018 as did the Dubai International Finance Centre in 2019.

3

Marks awarded 9.5 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.

Sealy and Hooley distinguish as follows between the objectives of insolvency for individuals and corporations:

Individuals: to protect the debtor from harassment by his creditors; to enable the debtor to make fresh start – especially in less blameworthy cases (where insolvency has not been brought about by the actions or conduct of the debtor); to reduce indebtedness by making contributions from present and future income to the estate while at the same time taking his personal circumstances into consideration.

Corporations: where possible to preserve the business, or viable parts thereof – not necessarily the company; where personal liability has been abused, to impose personal liability on responsible persons.

**This answer displays a satisfactory understanding of the issues. To improve your responses, ensure they are commensurate with the mark allocation – while Q 3.1 asks for a brief note, it is for 5 marks. It would be beneficial to also consider principles applicable to both and those only applicable to one or the other, for example exempt/excluded assets only applies to natural persons.**

4

#### **Question 3.2 [maximum 5 marks]**

Write a brief note on the difficulties that may be encountered when dealing with insolvency law in a cross-border context relating to pertinent differences in the relevant systems.

According to Friman, the problems in addressing “cross-border insolvency cases” start in finding a common insolvency language. “Insolvency” is normally quite clearly defined in a domestic context. Traditionally, “insolvency” means a situation where the combined total of the outstanding liabilities exceeds the measurable value of all the debtor’s assets and some degree of durability of this state of negative net worth is normally required. However, a more short-term inability to service debts, for example, a liquidity crisis, is sometimes also considered sufficient for the commencement of “insolvency proceedings”. As a result, at an international level it may be quite difficult to define the term “insolvency”.

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

**Further detail would be beneficial, e.g. consideration of Westbrook’s 9 key issues.**

3.5

#### **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.

1. 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.
2. In early 2000s, the World Bank produced guidelines on the regulation of insolvency, entitled Principles for Effective Insolvency and Creditor/Debtor Regimes. One of the Principles states that “insolvency proceedings may have international aspects, and a country’s legal system should establish clear rules pertaining to jurisdiction, recognition of foreign judgments, cooperation among courts in different countries, and choice of law. Non-discrimination between foreign and domestic creditors is one of they key factor to effective handling of cross-border matters.
3. The European Union is moving towards greater uniformity in the domestic insolvency laws of member states. In 2010, the European Parliament published a report on the Harmonisation of Insolvency Law at EU Level. The report outlined differences between domestic insolvency laws within the EU and identified a number of areas of insolvency law where harmonisation at EU level is believed to be worthwhile and archivable.

These moves to harmonise domestic insolvency laws can reduce the significance of an insolvency crossing a State boundary and the need for regulators or courts to resolve international insolvency issues.

**It would be beneficial to elaborate upon your opinion on how much impact these are likely to have in addressing international insolvency issues**

4

Marks awarded 11.5 out of 15

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

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

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

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

**Question 4.1 [maximum 5 marks]**

Assume the UNCITRAL Model Law on Cross-border Insolvency has been adopted by Utopia without modification, except as required to domesticate it. For example, the Cross-border Insolvency Act of Utopia names its local laws relating to insolvency and its competent court

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.

1. Under Article 9 of the Model Law, a foreign representative is given the right to direct access to the Utopia's court
2. Under Article 24 of the Model Law, upon recognition of a foreign proceeding, the foreign representative may, provided the requirements of the law of this State are met, intervene in any proceedings in which the debtor is a party.
3. Under Article 19 of the Model Law, interim relief may be granted upon foreign representative's request in order to protect debtor's assets or the creditor's interests, which includes staying execution against the debtor's assets, etc.
4. Furthermore, upon recognition of the foreign main proceeding, certain automatic relief ensues including a stay of actions of individual creditors (e.g. by Apex) against the debtor (i.e. Nadir) (subject to a condition that the recognition order is made in relation to foreign non-main proceedings).

**It would be beneficial to address COMI (or establishment law) and application in detail.**

4

#### **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) Under Article 29 of the Model Law, where a foreign proceeding (by Erewhon's creditor) and a local proceeding (by Apex) are taking place concurrently regarding the same debtor (Nadir), the Utopia's court shall seek cooperation and coordination under Articles 25, 26 and 27, and the Model Law requires that any relief granted for the benefit of the foreign proceeding must be consistent with the local proceeding. **More information is required on Utopia's insolvency laws on stays.**
  - (b) Additional information like whether Erewhon had adopted the Model Law is needed to determine how the liquidator should co-operate with Nadir's liquidator. **The MLCBI as drafted by UNCITRAL does not require reciprocity. The MLCBI provisions on concurrent insolvency proceedings would come into effect.**

1

#### **Question 4.3 [maximum 8 marks]**

##### **NB: This question is not related to Questions 4.1 and 4.2**

A court has ordered the commencement of an insolvency proceeding against a corporate debtor in the State of its incorporation and head office. The company has operated business in a number of States and has assets (real property or interest in land, other tangible assets and intangible assets); creditors (including taxation / revenue authorities) and directors in several States.

Select a country for the company's incorporation and, based on the insolvency laws of the country you select and the brief facts provided, describe four key international insolvency

issues facing the insolvency representative in this scenario. For each issue, what domestic laws or international instruments apply to assist the insolvency representative address these four issues?

[Type your answer here]

No answer has been provided for question 4.3

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Marks awarded 5 out of 15

**\* End of Assessment \***

Marks awarded 32 out of 50