



**FORMATIVE ASSESSMENT: MODULE 1**  
**INTRODUCTION TO INTERNATIONAL INSOLVENCY LAW**

This is a **formative assessment** relating to **Module 1** and is designed to provide candidates on the Foundation Certificate course with some direction and guidance as to the form and content of assessments on the course as a whole. The submission of this assessment is **not compulsory** and the mark awarded will not count towards the final mark for Module 1 or the course as a whole. However, students are encouraged to submit this assessment as part of their orientation for the submission of the formal (summative) assessments for all the modules on the course.

The Marking Guide for this assessment will be made available on the Course Administration page of the course web pages after the submission date on 15 October 2021.

## **INSTRUCTIONS FOR COMPLETION AND SUBMISSION OF ASSESSMENT**

**Please read the following instructions very carefully before submitting / uploading your assessment on the Foundation Certificate web pages.**

1. You must use this document for the answering of the assessment for this module. The answers to each question must be completed using this document with the answers populated under each question.
2. All assessments must be submitted electronically in MS Word format, using a standard A4 size page and a 11-point Arial font. This document has been set up with these parameters – **please do not change the document settings in any way. DO NOT** submit your assessment in PDF format as it will be returned to you unmarked.
3. No limit has been set for the length of your answers to the questions. However, please be guided by the mark allocation for each question. More often than not, one fact / statement will earn one mark (unless it is obvious from the question that this is not the case).
4. You must save this document using the following format: **[studentID.assessment1formative.]**. An example would be something along the following lines: 202122-514.assessment1formative. **Please also include the filename as a footer to each page of the assessment** (this has been pre-populated for you, merely replace the words “studentID” with the student number allocated to you). **Do not include your name or any other identifying words in your file name. Assessments that do not comply with this instruction will be returned to candidates unmarked.**
5. Before you will be allowed to upload / submit your assessment via the portal on the Foundation Certificate web pages, you will be required to confirm / certify that you are the person who completed the assessment and that the work submitted is your own, original work. Please see the part of the Course Handbook that deals with plagiarism and dishonesty in the submission of assessments. **Please note that copying and pasting from the Guidance Text into your answer is prohibited and constitutes plagiarism. You must write the answers to the questions in your own words.**
6. The final submission date for this assessment is **15 October 2021**. The assessment submission portal will close at **23:00 (11 pm) BST (GMT +1) on 15 October 2021**. No submissions can be made after the portal has closed and no further uploading of documents will be allowed, no matter the circumstances.
7. Prior to being populated with your answers, this assessment consists of **9 pages**.

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

## **ANSWER ALL THE QUESTIONS**

### **QUESTION 1 (multiple-choice questions) [10 marks in total]**

Questions 1.1. – 1.10. are multiple-choice questions designed to assess your ability to think critically about the subject. Please read each question carefully before reading the answer options. Be aware that some questions may seem to have more than one right answer, but you are to look for the one that makes the most sense and is the most correct. When you have a clear idea of the question, find your answer and **mark your selection on the answer sheet by highlighting the relevant paragraph in yellow**. Select only **ONE** answer. Candidates who select more than one answer will receive no mark for that specific question.

#### **Question 1.1**

It should be relatively easy to develop a single system to deal with cross-border insolvency since all jurisdictions have more or less the same local insolvency law rules.

- (a) This statement is true since all countries have implemented the UNCITRAL Model Law on Cross-Border Insolvency.
- (b) This statement is untrue since there are huge differences in both the approach and insolvency legislation of various jurisdictions.**
- (c) This statement is true since all systems have at least the same general insolvency concepts.
- (d) The statement is true since the historical roots of all insolvency systems are the same.

#### **Question 1.2**

The Statute of Ann, 1705 was a very important piece of legislation for the development of English insolvency law.

- (a) This statement is true since this Act introduced imprisonment of debt.
- (b) This statement is untrue because it dealt with the distributions of the proceeds derived from the proceeds of selling the assets of the estate.
- (c) This statement is true since it introduced the notion of discharge.**
- (d) This statement is true since it introduced fraudulent conveyances into English law.

#### **Question 1.3**

The purpose of the UNCITRAL Legislative Guide (2004) has direct application in all the member States of the UN.

- (a) This statement is true because UNCITRAL's model legislative guidelines apply automatically to all member States.
- (b) This statement is true because all member States supported its automatic implementation in their respective jurisdictions.

(c) This statement is untrue because the Legislative Guide serves merely as soft law and contains best practice to be considered when countries revise their own insolvency legislation.

(d) This statement is untrue since the Legislative Guide is only available for use by developing countries when reforming their own insolvency laws.

#### Question 1.4

Modern rescue proceedings have replaced liquidation as an insolvency procedure in most systems.

(a) This statement is true since business rescue is important for socio-economic reasons.

(b) This statement is true because liquidation is viewed as a medieval and outdated process.

(c) This statement is untrue since there is still a need for both liquidation and rescue procedures in insolvency systems.

(d) This statement is untrue since some systems have no formal rescue procedure.

#### Question 1.5

The principles and requirements for avoidable dispositions and executory contracts are the same in all jurisdictions – hence these do not pose problems in a cross-border insolvency matter.

(a) The statement is untrue, the requirements and principles do differ and pose problems in a cross-border case.

(b) This statement is untrue because the insolvency laws of the State where the original insolvency order is issued will apply to all the other States involved in the matter.

(c) This statement is untrue since avoidable dispositions and executory contracts do not pose any problems in a cross-border case.

(d) The statement is untrue since avoidable dispositions and executory contracts may be disregarded in a cross-border case.

#### Question 1.6

The domestic corporate insolvency statute of a country makes no mention of the possibility of a foreign element in a liquidation commenced locally. The country has ratified a regional treaty on insolvency proceedings that contain provisions on concurrent insolvency proceedings over the same debtor in a neighbouring treaty state.

In a local liquidation commenced under the domestic corporate insolvency statute, to what law can the local court refer in order to resolve an international law issue that has arisen because of concurrent insolvency proceedings in the neighbouring state?

(a) Public International Law.

(b) UNCITRAL Legislative Guide on Insolvency Law.

(c) World Bank Principles for Effective Insolvency and Creditor Rights Systems.

(d) Private International Law.

#### Question 1.7

Which one of the following documents mandates co-operation or communication between courts in concurrent insolvency proceedings on the same debtor, which are being conducted in different nation states?

(a) ALI / III Global Guidelines Applicable to Court-to-Court Communication in Cross-Border Cases (2012).

(b) EU Cross-Border Insolvency Court-to-Court Communications Guidelines (2014).

(c) UNCITRAL Model Law on Cross-border Insolvency (1997).

(d) JIN Guidelines for Communication and Cooperation between Courts in Cross-Border Insolvency Matters (2016).

#### Question 1.8

Latin and Middle America states have ratified various multilateral conventions and treaties that address international insolvency issues. While they promote unity of proceedings in the treaty states where a debtor has a single commercial domicile, they acknowledge the possibility of concurrent proceedings.

Which of the following conventions and treaties does **not** provide for judicial co-operation where there are surplus funds remaining in a proceeding in one treaty state and there are concurrent insolvency proceedings over the same debtor in another treaty state?

(a) Montevideo Treaty on International Commercial Law (1889).

(b) Montevideo Treaty on International Commercial Terrestrial Law (1940).

(c) Montevideo Treaty on International Procedural Law (1940).

(d) Havana Convention on Private International Law (1928).

#### Question 1.9

The Council Regulation on Insolvency Proceedings (European Insolvency Regulation) (2000), which applies in all European Union member states except Denmark, was reviewed after a decade's operation. An amended European Insolvency Regulation (EIR) Recast (2015) was adopted in 2015 and took effect in June 2017.

Which of the following aspects of international insolvency is **not** addressed in the EIR Recast?

(a) Proceedings to restructure a debtor that is facing the likelihood of insolvency.

(b) Definition of "centre of the debtor's main interests".

(c) A centralised insolvency register of insolvency proceedings opened in member states.

(d) Co-operation and co-ordination provisions applicable to corporate groups.

**Question 1.10**

An unsecured Creditor is owed monies by the Debtor for services it supplied locally. It has issued proceedings to recover the debt in the local Court. The Debtor has moved its registration and head office to the local country from its original place of incorporation in a foreign country. The Creditor is incorporated and has its head office in that foreign country. The contract to supply, which was created by exchange of emails sent between the head offices, denominates the debt in the currency of the foreign country. The Debtor is being wound-up in the foreign country and the foreign liquidator seeks recognition and a stay in the local Court proceedings. What aspect is an international insolvency issue?

(a) The local Court's jurisdiction over the Debtor.

(b) The standing of the foreign Creditor to sue for its debt in the local Court.

(c) The foreign liquidator's standing to request a stay of the local proceedings.

(d) The fact that the debt owed to the Creditor is in a foreign currency.

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 is a body of rules concerning certain insolvency proceedings which cannot be fully enforced or the applicable law cannot be executed immediately without considering the international aspects and foreign elements of a situation and how certain cases are resolved in foreign States.

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.

The difference between universality and territoriality is that:

- universalism believes that there should only be one insolvency proceeding covering all the debtor's assets and debts worldwide. No other proceedings or any other forms of execution of the debtor's assets would be possible. Only one forum should have jurisdiction i.e. the State where the debtor has its centre of main interest. This proceeding will have a worldwide effect, even outside the State where the so-called proceeding has been opened and only the law of that so-called State should regulate the matter. **It would be beneficial to elaborate regarding recognition.**

- territorialism believes that insolvency proceedings can be opened in every State / jurisdiction where the debtor holds assets. Proceedings of certain assets should only be held in the State where they are in situ and proceedings will only be limited and restricted in that State. Multiple insolvency proceedings can be running concurrently in regard to the same debtor.

4

**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 developments in the Middle East region are as follows:

- the Middle East and North Africa (MENA) region launched a joint initiative of the Hawkamah Institute for Corporate Governance, the World Bank, the OECD and INSOL International.
- certain states have reformed their domestic insolvency laws, such as the United Arab Emirates in 2016 and 2019, Saudi Arabia in 2018 and Dubai in 2019; and **Elaboration is warranted.**
- on international insolvency, Bahrain adopted the Model Law on Cross-Border Insolvency in 2018 as did the Dubai International Financial Centre in 2019.

2.5

**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.

Individual insolvency involves natural persons, is quite different in nature from corporate insolvency, which involves artificially created legal persona in the form of companies. In the worst-case scenario, individual debtors may receive a discharge of unpaid debts at the end of the insolvency proceedings and can continue without the pre-bankruptcy debt burden. On the other hand, corporations cannot be rehabilitated. Once the affairs have been wound up, corporations are dissolved at the end of the insolvency proceedings.

The objectives of insolvency for individuals are:

- to protect the debtor from harassment by his creditors;
- to enable the debtor to make fresh start; and
- to reduce indebtedness by making contributions from present and future income to the estate while at the same time taking his personal circumstances into considerations.

For corporations, the objectives that differ to that of individuals are:

- to preserve the business or viable parts of the business (if possible); and
- to impose personal liability on responsible persons, where personal liability has been abused.

Some systems allow the notion where certain assets may be excluded from distribution and the individual debtor can keep his assets whereas this exemption does not exist in insolvency proceedings for corporations.

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**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 are several difficulties that may be encountered when dealing with insolvency law in a cross-border context. There is not a single set of insolvency rules that applies globally. There is evident difference in approaches and policies as well as differences in substantive and procedural rules between each State. Certain rules cannot be fully enforced without considering the international aspect of a given scenario.

Some States are more "pro-creditor" oriented, a conservative approach towards the granting of a discharge of debt to debtors, whereas other States are pro-debtors and approach insolvency proceedings through rehabilitation or "fresh start".

Some systems have statutory provisions in place for dealing with the assets of insolvent estates that situated in foreign States however, in some States there is no statutory dispensation. One way is to approach local courts on an ad hoc basis for an order that may allow for a foreign insolvency representative to deal with assets in the local jurisdiction i.e. file for approval to the US Bankruptcy Court for the sale/realization of assets in the US.

In some systems it is not possible to subject an individual to a collective insolvency proceeding and in others this may only be allowed where such individual is a trader or entrepreneur.



Legislation in many legal systems treats corporations or companies as single entities. Insolvency laws generally respect the separate legal status of each enterprise group member and separate applications for the commencement of insolvency proceedings are usually required in respect of each member of the group. In some States the law makes provision for limited exceptions that allow for a single application to be made in regard to more than one member in a group.

**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.

Prior to the 21<sup>st</sup> century, efforts to harmonise the domestic insolvency laws began with the International Bar Association ("IBA") in 1997, drafting a Model Bankruptcy Code to be available to any State to consider when developing their domestic insolvency laws. Although, the project did not proceed and occurred prior to the 21<sup>st</sup> century, this is one of the steps taken that have significant impact to resolving that issue as the IBA contributed to the development of UNCITRAL project resulted in the Legislative Guide. The IBA also endorsed this Guide.

In 2004, UNCITRAL promulgated a Legislative Guide on Insolvency Law. In particular, Part One Recommendation 5 stated that insolvency law should include modern harmonized and fair framework to address the challenges of cross-border insolvency.

The World Bank also produced guidelines on the regulation of cross-border insolvency through Principles for Effective Insolvency and Creditor / Debtor Regimes. These guidelines were drafted in the early 2000's and revised a number of times in the years to come. This is another important piece as it dealt with a number of issues including, but not limited to, the importance of clear and speedy process for obtaining recognition of foreign insolvency proceedings, relief to be granted upon recognition and for foreign insolvency representatives to have access to courts and other relevant authorities.

The European Parliament also published a report in 2010 for the Harmonisation of Insolvency Law at EU Level. This added another layer of discussion as it dealt with possible common test of insolvency as a requirement for a formal insolvency process and formal procedure to deal with claims.

One final step that I think is important on the subject matter is the Action Plan on Building Capital Markets Union in 2015. A revised version was made in 2020. This plan aimed to unify insolvency and restructuring proceedings which would facilitate greater certainty for cross-border investors and encouraged timely restructuring of viable companies in financial distress.

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

**4.5**

**Marks awarded 13 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.

Further information will be required by the Erewhon liquidator (“foreign liquidator” or “FL”) in order to assess the situation including:

- the operations of Nadir; is the majority of activities performed in Utopia or Erewhon in order to establish the centre of main interest. This will be important in order to assess whether the proceeding should be heard in Erewhon or Utopia.
- It is unclear whether the court approved the proceedings that Apex took against Nadir. The FL will require this information.
- Assuming that the court has not issued the order yet, the FL may review the contract between Apex and Nadir on order to assess whether Apex has locus standi in this situation. As noted above, the contract between Nadir and Apex was set up through exchange of emails; is the contract legally binding or is it voidable. However, the Erewhon liquidator must consider. If it is the former, the further consideration must be taken on how Apex would rank in the priority of claims, whether the creditor upon which had opened the proceeding in Erewhon that resulted in his appointment has a higher priority than Apex or if it is the latter, Apex will not be able to open legal proceedings against Nadir.

The following considerations should be assessed by the FL:

1. The choice of forum to exercise jurisdiction in the matter:

Nadir is a registered company in Utopia. Although Nadir was originally incorporated in Erewhon, they moved their head office in Utopia. Assuming that majority of Nadir’s operations occur in Utopia, Apex may be able to open court proceedings in Utopia, under the Cross-Border Insolvency Act of Utopia, as the primary proceeding given that that is where the certain of main interest is. The liquidation process in Erewhon will be considered as secondary proceeding. Liquidator in Erewhon will required to co-

ordinate and cooperate with representatives in Utopia if Apex was to go ahead with their action.

2. The recognition and affect accorded foreign proceedings in the same matter.

The order that the FL obtained is in Erewhon, a foreign state. The FL must ensure that they are recognised as foreign representatives, which can be done by applying to the court in Utopia or in the case of a joint liquidation, a Utopian liquidator ("local liquidator" or "LL") will be required to be appointed, maybe an LL appointed by Apex.

3. The choice of law to apply to the matter.

The FL will have to consider what the similarities and differences of the approach in the rules governing Utopia and Erewhon. If laws under the Cross-Border Insolvency Act of Utopia is more beneficial, the FL can coordinate with the LL in order to have uniformed approach to the proceeding.

**The MLCBI is significant for its provisions on recognition and relief in 4.1. The question requires candidates to apply the relevant MLCBI articles regarding recognition and relief to the facts provided in more detail than that above. Its provisions on cooperation and coordination are secondarily important as the liquidator is primarily seeking advice about staying court proceedings in Utopia.**

3

#### **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. Even if Apex proceedings has not been heard by the Court, the fact above would still be the same. It is just a matter of timing. The FL will still be required to coordinate with an LL.
  - B. If Apex obtained a court order to wind-up Nadir in Utopia prior to the winding up order in Erewhon, the Erewhon creditors may be subject to automatic stay therefore preventing them from taking actions against Nadir. The Erewhon creditors will be bound by the actions made by Apex / the liquidators appointed by the court through Apex.

**Refer to Article 29 on concurrent insolvency proceedings, under which the local proceedings in Utopia maintain pre-eminence over the foreign proceedings in Erewhon.**

1

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

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

A court has ordered the commencement of an insolvency proceeding against a corporate debtor in the State of its incorporation and head office. The company has operated business in a number of States and has assets (real property or interest in land, other tangible assets

and intangible assets); creditors (including taxation / revenue authorities) and directors in several States.

Select a country for the company's incorporation and, based on the insolvency laws of the country you select and the brief facts provided, describe four key international insolvency issues facing the insolvency representative in this scenario. For each issue, what domestic laws or international instruments apply to assist the insolvency representative address these four issues?

The Company is incorporated, and head office is in Bermuda. Bermuda follows two main legislation when dealing with insolvency; the Companies Act 1981 and the Companies (Winding up) Rules 1982. Bermuda is pro-creditor oriented. The Company has assets, creditors and directors in the USA, which is governed under the Bankruptcy Code 1978.

The issues that the Bermudian representatives ("representatives") face in situations where the debtor has assets, creditors and directors in several States are as follows:

- Recognition of the representatives in a foreign state. Representatives may not be able to perform certain actions or legal proceedings without recognition in that foreign state. As a resolution, Representatives may be required to apply for recognition to the foreign court for example filing for Chapter 15 recognition order through the US Bankruptcy Court. The foreign representative may also be required to obtain approval for any sale procedure/realization of assets for example in the US. It is important to consider the cost involved in these applications and proceedings and whether they have net benefit to the insolvency procedure.
- The insolvency proceeding was ordered by the Court in Bermuda, the Company afforded moratorium of actions that may be taken by individual creditors. Since the Company has creditors in different States, Representatives will have to consider how to co-ordinate and cooperate with the Courts in other States. Representatives may be required to advertise the insolvency proceedings in those States. Furthermore, Representative will have to strategize on the best way to communicate such proceedings to its creditors and an efficient way to co-ordinate claims procedures. Again, Representatives will have to consider the cost of different procedures.
- Representative will be required to assess the priority of payments of all its creditors' claims.
  - i. The Company has Directors (and possibly employees) in different States. Representatives will look for guidelines in the legislation of those States on the priority of payments. Some States would require amounts owing to employees and any unpaid tax (as the case in Bermuda; section 236 of Companies Act 1981 / Rule 140 of Companies (Winding-Up) Rules 1982), and amounts owing to revenue authorities. Some States grant employees a "super preference" that will enjoy priority over other priority creditors.
  - ii. Since the Company has real properties and interest in land, it is important for the Representatives to assess the legal contracts of various assets and whether any creditors have security in those assets. If the Company has any loans due to different institutes / creditors, those creditors may be secured in these properties, as a result, can only be distributed to those creditors.
  - iii. Any remaining funds will be distributed to all other (unsecured) creditors on a pari passu basis.

**5.5**

**Marks awarded 9.5 out of 15**

**MARKS AWARDED 38.5/50**

**\* End of Assessment \***