



## 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**.

## **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.

Mark awarded 8 out of 10

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

### Question 2.1 [maximum 2 marks]

Explain what the term "international insolvency law" means.

International Insolvency Law can be referred to as a body of rules which concern certain insolvency proceedings or measures, which is unable to be fully enforced. This is due to the fact that applicable laws are unable to be executed immediately and exclusively in the absence of consideration given to the international aspect of a given case (B Wessels, International Insolvency Law, (Kluwer Law International, 2006), supra note 1, p 1).

**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.

Universality and territoriality are concepts in cross-border insolvency that are direct opposites of each other in relation to the way in proceedings against a debtor are conducted.

Under the Universality approach, there is only one insolvency proceeding which covers all of the assets of the debtor worldwide. Upon commencement of these proceedings, it should not be possible to commence other insolvency proceedings or execute other

assets of the debtor. This approach takes the idea that all of the debtor's assets should be included in the insolvency proceedings and that the office holder has the means to obtain and control all of these assets. Inherently, creditors worldwide should have the opportunity to participate in the proceedings with their claims treated equally. The issue with this approach is establishing which state should be recognized as the 'home' state for the insolvency proceedings to be opened.

Territoriality on the other hand follows the notion that insolvency proceedings may commence in every state or jurisdiction that the debtor holds assets. These assets are territorially limited to properties that are held within the state that the proceedings commenced. Under this approach, multiple proceedings run concurrently in relation to the same debtor, and creditors are restricted to which jurisdiction they may file their claims. This means that local creditor claims must be protected before assets can be transmitted overseas. This approach is heavily focused on protecting the interest of local creditors, however it presents an issue whereby the debtor can be considered insolvent in one state, but not in another, thereby allowing the debtor to retain its assets in the state where it is not insolvent.

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.

Three examples of developments in the Middle East region to reform domestic insolvency laws to address international insolvency issues include:

#### **UAE in 2019**

On 17 November 2019, the UAE passed a new insolvency law, geared towards regulating cases of insolvency in the UAE which will bring relief to debtors as currently, default of debt can escalate to a criminal liability. (Gulf Business, "The UAE's new insolvency law: What we know so far", <https://gulfbusiness.com/uaes-new-insolvency-law-know-far/>, 21 November 2019).

#### **Saudi Arabia in 2018**

Saudi Arabia has passed its new bankruptcy law which should assist in attracting foreign direct investment, boost credit growth, and allow the country's SME sector to thrive and winding up companies become easier. (The National News, "Saudi Arabia approves landmark bankruptcy law". <https://www.thenationalnews.com/business/economy/saudi-arabia-approves-landmark-bankruptcy-law-1.707236>, 22 February 2018).

#### **Dubai in 2019**

In 2019, Dubai International Financial Center (DIFC) enacted a new Insolvency Law with the aim to balance the needs of stakeholders in the context of distressed and bankruptcy situations in DIFC, which will facilitate a more efficient and effective bankruptcy restructuring regime (Dubai International Financial Centre, "Dubai International Financial Centre Enacts New Insolvency Law", <https://www.difc.ae/newsroom/news/dubai-international-financial-centre-enacts-new-insolvency-law/>, 11 June 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.

The differences regarding the objectives of insolvency for individuals and corporations are summarized best by Sealy and Hooley (M A Clarke et al, Commercial Law (Oxford University Press, 2017) chap 28.

Sealy and Hooley state that with respect to individuals, the objective is to protect the debtor from harassment by creditors; to allow the debtor access to a fresh start; and to reduce indebtedness through contributing towards the debt from present and future income.

On the other hand, the objective of insolvency for corporations is to preserve the business or viable parts of it.

Overall, for both individuals and corporations, the objective is to ensure pari passu distribution to creditors, excluding situations where creditors have priority, to ensure fair treatment across the board.

**There is scope for elaboration, for example with respect to excluded assets.**

**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.

There is significant difficulty which may be encountered when dealing with insolvency law in a cross-border context relating to pertinent differences in the relevant systems.

In short, there is no single set of insolvency rules that applies globally as local countries will have differences in their approach to their policies and procedures, varying legal systems, and the source of their insolvency law adopted – typically whether it originated from common law or civil law. There are also different considerations such as whether the local law is pro-debtor or pro-creditor.

To start, even the definition of insolvency varies across territories – some may adopt insolvency to mean liabilities exceeding assets, whereas others adopt it to mean that debts are not being serviced. While the definition may appear to be the same, the latter simply means cash-flow insolvency, whereby a debtor may hold illiquid assets (which may be substantial), but may be unable to turn it into cash quickly to service its debts.

Some key issues which creates difficulties in dealing with insolvency law in a cross-border context includes recognition of foreign representatives; moratorium on creditor actions; creditor participation; existence of executor contracts; priorities and preferences; discharge; and conflict of law issues.

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

**4.5**

#### **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.

There are several multilateral steps taken to promote the harmonisation of domestic insolvency law. This includes the introduction of the United Nations Commission for International Trade Law (UNCITRAL) Legislative Guide on Insolvency Law; the EC Convention on Bankruptcy and Related Matters (1970); the International Bar Association (1997); and the World Bank's Principles for Effective Insolvency and Creditor/Debtor Regimes.

The EC Convention on Bankruptcy and Related Matters had potential to create Uniform Law for States that adopted it. It also allowed for provisions for issues such as fraud against creditors; set-offs; extension of bankruptcy to individuals managing the companies; and the bankruptcy of vendors where a contract of sale exists with the retention of title. The overarching issue however, is that subsequent draft European insolvency conventions did not focus on achieving uniform law.

Similarly, there is the International Bar Association draft Model Bankruptcy Code which provided consideration for states to develop their domestic insolvency law, but the code did not proceed, but rather aided in the development of the UNCITRAL project. The UNCITRAL Legislative Guide on Insolvency Law was seen as a guide to aid nations in developing new laws and regulation and to address instances of cross-border insolvency.

Additionally, the World Bank Principles for Effective Insolvency and Creditor/Debtor Regimes provide guidance to developing countries to promote a convergence of insolvency law, and together with the UNCITRAL Legislative Guide provide international best practise standards for insolvency regimes.

With the above steps taken, it appears that international insolvency issues can be dealt with and they reduce the need for insolvency crossing state boundaries or regulators and courts needing to resolve international insolvency issues.

I believe that the impact of this is significant, especially in circumstances where a country's domestic insolvency laws were not amended since initial adoption in a colonial era. This may cause local systems to be inefficient with dealing with these matters. If adopted, the steps taken above can aid in reform of domestic laws especially with globalization and pressure from foreign investors who require confidence for creditor protection. Furthermore, the implementation of the steps can aid countries in acquiring funding where the IMF and World Bank have stipulations for insolvency law reform as a condition of loan support.

**5**  
**Marks awarded 13.5 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.

It is first important to know and understand the Cross-border Insolvency Act of Utopia. As the UNCITRAL Model Law on Cross-border Insolvency (MLCBI) has been adopted, it is safe to assume that the ability exists for co-operation and co-ordination of concurrent proceedings across jurisdictions.

With MLCBI, the main goal is to maximize the value of the estate of the debtor and to harmonize the proceedings to minimize expenses. In this instance, the Erewhon liquidator can communicate with the court in Utopia requesting that one court will defer to the other court, and large transactions will not occur (ie: Apex will not be repaid) without the consent of the Erewhon court.

The Erewhon liquidator may have relevant grounds for having the Erewhon court take lead as the primary proceedings on the basis that all creditors appear to be resident in Erewhon, including Apex who commenced the proceedings in Utopia.

**The MLCBI is significant for its provisions on recognition and relief in 4.1 and on concurrent insolvency proceedings in 4.2. Its provisions on cooperation and coordination are secondarily important as the liquidator is primarily seeking advice about staying court proceedings in Utopia.**

**2.5**

**Question 4.2 [maximum 2 marks]**

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

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

Under (a), my answer would not change as the situation remains the same. Under (b), as a winding up order is initiated and chances are that a liquidator is already appointed, it may be easier to have the Utopia court take the primary proceedings as the liquidator would have commenced action to evaluate all the assets of the debtor and seek to identify all of its creditors, including creditors in Erewhon.

**The MLCBI is significant for its provisions on concurrent insolvency proceedings in 4.2.**

**Apply the MLCBI provisions on concurrent insolvency proceedings (see Article 29)**

.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?

A country for this scenario is Australia. Four key international insolvency issue facing the insolvency representative are: recognition of foreign representative; creditor participation; co-ordinated claims procedure; and conflict of law.

Firstly, the issue is whether the commencement of insolvency proceedings in Australia will be recognized in other territories where the debtor has assets, creditors and other directors.

The second issue is that creditors should be able to take part pari passu in distribution from the assets of the creditors, and that their claims process can be co-ordinated, regardless of the jurisdiction. Consideration should be given to priorities in the distribution of these claims.

Finally, with assets and creditors across borders, an issue is raised with regard to which law is applicable, thereby creating a conflict of law issue.

In Australia, there are statutory provisions which allow for the co-operation between Australian and foreign courts. Through the Cross Border Insolvency Act (2008), recognition and co-ordination is possible. Furthermore, Australia has adopted the UNCITRAL Model Law on Cross-Border Insolvency which is also accepted by many other territories, in addition to accepting the UNCITRAL Practise Guide on Cross Border Insolvency Agreements.

**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. Then apply the current Australian laws on CBI in detail to such issues.**

5

**Marks awarded 8 out of 15  
MARKS AWARDED 39/50**

**\* End of Assessment \***