



## 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 7 out of 10

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

#### Question 2.1 [maximum 2 marks]

Explain what the term "international insolvency law" means.

Various guidelines, principles and rules, as outlined by inter-state literature, treaties and agreements, which may be, but are not necessarily, adopted by the individual nation states as enforceable laws relating to issues of enforcement, recognition and procedural matters of insolvencies with issues affecting more than one nation state.

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

1.5

#### Question 2.2 [maximum 5 marks]

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

Universality is when the insolvency laws of more than one jurisdiction are the same as or congruent with each other, allowing an insolvency proceeding in one jurisdiction to have effect within another jurisdiction, without the need for separate proceedings in each jurisdiction, thereby effecting the creditors in each jurisdiction in the same way. Conversely, territoriality describes the notion that separate insolvency proceedings should be commenced in each relevant jurisdiction, under that jurisdictions particular insolvency laws and principles, such that a the rights of creditors within that particular jurisdiction are paramount to the insolvency proceeding, without necessary regard to issues or creditors of the same estate within another jurisdiction.

More detail would have improved the mark awarded for this sub-question. There is scope to elaborate with respect to recognition and effect in that for example, with universalism, recognition and effect requires that other States recognise that one set insolvency proceedings (that all agreed is the appropriate jurisdiction) and recognise it as having extraterritorial effect in their States.

3.5

**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.

- (1) The comparative survey of insolvency systems across much of the Afro-asiatic region, the first of such survey in the region, which was conducted from 2009 and aimed to determine key differences in domestic and international insolvency laws within the various participating jurisdictions (2) Bahrain's and Dubai's adoption of UNCITRAL model law on insolvency in 2019; (3) Reformation of domestic laws in Saudi Arabia, UAE / Dubai from 2016 to 2019, which generally aimed to modernise those jurisdictions' laws, including in relation to financial restructurings, and affected both small, medium and large business.

3

**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 main differences arise from the fact that corporations, whilst distinct legal personalities, are not actually natural persons who have individual agency and carry on lives of their own. In this regard, it is necessary for insolvencies of individuals to consider the ability of that person to continue on living and to recover from the proceeding. This results in a number of differences, particularly, 1) Jurisdictions generally allowing personal bankrupts to retain certain assets up to maximum values to allow them to continue living, participate in the workforce, etc, whereas on the other hand, there is no need for a cooperation to continue 'living' or to retain assets following an insolvency and so the objective is simply to maximise obtain maximum value in respect of all possible assets or claims to then be distributed to creditors. 2) individuals must be able to continue their lives whilst an insolvency appointment continues and, therefore, are allowed to carry on employment or certain business in their own capacity during and separately from an insolvency proceeding (although income contributions to the bankrupt estate would generally be required). Conversely, laws generally provide that a corporation cannot, without approval of or by force of any agent other than the appointed insolvency practitioner, trade or carry on business separately to the insolvent estate following the commencement of the insolvency appointment.

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.

1) Differences in the treatment of classes of creditors (e.g. one jurisdiction may provide that government taxation debts are afforded priority over ordinary trade creditors, whereas the other jurisdiction may provide that all unsecured creditors rank *pari-passu*) 2) the enforceability of certain judgments obtained against the insolvent party across different jurisdictions (e.g. a debt enforceable in one jurisdiction not being enforceable in another); 3) the priority of costs of the insolvency, including liquidators' remuneration and trading costs, personal liability; 4) common law principles relating to the not being applicable in civil law jurisdiction relevant to the insolvency proceeding, or vice-versa. One relevant example of this is the principle of a floating charge over a group of assets (e.g. cash or debtors) – a type of security enforceable across English common law systems but which is commonly not provided for in the legislation of civil law jurisdictions.

**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.

Various multilateral steps have been taken including 1) the 2009 UNCITRAL Practice Guide on Cross-border Insolvency cooperation, 2) American Law Institute (ALI) and International



Insolvency Institute (III) NAFTA guidelines on court to court communications in 2000, 3) ALI-III global guidelines on court to court communication in cross-border cases (2012), Judicial Insolvency Network (JIN) guidelines for communication and cooperation between Courts in cross-border matters (2016), 4) UNCITRAL model law on Recognition and Enforcement of Insolvency-Related Judgments with Guide to Enactment in 2018. In my opinion, these developments, and others, are indicative of the participating nations' objective to create a more congruent international insolvency system and are likely to have a significant impact in doing achieving that objecting, as supported and seen by the globalisation of the world economic and social structures generally. However, the effectiveness of these multilateral steps is entirely dependent on the individual jurisdictions' adoption of the relevant principles and laws set out by the multilateral literature. In this regard, it will be interesting to see whether such multilateral steps continue to have significant effect if populist nationalist political movements, which would appear to have increasing traction in countries such as the USA, UK and Australia (all already having relatively robust international insolvency law provisions), gain traction in jurisdictions yet to enact the principles set out in such multilateral literatures.

**Please refer to the model answer.**

**3**

**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.

A number of issues are relevant. 1) Erewhon liquidation will have to be recognised, or a liquidator separately appointed, in Utopia before the liquidator can take steps such as staying court action against Nadir. The Cross-Border Insolvency Act, having adopted without substantive change the Model Law will deal with recognition and set out the procedures for same, including jurisdiction etc. (2) Another important issue will be the co-ordination between the foreign (existing) proceeding and the new, or newly recognised, local proceeding. The Model Law will also deal with this issue. It would be useful to know for this question whether Apex holds a security interest in any property of Nadir, and whether there are differences in the local laws in dealing with security interests, as the Cross-Border Act will set out how to deal with such differences, and this will effect the rights of Apex to enforce that security against Nadir.

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

3.5

**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) No – it would not make a difference. (b) – Yes, it would make a difference. **Why?**

**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?

Incorporated in BVI.

1) Whether the liquidation is capable, at all, of being recognised in a foreign jurisdiction in which the insolvency company has ownership or interests in assets. For example, prior to its adoption of the UNCITRAL Model Law on Cross-Border insolvency in 2021, Brazil had no mechanism for recognising foreign insolvencies and liquidators were unable to be recognised or take substantive steps in Brazil. If the company has assets in such a jurisdiction, the liquidators would be ineffective in their enforcement actions in that jurisdiction.

2) Priority of taxation/revenue authorities' claims – for example BVI does not provide for priority of tax/government revenue authorities' claims in insolvent estates and same will rank equally with other unsecured creditors (to the extent the relevant authority is unsecured). However, the foreign States' legislation may afford priority to their taxation authorities' claims. To the

extent such other state has adopted the UNCITRAL Model Law on Cross-Border Insolvency, the law will deal with this issue.

3) Examination of Directors located outside the BVI. Liquidators have power to examine directors of insolvency companies under the BVI Insolvency Act 2003. However, given that certain directors are located outside the BVI, enforcing such an entitlement may be difficult. For example, if the Directors are located in the USA, the USA would not automatically recognise the BVI insolvency proceeding and the applicable legislation. This is further complicated by the fact that the USA's legislation is substantially different from the English common law on which the BVI's legal system is based. However, in that case, the ALI-III 2012 guide on cross-border court communications would assist and the BVI Court may be able to issue a Letter of Rogatory to US Court's in order to have the Directors examined in the US Court, without the need for recognition or a separate insolvency proceeding in the US.

4) If a parallel proceeding is needed to enforce the company's in another state, the issue will arise of how costs of the parallel proceedings are dealt with, including in terms of their relative priorities (e.g. BVI legislation affords broad priority to the costs of the liquidation over unsecured claims, whereas other jurisdictions may be more limited in what is given priority and what approvals are required etc) as well as how the parallel liquidations are dealt with efficiently. The Judicial Insolvency Network (JIN) addressed this issue in a 2016 conference in Singapore and the guidelines issued as a result have been adopted by various jurisdictions around the world.

**8**  
**Marks awarded 12 out of 15**  
**MARKS AWARDED 38.5/50**

**\* End of Assessment \***