



## 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 web pages for Module 1 as well as the Course Administration page for this course after the submission date of 15 October 2022.

## 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: 202223-336.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 2022**. The assessment submission portal will close at **23:00 (11 pm) BST (GMT +1) on 15 October 2022**. 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 **10 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).

**Please only select one of the multiple-choice answers**

### 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: 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 relates to the laws that govern situations where an entity which operates or has assets in more than one jurisdiction is insolvent. The insolvency proceedings which are commenced in one jurisdiction therefore need to take into account foreign issues. As there is no global insolvency law that applies to all countries, in cross border insolvency cases, the insolvency laws of the relevant countries and the extent to which those laws provide for cross border insolvency (if at all) are important to consider.

**2**

### **Question 2.2 [maximum 5 marks]**

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

Universality is about having the laws of one country determine the manner in which the insolvency of an entity will be dealt with in totality (the "**Main Proceeding**"). All creditors would participate in one insolvency proceeding which determines how assets will be distributed to creditors and they would be treated equally. Even if other proceedings are commenced in other countries, they would all be governed by the law of the Main Proceeding.

Another approach to universality is to have one worldwide law which governs cross border insolvencies although given the differences in policy and approaches to insolvency in various countries this may not be practical.

Universalism makes sense in the global interconnected world we live in and can bring about cost savings however it presents certain challenges such as:

1. How would creditor priority be dealt with when each country has its own payment waterfall for distributing assets to creditors?
2. If one insolvency proceeding is to be used, where should the proceeding be commenced? Is it where the debtor has its main operations?
3. Which law should apply to the proceeding? It is the laws of the country where the proceeding is instituted?
4. Trust concerns in relation to the robustness of the laws that will apply to the proceeding and whether that law can adequately deal with cross border issues

Territoriality is about having the ability to institute insolvency proceedings in different countries in relation to the same debtor but the proceedings are limited geographically so that they only cover assets in the relevant country and protect the creditors of that country so that they are fully paid before foreign creditors have access to any assets. Usually there would be a main proceeding in one country and then secondary proceedings brought in one or more of the other relevant countries. This exercise can be very expensive for creditors and could lead to a situation where a debtor is declared insolvent in one country but not in another where it has most of its assets. It could also lead to creditors not being treated equitably.

Both of these approaches have been criticised and a modified version of each of these approaches could work to resolve international insolvency issues.

**There is scope to elaborate with respect to recognition and effect**

**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.

- Bahrain and the Dubai International Finance Centre have adopted the UNCITRAL Model law on cross border insolvency
- UAE reformed its domestic insolvency laws in 2016 and again in 2019.
- Saudi Arabia reformed its domestic insolvency laws in 2018

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

**2.5**

**Marks awarded: 8.5 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 objectives of insolvency for individuals are to protect the debtor from creditor pressure and provide an orderly framework for the bankruptcy trustee to distribute assets to creditors in order of their priority. Certain insolvency regimes exclude certain assets from distribution so that they can be retained by the debtor. The objective is also to reduce the debtor's debt levels and give them a fresh start after they have been discharged from bankruptcy. There are prominent examples of individuals who have been declared bankrupt and have managed to rebuild their wealth.

The objectives of insolvency for corporations are to preserve viable businesses wherever possible and create a system of accountability and liability for directors and officers of the company who have caused avoidable losses to creditors or fraudulently hidden assets from creditors.

**There is some scope to elaborate**

**4**

#### **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.

National and international laws have traditionally not included a structure for dealing with cross border insolvencies therefore it is only in a few countries such as a Chapter 11 process in the United States that court proceedings in one country have extraterritorial effect. There are also few countries such as the European Union, which have transferred the power to deal with cross border insolvency issues to a supranational body such that EU laws apply to all member states.

Many countries have laws that are outdated or improperly drafted and are therefore not fit for purpose to deal with insolvency in a cross - border context. A lot of laws were put in place by colonial masters and have not been revised post-independence to capture the global interconnected world we live in.

Different countries have different approaches to insolvency; some are debtor friendly, and others are creditor friendly which makes it difficult to resolve cross border insolvency issues and can lead different countries to compete for the debtors assets. That contradicts one of the main insolvency principles which is to treat all creditors equally.

**Further detail would be beneficial. For example, consideration of Westbrook's 9 key issues.**

**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 Organisation for Cross -border Co-operation in Civil and Commercial Matters and UNCITRAL co-operated in formulating the *UNCITRAL Legislative Guide on Insolvency Law (2004)*.

The World Bank has developed the *Principles of Effective Insolvency and Creditor/Debtor Regimes* which have been updated over the years with the latest updated being done in April 2021.

The World Bank and IMF carry a lot of influence in developing countries because of the financial support they give to countries. If as part of a funding condition, they require a developing country to follow the Legislative Guide and/or Principles to reform its insolvency laws, that will have a big impact in bringing about consistency in national approaches to insolvency laws in developing countries.

UNCITRAL has developed various model laws and guides which have been instrumental in harmonising domestic insolvency laws in various countries in which they have been adopted. For example, in 2015, OHADA countries all adopted the UNCITRAL Model Law on Cross Border Insolvency.

In the EU, there have been a number of steps taken to harmonise EU insolvency laws and to encourage better communication between courts in EU member states such as:

- in 2010, the European Parliament has published a report on *Harmonisation of Insolvency laws at EU Level* which if implemented will help to resolve inconsistencies in insolvency laws in EU member states.
- The European Commission is keen on building a capital markets union and has stated how important it would be for cross-border investors to have consistency in insolvency laws in EU member states. The HighLevel Forum has published a report on the capital markets union plan called "A new Vision for Europe's capital markets" in June 2020.
- A project funded by the EU and the International Insolvency Institute led to the development of the *EU JudgeCo Guidelines 2015*
- *INSOL Europe* helped to publish the *European Guidelines on Communication and Co-operation 2007* which contains non -binding rules and a draft protocol for international insolvencies subject to the European Insolvency Regulation which guidelines were reviewed in 2017 by a joint working group of members of the Conference of European Restructuring and Insolvency Law and *INSOL Europe*. The working group focussed on the duty to co-operate and communicate under the EIR Recast 2015.

Across the sea, the American Law Institute (ALI) Transnational Insolvency Project developed the *ALI NAFTA Guidelines Applicable to Court to Court Communications in Cross-Border Cases (2000)* for cross border insolvency cases in NAFTA countries being the US, Canada and Mexico . The ALI together with the International Insolvency Institute subsequently developed the *ALI -III Global Principles for Co-operation in International Insolvency Cases and Global Guidelines Applicable to Court to Court Communications in Cross-Border Cases (2012)*

The Judicial Insolvency Network (JIN) has developed the *Guidelines for Communication and Co-operation between Courts in Cross-Border Insolvency Matters*. These guidelines encourage court to court operation and co-ordination in cross border cases and have been adopted by courts in Asia, UK and other courts in the Americas. Subsequently, JIN developed the *Modalities of Court to Court Communication* which goes into the detail of how communication between courts should be done.

In 2020. Asian Business Institute jointly with the International Insolvency Institute have published a report on *Corporate Restructuring and Insolvency in Asia* which sets out the business rescue regimes in Australia, China, Hong Kong, India, Japan and South Korea.

In the MENA region, a comparative survey of insolvency systems was done in 2009 as a joint initiative of the World Bank, OECD, INSOL International and the Hawkamah Institute for Corporate Governance.

It is clear that in all continents, efforts are being made to harmonise insolvency laws in regions or to at least map out the insolvency law landscape in various regions like the MENA and ASEAN and encourage best practice in insolvency. There is unlikely to be one international insolvency law that applies globally but at least these efforts will improve regional laws which will go a long way to create certainty for investors in those regions.

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

**3**

**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.

- Information on whether Utopia and Erewhon have adopted any soft law that allows for co-operation and co-ordination of courts and recognition of foreign proceedings

#### **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.

The Cross-border Insolvency Act will allow for recognition of foreign proceedings because of the adoption of the Model Law into local law. The liquidator could therefore apply for recognition of the liquidation order in Erewhon. The Model Law would also allow the liquidator to seek for relief from the court in Utopia and one of the reliefs could be to stay the debt suit brought about by Apex so that the payments to Apex can be dealt with together with payments to other creditors under the liquidation in Erewhon.

**There is some scope to elaborate**

**4.5**

#### **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.

In scenario A, my answer would not be different.

In scenario B, my answer would change as follows:

The applicability of the Model Law in Erewhon would mandate the court in Utopia to co-operate and co-ordinate with the court in Erewhon. Rather than applying for recognition

proceedings, the liquidator in Erewhon could reach out to the liquidator in Utopia and negotiate a Protocol or Cross-border Insolvency Agreement dealing with how the liquidation of Utopia would be co-ordinated. Both liquidators could then apply for the Protocol or Agreement to be approved by the courts in Utopia and Erewhon.

**Apply the MLCBI provisions on concurrent insolvency proceedings (see Article 29)**

**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: Ghana

There are four key international issues that face the insolvency representative as set out below:

1. Whether the other states have local laws which allow for co-operation and co-ordination with foreign courts and recognition of foreign proceedings or foreign insolvency representatives. The Model Law and the UNCITRAL Practice Guide on Cross-Border Insolvency Co-operation can help to address this issue.
2. Which law will govern the issues that arise during the proceeding such as issues around creditor priority and security rights? The UNCITRAL Practice Guide on Cross-border Insolvency Agreements can help to address this issue
3. How creditors in all states will participate in the insolvency proceedings. The Model law can help to address this issue
4. How to obtain a moratorium on creditor action in all affected states to enable the proceedings to be conducted in an orderly manner. The Model law can help to address this issue

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

**3.5**

**Marks awarded 9 out of 15**

**\* End of Assessment \***

**A good paper that correctly identifies many of the issues raised and satisfactorily substantiates several answers.**

**TOTAL MARKS AWARDED 36/50**