



## 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 7 out of 10

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

#### Question 2.1 [maximum 2 marks]

Explain what the term "international insolvency law" means.

- [(a) International insolvency law refers to how domestic laws address domestic insolvency proceedings when the assets of the subject company are located in more than one jurisdiction or there are creditors in more than one jurisdiction or both. The relevance of there being more than one jurisdiction is that the some of alignment initiative, whether procedural or substantive is required to ensure that there is certainty in how these proceedings are managed as well as the outcome and to ensure that the jurisdictions involved are mandated to provide cooperation, coordination and assistance.
- (b) The incorporation of such alignment initiative in the domestic laws of a country will help very much to give certainty or confidence in the domestic legal system, for example, countries that have adopted the UNCITRAL Model Law on Cross Border Insolvency where it is adopted is a form of 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.

- [(a) Universality

- (i) This concept at its most ideal, envisions international insolvency proceedings to be initiated in 1 jurisdiction as the main jurisdiction and for all assets of the company and all the creditors to be managed and dealt with based on 1 set of rules regardless of the jurisdiction where the assets are located or the where the creditors are located.
  - (ii) There may be multiple or concurrent proceedings but the challenges of having multiple or concurrent proceedings will be mitigated or eliminated because all these provisions will be subsidiary or subservient to the main proceedings. This eliminates uncertainty of outcome and is expected to provide a more equitable result for all creditors.
  - (iii) This concept requires countries to acknowledge that the primary jurisdiction of an insolvency proceeding is another country and that the court that is not in the primary jurisdiction should play a subsidiary role in the insolvency proceedings. This is quite a tall order or expectation to require from countries that are not the primary jurisdiction for proceedings.
  - (iv) As the concept, at its most ideal may not be easy or practical to implement, there are variations to the concept, which are intended to make it more practical to facilitate adoption.
- (b) Territoriality
- (i) The concept of territoriality is the opposite of universality.
  - (ii) This concept at its most ideal, envisions where insolvency proceedings take place in more than one jurisdiction, these proceedings should be adjudicated based on the law of the respective jurisdictions. This means there are more laws in play as opposed to the concept of universality.
  - (iii) This also means that there could be different outcomes resulting from adjudication of such proceedings.
  - (iv) This also means that creditors may have to seek recognition of their claims in various jurisdictions, if only to protect their rights as creditors. This results in additional or multiple proceedings which would cost time and resources without certainty of the outcome or the result in terms of recovery of debt.
  - (v) It is well recognised that this concept does not eliminate issues either and some measure of communication and cooperation amongst jurisdictions would go along way to resolve common issues that arise when there are multiple proceedings in various jurisdictions. ]

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.

- [(a) adoption of the Model Law on Cross Border Insolvency by Bahrain in 2018.
- (b) adoption of the Model Law on Cross Border Insolvency by the Dubai International Finance Centre in 2019

(c) enactment of a new Bankruptcy Law in Saudi Arabia which came into effect in 2018.]

**3**

**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.

[The objective of insolvency for individuals is to ensure that the individual can still make a fresh start after all debts are paid. Individuals who are bankrupt may be discharged (not liquidated)

The objective of insolvency for corporations is to preserve as much of the business or assets of the company as possible and if there is nothing to preserve, then ultimately liquidation.]

**This answer displays a general 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**

#### **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 challenges that present themselves when there is insolvency in a with a cross-border context are as follows:

- (a) As there is more than one jurisdiction involved, it follows that there would be more than 1 set of laws to overcome or address.
- (b) The different systems which evolved from its historical origins are different across jurisdictions. Some jurisdictions are inherently pro-debtor (like the USA and its Bankruptcy Code which may be recognised as a form of universalism as the code applies to all states), while others pro-creditor (such as Australia and England which have common law systems).
- (c) These differences across jurisdictions make it difficult to navigate thorough the different systems or to align/reconcile insolvency proceedings when there is more than one jurisdiction involved. The difference in the systems lies in its substantive provisions and procedural rules. These affect the outcome for how assets are distributed as there would be competing interests to address in each state and it be difficult to ensure an equitable outcome for all creditors during distribution of assets.
- (d) The insolvency laws in various jurisdictions, while it has evolved or developed, such developments focus on insolvency proceedings within its jurisdiction and do not have provisions that address situations where more than one jurisdiction is involved. Examples of provisions that would be helpful in cross border jurisdictions would be provisions that address cooperation and communication between different states and the courts of the different states.]

**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 introduced guidelines called Principles for Effective Insolvency and Creditor/Debtor Regimes in the aftermath of the 1999 Asian Financial Crisis. These principles have been revised several times over the years, the latest being in 2021 and form the basis of reform in bankruptcy law for developing countries. Developing countries are encouraged to undertake reform of its bankruptcy law as a condition of being eligible for loans granted by the International Monetary Fund. Improvement in its bankruptcy legislation encourages investor confidence in these countries. These guidelines include a criteria that there must be cooperation in international insolvency proceedings which is quite an essential element in international insolvency proceedings and is one of the key criteria when dealing with international insolvency issues. Countries that undertake such reforms help to reduce the types of issues that would normally arise in international insolvency. Bear in mind that these guidelines are primarily aimed at developing countries and not all countries.]

In 2010, the European Parliament published a report on Harmonisation of Insolvency laws. Initiatives undertaken by the European Parliament would only be applicable to EU states and not all countries, however the rationale for encouraging harmonisation remains the same. It will help reduce the type of issues that would normally arise in international insolvency because these issues are not addressed in the initiative.]

**Have you considered the UNCITRAL Legislative Guide on Insolvency Law (2004)? Elaboration is warranted regarding much impact these are likely to have in addressing international insolvency issues and why.**

**4**

**Total marks awarded 10.5 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.

[Under the Cross-border Insolvency Act of Utopia, the Erewhon liquidator may apply to the court in Utopia to recognise the insolvency proceedings commenced in Erewhon (assumes that the Erewhon liquidator satisfies the criteria for the liquidation proceedings in Erewhon to be recognised by the court in Utopia).

Once the court in Utopia recognises the insolvency proceedings in Erewhon, the liquidator may (i) apply for the civil proceedings commenced by the creditor in Utopia to be stayed, (ii) may apply for execution against assets of the debtor to be stayed and (iii) may apply for the right to transfer, encumber or dispose any assets of Nadir be stayed.

The foreign proceedings in Erewhon are eligible to be recognised by the court in Utopia if Nadir has its centre of main interests in Erewhon; or Nadir has an establishment in Erewhon. It seems unlikely that Nadir has its centre of main interests in Erewhon.

It would be helpful to have additional information to ascertain whether Nadir has an establishment in Erewhon.]

**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.**

**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) where Apex had filed proceedings to wind-up Nadir, but the matter had not yet been heard:

No.

It would not make a difference if the Erewhon liquidator was not successful in his application for the court in Utopia to recognise the liquidation proceedings taking place in Erewhon.

If the Erewhon liquidator was successful in his application for the Erewhon liquidation proceedings to be recognised in Utopia. The Erewhon liquidator can apply to the court in Utopia to stay the proceedings filed by Apex to wind-up Nadir.

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

No.

If the Erewhon liquidator was successful in his application for the Erewhon liquidation proceedings to be recognised in Utopia. The Erewhon liquidator (i) can apply to the court in Utopia to stay the proceedings filed by Apex to wind-up Nadir; (ii) can apply to stay execution

proceedings; (iii) can apply to stay the exercise of rights to transfer, encumber or dispose assets of Nadir.]

**It would be beneficial to refer to article 29 regarding concurrent proceedings.**

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?

[Country of incorporation : Australia.

- (a) The insolvency representative based in Australia may expect to the following key international insolvency issues:
- (i) addressing the application of insolvency laws of the other countries where the assets are situated or where it also operates for the purposes of being able to commence insolvency proceedings in these other countries.
  - (ii) coordination of insolvency proceedings commenced by the insolvency representative in the courts of the respective states (the insolvency representative seeking assistance from the courts in other jurisdictions).
  - (iii) cooperation amongst the courts of the respective states with each other and with the court in Australia (the insolvency representative seeking assistance from the courts in other jurisdictions where there are concurrent proceedings).
  - (iv) dealing with any existing judgments obtained against the company in these other countries.
  - (v) ensuring an equitable outcome for distribution of assets for all creditors.
  - (vi) whether the insolvency representative has standing in the courts of these other countries (without needing to undergo a separate process of certification or qualification).
- (b) For countries that have adopted the UNCITRAL Model Law on Cross Border Insolvency in some form form (of which Australia is one such country but in this case, it would be more meaningful for the other countries to have adopted the Model Law), the extent of abovementioned difficulties would be reduced quite significantly or at the minimum the existence of rules of procedure provides clarity on what to expect during proceedings in these other countries.

- (i) For example the insolvency representative may commence proceedings in these other countries to apply for the insolvency proceedings in Australia to be recognised in these other countries on the basis that Australia is the centre of main interest, it will also be possible to expect cooperation and coordination by the courts in the other jurisdictions.
  - (ii) In the case of any ongoing proceedings in these other countries, the insolvency representative may apply to the court in these jurisdictions for the ongoing proceedings to be suspended. It is also possible to obtain pre-recognition relief (e.g., stay of execution).
  - (iii) The courts in these other countries will have to recognise the authority of the foreign main proceedings in Australia (assuming the relevant criteria are met).
- (c) If there are any countries/ jurisdictions that do not adopt the UNCITRAL Model Law on Cross Border Insolvency, the foreign insolvency representative will have to rely on the laws of the other jurisdictions (to see if there is any existing provision which allows the court to recognise the authority of the insolvency representative or the proceedings commenced in Australia or render cooperation or give preference to proceedings commenced in Australia) to grant any equitable relief such as a stay of proceedings or stay in execution of judgment).
- (i) In addition, if one of these other jurisdictions is the United Kingdom, the court in the UK has jurisdiction to wind up a company that is incorporated in a country other than the UK if the company is registered as a foreign company in the UK. The Insolvency Act 1986 allows a court to order the winding-up of unregistered companies.
  - (ii) New Zealand itself has insolvency legislation that gives authority to the New Zealand High Court to respond to requests from a foreign court for aid the New Zealand court to exercise its jurisdiction to assist the foreign court. The insolvency representative will find this domestic legislation to be useful for insolvency matters in New Zealand.]

**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.**

**5**  
**Marks awarded 8.5 out of 15**  
**MARKS AWARDED 36/50**

**\* End of Assessment \***