



## 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: 6 out of 10**

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

### **Question 2.1 [maximum 2 marks]**

Explain what the term "international insolvency law" means.

The collection of laws but also rules, treaties, agreements, models and processes which define how a multinational debtors' affairs are administered upon commencement of a process to collectively deal with the debtors' inability to pay its debts as and when they fall due.

**2**

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

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

Universality provides that there should be one process which administers an insolvent debtors' affairs across all jurisdictions. Under universality, there should be no instances of insolvency proceedings commencing in multiple jurisdictions.

Territorialism is the opposite of universalism in that there should be no barrier to commencing insolvency proceedings in the multiple jurisdictions concurrently. Territorialism seeks to meet the needs of local stakeholders.

**There is scope to elaborate. These theories involve two key aspects of private international law - recognition and effect as well as jurisdiction:  
For example, with universalism, (1) the jurisdictional aspect requires all States to agree on the place for the one set of insolvency proceedings in respect of the debtor and, to be successful, (2) recognition and effect requires that other States recognise that one**

**set insolvency proceedings and recognise it as having extraterritorial effect in their States.**

**3**

**Question 2.3 [maximum 3 marks]**

Describe **three** recent examples of developments in the Middle East region to reform domestic insolvency laws or to address international insolvency Issues.

1. Domestic insolvency law reform has occurred in the UAE in 2016 and 2019, Saudi Arabia in 2018 and Bahrain and DIFC have adopted the Model Law on Cross-Border Insolvency in 2018 and 2019 respectively. **There is scope to elaborate.**
2. Regional comparative studies of the insolvency systems in the Middle East and North Africa have been undertaken with support from the Hawkamah Institution for Corporation Governance, the World Bank, the OECD and INSOL International. **what impact did this have on reforming domestic insolvency laws or addressing international insolvency Issues in the Middle East?**
3. Organisation pour L'Harmonisation en Afrique du Droit des Affaires (OHADA) is a treaty including 17 Middle Eastern/African counties with a view to harmonising the domestics laws of its members on various topics including insolvency proceedings.

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

**2.5**

**Marks awarded: 7.5 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.

- Insolvency for individuals requires a rehabilitation or “return to normal” which is not always a requirement of corporation insolvency.
- The completion of the insolvency process for a corporations often concludes with the deregistration and striking off of the corporation.
- Individuals are require at least a basic level of income and assets to sustain themselves and their dependants.
- **This answer displays a satisfactory 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.

Difficulties can arise where:

- Where UNCITRAL Model Law or other recognition procedures are limited in one or more jurisdiction (certain developing countries) meaning accessing those jurisdictions
- Pro-creditor insolvency regimes (Holland, Curacao and France) will typically not look kindly upon restructures trying to be initiated in typically pro-debtor jurisdictions (US, UK and Singapore) particularly for debtor-in-possession processes
- A disparity of assets and liabilities within the respective jurisdictions, under a territorial insolvency regime can result in certain creditors receiving a significantly better outcome than the creditors in another jurisdiction.
- Differences in priority rules can also result in creditors in different jurisdictions receiving a more/less favourable distribution depending on the insolvency law applicable to the distribution of funds.
- Voidable disposition rules can ultimately result in a very different outcome for the debtor and its creditors depending on whether the applicable jurisdiction has wide powers and clear precedent to overturn transactions.
- **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.

UNCITRAL Model Law on Cross-Border Insolvency: Provides the widest range of a common set of rules to administer cross border insolvency, even for countries that have not adopted it.

OHADA in Africa, American Law Institute / International Insolvency Institute, Judicial Insolvency Network and other organisations have various projects to harmonise insolvency law but, in my opinion create a disparate set of ideals and outcomes which may, at best, result in a blocs of alignment but just as likely result in incompatible cross-border insolvency laws.

**There is scope to elaborate on your opinion on how much impact these are likely to have in addressing international insolvency issues. There is scope to consider political pressure, foreign investor pressure and/or loan conditions.**

**3**

**Marks awarded 9.5 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.

Utopia's Cross-Border Insolvency Act has adopted the UNCITRAL Model Law on Cross-Border Insolvency meaning that:

- The Erewhon liquidator needs to understand the position of the legal proceedings of Apex and Nadir in Utopia. The Erewhon liquidator will need to act expeditiously if a winding up petition on foot. From a practical perspective, the Erewhon liquidator will also need to assess what assets and records are located in Utopia
- In any case, the Erewhon liquidator can seek foreign main recognition of the liquidation proceeding in Utopia which will provide for a stay against execution (Article 20(1)(b)) against Nadir's assets in Utopia
- This relief can be granted on a provisional basis at the time of filing where relief is urgently needed to protect the assets of the Nadir (Article 19(1)(a)) for example, if Apex is about to file a petition to wind up Nadir.

**A good understanding of the issues and the answer could be strengthened by more detail.**

**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) Recognition of a foreign main proceeding does stay the continuation of proceedings already on foot concerning a debtor's assets, rights, obligations or liabilities (Article 20(1)(a)). Accordingly, the fact that the winding up is on foot but not yet heard does not impact on Erewhon liquidator staying the proceedings in Utopia
- (b) If the court had made an order to wind up Nadir in Utopia prior to the Erewhon winding up, it is important to determine the 'centre of main interest' (**COMI**) to determine which jurisdiction has universal scope. Typically, COMI will be the same location as its registration however Nadir was registered in Utopia and relocated to Erewhon one month prior. In determining whether Utopia or Erewhon is the COMI, a consideration of where the administration of Nafir takes place and where/how the debtor/creditor relationships arose (Para 145-146 Guide to Enactment and Interpretation of the UNCITRAL Model Law on Cross-Border Insolvency). More information is required regarding the dealings between Nadir and Apex to make an assessment of where COMI is likely to be.

**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?

The corporate debtor was incorporated in the Cayman Islands and has directors in the Cayman Islands, USA and Hong Kong.

- The Cayman liquidators are aware of a US bank account and books and records in the USA. They file for Chapter 15 recognition (which incorporates the UNCITRAL Model Law on Cross Border Insolvency) under the US Bankruptcy Code which enables the recognition of the Cayman liquidation as the foreign main proceeding thereby allowing for the recovery of the bank account and issuing of subpoenas in order to recover the books and records.
- The Cayman liquidators are aware of creditors in Hong Kong and are concerned they may seek to sue. Hong Kong has not adopted the UNCITRAL Model Law on Cross Border Insolvency however have established a common law framework for recognition of foreign insolvency proceedings. The Cayman liquidators obtain foreign recognition in Hong Kong in order to stay any proceedings in Hong Kong.

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

**2.5**

**Marks awarded 7 out of 15**

**\* End of Assessment \***

**A satisfactory paper that identifies some of the issues raised, generally substantiating its answers satisfactorily. More detail would have strengthened a number of answers.**

**TOTAL MARKS 30/50**