



## 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.

Marks awarded 9 out of 10

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

### Question 2.1 [maximum 2 marks]

Explain what the term "international insolvency law" means.

In today's globalized world there is relatively free movement of trade/assets/finance as compared to past. Thus, assets and liabilities of corporations are being created in multiple jurisdictions.

However, there is no single insolvency law which can be applied across jurisdictions. Each country has developed their own set of insolvency laws which differ in the substance, principles, procedures etc. and are primarily focused on their own domestic market and related issues. These domestic legal systems find it difficult dealing with insolvencies which have cross border implications. Multiple issues arise ranging from jurisdiction of the domestic legal system to which law to be applied etc. To overcome these shortcomings, stakeholders have developed certain set of rules/guidelines/principles.

These set of rules/guidelines/principles can be applied to insolvencies having cross border implications and are collectively referred as "International Insolvency Law"

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### Question 2.2 [maximum 5 marks]

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

Universality and Territoriality are the two main (opposite) approaches which are widely suggested as a solution to the issues arising out of cross-border insolvency.

Universality – This approach suggests only one insolvency proceedings worldwide covering all of debtor’s assets and liabilities. The proceedings can be opened in the state where debtor has its main business interest. Once this proceeding starts, no other proceedings can be opened in any other jurisdiction. All creditors across the world can file their claim in this proceeding and an officer can be appointed with specific tools/powers to conduct the process. This approach will save time as well as money and is expected to be more efficient. However, this approach is impractical as of now as no state government will easily give up their jurisdiction and control. Additionally, insolvency law also interacts with general law which might need modification by states.

Territoriality – This approach suggests starting multiple insolvency proceedings (all running concurrently) in each jurisdiction that the debtor has assets in. Each proceeding is restricted in terms of the assets in the particular jurisdiction and the creditors who can file a claim. This is to protect the national interest and local creditors.

The cross-border issues can be resolved by way of more co-operation and co-ordination between various proceedings in different jurisdiction.

While this approach can be costly, it is more practical to achieve given limitation of local government in acceptance of foreign jurisdictions.

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### **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. Bahrain adopted the Model Law of Cross-Border Insolvency in 2018
2. Dubai adopted the Model Law of Cross-Border Insolvency in 2019
3. Saudi Arabia has reformed its domestic insolvency law in 2018
4. UAE has reformed its domestic insolvency law in 2016 and 2019
5. Hawkamah Institute of Corporate governance along with world bank, OECD, INSOL International launched a comparative survey of insolvency systems across Middle East in 2009.

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**Marks awarded 10 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.

Objectives of Insolvency for Individuals-

1. Protect the debtor from harassment by creditors. Normally, creditors to individual debtors are financial institution with substantial legal prowess. Insolvency laws are to ensure against misuse of such power imbalance by creditors to harass the debtor.
2. To allow individual debtors to make fresh start especially in cases where the insolvency/bankruptcy are due to reasons beyond the control of the debtor.
3. To agree to a formal payment plan by finding a balance between debt servicing and individual's personal expenses need by restructuring debt servicing from present and future cash flows of individual.
4. To exclude certain essential assets of the Individuals from attachment to maintain his dependents.
5. To limit the new debt taking capacity of bankrupt individual as well as take up certain positions wherever necessary.

Objectives of Insolvency for Corporations-

1. To protect the economically viable businesses from being destroyed by actions of individual creditors. This is done by restructuring of the business as well as debt through a formal process.
2. To ensure orderly dissolution of unviable businesses to maximise the recovery for all stakeholders.
3. To investigate the abuse for power by corporation's stakeholder/ employee/ management/ directors and assign personal liability wherever necessary.

**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.

Following are few of the difficulties that may be encountered in dealing with insolvency law in a cross-border context.

1. Choice of Forum – Does the court have the jurisdiction to hear and decide on the insolvency case. This depends on the relation of the parties and disputes with the jurisdiction. Presence of proceedings from other jurisdictions, foreign parties and foreign assets might further complicate the issue. A generally acceptable criteria is Centre of Main Interest (COMI) i.e. where the debtor is based out of .
2. Choice of Law – Decision on which law to be applied i.e. law of the forum or any other law. This depends on the type of legal system i.e. common law or civil law as well as local nuances.
3. Recognition/Enforcement of Foreign proceedings – Can a foreign judgement on the same matter can be enforced. Various aspects such as the court issuing the order, type of judgment, effect of judgment, presence of treaties, etc complicate the matters.
4. Differing insolvency language – There is no standard definition for “Insolvency” across various jurisdictions. This might result in a corporation being insolvent in one jurisdiction while at the same time being solvent in another.



5. Priority of claims – Different jurisdiction treat different claims in differing priority. While some jurisdiction might give priority to some claims such as employees and government taxes, other might not. This becomes even more complex when there is presence of security, netting arrangement, set-off etc.

**Further detail would be beneficial. For example, 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.

Following are some of the Multilateral steps taken in 21<sup>st</sup> century to promote harmonisation-

1. UNCITRAL’s legislative guide on insolvency (2004)

This is a guide prepared by United Nations commission on International Trade to be used by the member states as reference when drafting/revising the domestic insolvency laws. This guide provides a common framework to bring in consistencies between insolvency laws of various member states of UN. This framework is not mandatory and can be customised by member states as per their domestic needs.

2. The World Bank Principles for Effective Insolvency and Creditor/Debtor Regimes

This guide was developed in early 2000 and revised in 2005, 2011, 2015 and April 2021. IMF and The World Bank requires developing nations to reform their insolvency laws basis this guide and UNCITRAL as a condition of loan support. This has helped in harmonisation efforts.

3. European Parliament Report on Harmonisation of Insolvency law

European Parliament Report published in 2010 has identified number of differences in insolvency laws of member states which can be harmonised. Also, European Commission has come up with a report on its Action plan on Building a Capital Market Union (CMU) with stated objective of convergence of insolvency laws.

While all the above are quite effective in jurisdictions which have adopted these model laws the issue remains that majority of the developing world are yet to make substantial progress in revising their insolvency laws. This makes it still quite difficult to drive efficiencies in the international insolvency process. Additionally, even the current available instruments (mentioned above) are far from perfect and some issues such harmonising penalty for avoidable transaction yet to be fully addressed.

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

**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.

UNCITRAL Model Law on Cross-border Insolvency has been adopted by Utopia without modification. This mandates co-operation and communication between Utopian court and any other foreign courts including that of Erewhon.

UNCITRAL practice guide on cross-border insolvency cooperation will provide the liquidator with information on practical aspects of co-operation and communication with Utopian court. Liquidator can negotiate with Apex for a co-ordination agreement and approach the court once finalised. Else petition utopian court highlighting the liquidation order passed by Erewhon's court.

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

**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.
  - a. Matter has not been heard – Make the utopian court aware of the liquidation order passed by Erewhon court and get it implemented in Utopia. Apex can become part of the existing liquidation process as a creditor.
  - b. Utopian court has order wind-up order – Negotiate co-ordination agreement with Utopian liquidator to ensure assets are fairly distributed between all creditors including apex and Erewhon creditors.

**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 choice of country is England

Following are four key international insolvency issues facing the insolvency representative

1. Difference in the domestic insolvency laws of each jurisdiction-  
Since the corporate has assets and liabilities (creditors) in multiple geographies, domestic insolvency laws will be applicable in absence of any single international insolvency law. Insolvency laws of each jurisdiction differs making the process very complicated. The result of insolvency process might differ from jurisdiction to jurisdiction.  
While each jurisdiction may have different legal systems/process, Insolvency representative can try to get courts to apply uniform approach to the choice of law. This way the results of the process might be same irrespective which state applies it. This is possible especially in countries who are bound by regional treaties or conventions such as EU member states and Nordic countries.
2. Recognition of Foreign proceedings/court orders –  
England has adopted the UNICTRAL model law in 2006. Hence some jurisdictions specially the one which have a treaty with England or which have adopted UNICTRAL Model Law such as USA, EU etc, the insolvency representative will have find it relatively easy to get the English Court orders such as moratorium recognised in those jurisdictions.  
For other jurisdiction, there might be multiple proceedings in different jurisdictions increasing the cost and inefficiencies in the entire process.
3. Coordination and communication between courts -  
Multiple jurisdictions will give rise to multiple insolvency process against the same debtor which will be difficult and costly to manage. Insolvency representative can use the UNICTRAL Model Law on Cross-Border Insolvency or Judicial Insolvency Network's Guidelines for communications and co-operations between courts in Cross-Border Insolvency matters or similar guides to establish a protocol to manage the insolvencies in multiple jurisdictions more efficiently. England is part of the Judicial Insolvency Network along with multiple other countries. Insolvency representative can also reduce the number of concurrent insolvency processes in different jurisdiction by using the Centre of Main Interest of the corporate as England and consolidating insolvency proceedings in English Courts.
4. Domestic international insolvency provision -  
Some states have made provision in their domestic insolvency laws for recognition and co-operation with foreign proceedings. Some states have provision to even apply the court orders of foreign courts. Insolvency representative can use such provisions in the respective domestic

insolvency laws to get the insolvency proceedings in England recognised in domestic jurisdiction.

**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 English laws on CBI to such issues.**

**3.5**

**Marks awarded 6.5 out of 15  
MARKS AWARDED 39 /50**

**\* End of Assessment \***