



## 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 9 out of 10

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

### Question 2.1 [maximum 2 marks]

Explain what the term "international insolvency law" means.

A body of rules formulated with the view of addressing insolvency issues that have foreign element(s).

More detail would have improved the mark awarded for this sub-question.

1

### Question 2.2 [maximum 5 marks]

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

Universality provides that there would only be one insolvency proceeding to deal with all of the debtor's assets and debts (i.e. not confined to national borders). In other words, only one forum would have jurisdiction to hearing the insolvency proceeding. The creditors from any part of the world would have the right to participate in the insolvency proceedings and their claims would be treated equally. The outcome of the insolvency proceeding would have extraterritorial effect. The officeholder would be prescribed with the power to deal with all of the debtor's assets.

On the contrary, territoriality provides that there could be multiple insolvency proceedings to deal with all of the debtor's assets and debts which are within a national border. In other words, (a) multiple insolvency proceedings with respect of the same debtor could be running concurrently; and (b) insolvency proceedings commenced in a particular state or jurisdiction

may only cover the debtor's assets and debts located in that state or jurisdiction. The creditors' claims across different states or jurisdictions might not be treated equally. The outcome of the insolvency proceedings would only have local effect. The officeholder's power would be restricted to that particular state or jurisdiction.

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 recent examples of development in the Middle East region to reform domestic insolvency laws or to address international insolvency issues include:

1. The launch of the first regional and comparative survey of insolvency systems.
2. Domestic insolvency laws have been reformed in some of the Middle East states.
3. Bahrain and the Dubai International Financial Centre adopted the Model Law on Cross-Border Insolvency in 2018 and 2019 respectively.

**More detail would have improved the mark awarded for this sub-question.**

2

**Marks awarded 8 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 objective of insolvency for individuals is to allow the bankrupt individuals to have a “fresh start”. After the bankruptcy administration, the individual will be discharged from making repayment of the debts. The pre-bankruptcy debts no longer exist.

The objective of insolvency for corporations is to realise the assets of the insolvent corporations and distribute the proceeds to creditors and other stakeholders. Upon the completion of the distribution, such corporations will be dissolved. If corporate rescue is viable, the objective of which would be to save the corporations so that the businesses could be preserved and the corporations could continue to operate.

**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.**

**3.5**

#### **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.

The difficulties that may be encountered when dealing with insolvency law in a cross-border context relating to pertinent differences in the relevant systems include:

1. The creditors might be attracted to engage in forum shopping.
2. Conflicts of laws might arise if there are multiple parallel proceedings.
3. The occurrence of inconsistent judgments – In multiple parallel insolvency proceedings conducted in different states or jurisdictions, the differences in legal systems might give rise to inconsistent judgments, for example different places might have different definitions of “insolvency”.
4. The domestic norms dictate the position of the creditors and stakeholders – Different systems might have different rules on the priority with respect of proceeds distribution.
5. The power of the officeholders might be different in different systems.

**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.

The World Bank produced the Principles for Effective Insolvency and Creditor / Debtor Regimes (the “**World Bank Principles**”). The World Bank Principles (amended from time to time) cover the regulation of insolvency. International organizations, such as the International Monetary Fund and the World Bank, have structured the loans so that they are conditional on bankruptcy reform undergone in accordance with the World Bank Principles. By doing so, states or jurisdictions relying on such loans would make reference to the World Bank Principles thereby creating uniformity between those states or jurisdictions.



UNCITRAL promulgated the Legislative Guide on Insolvency Law (the “**Legislative Guide**”). The Legislative Guide aims to provide guidance to national authorities and legislative bodies for the purposes of formulating new laws and regulations and assessing the existing laws and regulations. Given that the Legislative Guide covers an expanded scope of insolvency law, if more states make reference to the Legislative Guide, more similarities should be found across the different states or jurisdictions.

The European Parliament published a report on the Harmonisation of Insolvency Law. By identifying the areas of insolvency law that could be harmonised and providing the justification for harmonisation, it draws attention of the states or jurisdictions at the EU level and encourages different states or jurisdictions to follow the same set of rules.

All in all, harmonisation creates legal certainty and clarity for cross-border businesses thereby allowing them to understand how their rights of creditors could be protected and the way in which businesses could be restructured at times of financial distress (as the case may be).

**There is scope to elaborate upon on how much impact these are likely to have in addressing international insolvency issues**

**4.5**

**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.

Given that the UNCITRAL Model Law on Cross-border Insolvency (the “**Model Law**”) has been adopted by Utopia, the Cross-border Insolvency Act of Utopia would have mirrored the Model Law to a certain extent, including but not limited to provisions on (a) the cooperation and coordination on cross-border proceedings and (b) recognition and enforcement of foreign judgments.

If the liquidator appointed by the Erewhon Court would like to stop Apex's court action against Nadir in Utopia (the "**Utopia Court Action**"), he/she should look into the Cross-border Insolvency Act of Utopia and identify whether or not there are statutory provisions on the recognition of the winding up order made by the Erewhon Court (the "**Erewhon Court Order**"). If the Erewhon Court Order could be recognized, it would be treated as if it is an order made by the Utopia Court. The next step would then be to check whether a winding up order would give rise to an automatic stay of proceedings. If so, there would be a likelihood that the Utopia Court Action could be stayed.

**The question requires candidates to apply the relevant MLCBI articles to the facts provided in more detail than that above.**

**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.

The Cross-border Insolvency Act of Utopia should still be reviewed to find out whether it contains any provisions on cooperation and coordination between the Utopia Court and Erewhon Court. If there are, an insolvency agreement might be reachable so that the liquidator's objective could be achieved.

- (b) Apex had obtained a court order to wind-up Nadir in Utopia prior to the Erewhon winding-up order.

The Cross-border Insolvency Act of Utopia might not be relevant if Apex had already obtained a winding up order in Utopia. Whether the Utopia Court Action could be stayed is a matter of Utopia domestic law and would not have the cross-border elements.

**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 company is incorporated in the British Virgin Islands ("**BVI**"). The insolvency representative appointed by the BVI Court may not be recognized in other states where the company's assets, creditors and directors are located. As a result, the insolvency representative may not be able to:

1. commence or attend foreign proceedings;
2. handle concurrent parallel foreign proceedings;
3. realize the foreign assets of the company; and
4. investigate the foreign affairs of the company.

The applicable international instruments include:

1. UNCITRAL Model Law on Cross-Border Insolvency;
2. JIN Guidelines (Guidelines for Communication and Cooperation between Courts in Cross-Border Insolvency Matters; and
3. Common law to recognize and grant assistance to an insolvency officeholder<sup>1</sup>.

**Provide detail on the relevant CBI laws to the issues you identify (for this 8 mark question).**

**For another approach that is 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.**

**3**  
**Marks awarded 6 out of 15**  
**MARKS AWARDED 34.5/50**

**\* End of Assessment \***

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<sup>1</sup> *Net International Property Limited v Adv. Eitan Erez* (BVIHCMAP2020/0010, 22 February 2021).