



## 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).

### 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.

International insolvency law is a law used to assist with an issue resulting due to the many countries having different laws and regulations. As well as there not being one standard insolvency guidelines that the whole world uses. It is the cross-border law which is discussed internationally to allow cases which Debtor/ creditors, could be linked to more than one jurisdiction. The international law tries to regulate the use of the insolvency laws in more than one country to avoid conflict and to assist debtors/creditors in the treatment of financial distress. It allows the use of 'Soft Law' which is guidelines that can be used.

**2**

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

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

These are both cross border approaches used in insolvency cases. But most legal systems have been developed using the territorial approach

The territorial approach is where each country has its own domestic laws in which to handle the Debtors and Creditors in the jurisdiction specifically, this does not allow for any compromise of exercising laws differently. So where-ever the debtor/creditor and assets are located is where the laws will be in place. This is normally more in line with Civil Law countries.

Whereas universal approach is where it allows the use of a single global insolvency regime, and the case is allocated to a single office holder, and it does not depend on where the assets and Debtors/Creditors are located. This is difficult to achieve due to no single approach being available and results in states working together. This approach is more in line with Common Law countries.

**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.

There has been development to reform Middle east:

- UAE reformed their domestic insolvency laws in 2016 and 2019 **More detail would be beneficial**
- Saudi Arabia approves landmark bankruptcy law in 2018 **More detail would be beneficial**
- 
- Model law on Cross Border Insolvency was adopted by Bahrain in 2018 and Dubai International Financial Centre Enacts New Insolvency Law in 2019 (Insolvency Law DIFC Law No. 1 of 2019)

They have been working with the World Bank to be able to reform the issues but there are currently no instruments to facilitate the regulation of cross borders with Middle east.

**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.

The differences of the objectives for individuals and the corporations are that: For the individual, insolvency law is used to protect the debtors and to allow the debtor to make a new start with the insolvent status, this allows debtors to keep certain assets which allow the individual to maintain themselves and restart. This is due to an individual is not considered to be dissolved once they are declared bankrupt and proceedings wound up. The notion of exempt or excluded assets is only for individuals and they can continue without any burden.

When it comes to corporations, there is motivation to help the business which can be saved (business rescue) but if an individual (Former directors and officers) is involved due to fraud or acting recklessly, they will get personally liable as the person responsible, not the business. There is also differences in how legal systems treat a corporation. Some systems treat them as a single entity which causes issues when a corporation is several companies. Which is not an issue for an individual. There is also different laws and regulations for corporation's vs individuals. With a corporation, once all of the affairs of the corporation are wound up, the corporation can be dissolved as corporations unless there is option for business rescue which is seen as more popular recently.

**5**

#### **Question 3.2 [maximum 5 marks]**

Write a brief note on the difficulties that may be encountered when dealing with insolvency law in a cross-border context relating to pertinent differences in the relevant systems.

The three issues which are faced when dealing with insolvency law in a cross-border context are:

-Forum - this discusses the jurisdiction of the matters at hand, this is difficult due to only one forum should have jurisdiction but there could be multiple which are applicable due to asset locations and debtor/creditors, this would create need for the different jurisdictions to communicate and cooperate and work together, which is not always an easy task.

-Recognition and enforcement- this discusses the differences in the foreign proceedings in the same case. This is difficult as there isn't a single set of laws and regulations which are used worldwide. There are "soft laws" which are guidance but there are different approaches which will need to be looked at and could change the way the case is held. With Civil law there is more of a territorial approach where with common law there is more of a universalism approach, this causes differences in the law and approach. Which can result in a debtor being insolvent in one state but not in another, as a debtor/creditor may be treated differently in different jurisdictions.

-Choice of Law- this discusses which law to choose to apply as different laws have different approaches, this makes it difficult. All jurisdictions have their own legal systems and an insolvency system, but all policies and approaches have differences as well as different general laws and this has caused difficulties in creating one single insolvency legislation.

**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.

Different strategies have been made to assist with the harmonisation of domestic insolvency laws:

- UNCITRAL - which was brought out as a soft law which can be referenced to when preparing new laws and reviewing old laws and regulations.
- Uniform law- there was an attempt to contact states to enact a uniform law.
- There is a model Bankruptcy code which was developed to assist states in developing insolvency laws
- The World bank issued guidelines for bankruptcy reform for developing countries
- The EU published a report for harmonisation which they believe can be achieved.

I believe that the above is a good step towards a common goal. This will take time as all jurisdictions believe that their laws are adequate even though they have differences. Therefore, with the attempt to get more jurisdictions on the same level, it will slowly happen as the world gets closer and closer, with more cases will come out of cross border law and provide more and more guidance and can develop a single use law or compromised laws. Without the above attempts, there will never be any change and it will continue to have issues with cross borders. By attempting to find harmonisation, it slowly brings all laws together.

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

**4**

**Marks awarded 12.5 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.

Universalism approach allows for more than one insolvency case in different states to be dealt with under one state where the debtor has centre of main interests. But there could be a primary and secondary case. Primary being where the centre of main interest is and secondary being where the debtor has assets.

We would therefore need to know if Erewhon approach is universalism or Territorial approach. As well as if the law in Erewhon is Pro creditor or pro debtor. As currently the state is Erewhon where the court filing was filled but Nadir centre of main interests is now seen as UTOPIA. **It would be beneficial to note that the MLCBI as drafted by UNCITRAL does not require reciprocity so it does not matter whether Erewhon has adopted the MLCBI or not.**

When a creditor applies for liquidation, there is a presumption that the debtor is unable to pay due to the debtor failing to pay one or more of the debts over a specified timeframe. This is therefore presumed that there are multiple creditors in Erewhon and that is why the liquidation proceedings were appointed by the court, as the debtor must have fraud or be insolvent. Therefore, the liquidator should notify Apex of the already processed court proceedings in Erewhon.

Insolvency law establishes a collective debt - collecting mechanism, which discourages individual creditors from continuing to claim their debt separately, which in this case is Apex. But the claim may have taken place prior to the commencement of the liquidation. So, this could result in the transaction being set aside from the liquidation proceedings and not seen as a post commencement.

This may also be in the suspect period and the Apex claim could therefore be included in the insolvency proceedings retrospectively and not seen as a separate claim, these have not yet been filled so could be included in the liquidation creditors.

If Utopia is triggered by jurisdiction, this would result in cross border insolvency, which UNCITRAL (adopted by UTOPIA) promotes cooperation and communication to be able to work together to decide which laws will be used. This is a soft law which would allow UTOPIA to communicate and compromise with Erewhon, dependent on their laws. We would need to know what laws Erewhon uses. But only one state law can be used.

When looking at where the jurisdiction of Nadir, UTOPIA use the test of where the centre of main interests is. Nadir, has recently moved its head office and registration to UTOPIA and this is therefore seen as the centre of main interests. We would also need to know where their assets are located in order to trace and collect them for the liquidation processes and assess which locations are triggered as even if the main office and registration is in Utopia, we would need to know the assets location to assess centre of main interests.

The court proceedings with Apex have been filled in UTOPIA but the winding up order has been processed in Erewhon and liquidator already appointed. So, this triggers cross border insolvency but without being a modified approach. There can only be one states laws.

But it is crucial to determine the exact moment when the liquidation procedure commences and whether this was prior to Nadir moving the registered office to UTOPIA. As this can also impact the jurisdiction.

**Detailed application of the articles relevant for the recognition and relief, including on COMI/establishment and on foreign main / non-main proceedings) was required for this fact-based application-type question.**

**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) If the universalism approach is being used. The Erewhon creditor has already filled the winding up order and a liquidator has been appointed in Erewhon. If Apex filed for winding up, it could result in the debtor being insolvent in two states with different laws. But the matter has not yet been heard. But universalism allows for more than one proceeding but to be dealt with under the same state.
- (b) If Apex had obtained a winding order in UTOPIA, this would be the jurisdiction as this is seen currently as the centre of main interests in UNCITRAL and this is where the liquidator would be, using UTOPIA law. There would then be creditor claims from Erewhon but not be using the laws of Erewhon.

**It would be beneficial to refer to article 29 of the MLCBI.**

**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 Chosen: United States of America

4 key international insolvency issues:

- 1) Recognition of the foreign representative
- 2) Priorities and preferences
- 3) Avoidance provision Powers
- 4) Conflict of Law issues

US has brought out a domestic adoption of the UNCITRAL law- Bankruptcy Code by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005. There is a new chapter, 15, which has been added to assist in the cross-border legislation. It was designed to:

- promote cooperation
- provide greater legal certainty for trade and investment

- the fair and efficient administration of cross-border insolvencies
- the protection of debtors assets
- to help the rescue of financially troubled businesses.

US have a Civil Resource Manual, of which point No. 58, a domestic law, which works to promote equality of treatment among creditors.

The American Law Institute developed a guidance for court to court communications for international insolvencies. This is called the NAFTA which is the North American Free Trade Agreement. This is for corporate entities, not individuals.

**The answer could be strengthened by more detail.**

**5**

**Marks awarded 9.5 out of 15**

**\* End of Assessment \***

**A very good paper that generally addresses the questions asked and substantiates its answers.**

**TOTAL MARKS 37/50**