



## 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: 8 out of 10**

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

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

Explain what the term "international insolvency law" means.

The international insolvency law is the group of norms that regulate insolvency situation when there is an international element involved, for example the debtor domicile or offices are located in one country and the creditors in another, or the debtor conduct a business in a foreign country with assets located in that country.

**2**

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

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

Both concepts are doctrinal approaches to cross-border insolvency. Universality holds the idea for one insolvency proceeding in the most significant country or jurisdiction, and what is ruled in this proceeding needs to be followed on other countries or jurisdiction involved. On the other hand, territoriality holds for various insolvency proceedings opened in the different countries or jurisdictions connected with the parties in the proceedings, each one governed by local rules.

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

**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.

The United Arab Emirates have reformed their insolvency law in 2016 and 2019. Saudi Arabia reformed their domestic law in 2018. Dubai enacted a reform in 2019. Also, as an examples of addressing international insolvency issues, Dubai International Financial Centre adopted the Uncitral Model Law on Cross-Border Insolvency (UMLCBI) in 2019, so does Bahrain in 2018.

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

**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.

For individuals, the objectives are in line to protect the debtor from creditor harassment and to help the debtor to reinsert in the market, lowering the debt charge and pushing for as fresh start.

For corporations the incentives are put in preserve the business and the value of the assets, and in case the insolvency situation is fraudulent, to pursue the responsibility.

Maybe these differences have their origin in historical reasons. On the early development of insolvency law, the debtor was a merchant, and the insolvency state was viewed as undesirable and fraudulent, leading to exclude the debtor from the merchant activities. With the evolution of the insolvency law, a more comprehensive study of the causes of the insolvency led to broaden the definition of the debtors, applying insolvency rules to non-merchant individuals and set out the fraudulent character of the insolvency situation.

**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.**

3.5

#### 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 difficulties start with the different origin of the legal systems, with some countries rooted on a (roman) civil law system, and other countries rooted in a common law system. This difference leads to a different form of create, apply and enforce the law. Civil law systems are based on a coded body of laws or acts enacted by a Congress or legislative body, with courts that apply these laws on a concrete case and are restrained in the interpretation and application. Common law systems, on the other hand, are not only based on coded laws but also in precedent decisions ruled by the courts, which are mandatory to apply in similar cases. The courts have more freedom in how to apply and interpretate the law, but also applying the precedents. Also, on common law system, the courts have more freedom in the enforcement of the rules.

Another difference that lead to difficulties is the different approach of the domestic insolvency system between a pro-creditor or pro-debtor system. Some systems favour the creditors powers to recover the assets and get a satisfying pay of the debts, and some systems favour protections and prerogatives of the debtor. If the systems involved in a cross-border insolvency are opposing each other, it would be difficult to find a solution.

One relevant difficulty in the present day is the grade of adoption of multilateral treaties or laws between two or more jurisdictions involved on a cross-border insolvency case. For example, if all jurisdictions involved have adopted the UNCITRAL MLCBI, it will be easier to recognize the different proceedings and coordinate them, with advantages to the debtor, the courts and the creditors. If one jurisdiction haven't adopted a multilateral instrument, it will be difficult and more time consuming to achieve an agreement.

**Further detail would be beneficial. For example, consideration of Westbrook's 9 key issues.**  
**4**

### **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.

There are a number of organizations that contribute to the harmonisation of law, namely UNIDROIT, UNCITRAL, the International Insolvency Institute and INSOL International.

Regarding instruments issued in the 21<sup>st</sup> century, I can name UNIDROIT texts such the Convention on Mobile Equipment of 2001, railway rolling stock of 2007 and space assets in 2012. Very important also are the guides issues by UNCITRAL, the Legislative Guide on Insolvency, the Enactment and Interpretation Guide of the UNCITRAL MLCBI and the Practice Guide on Cross-Border Insolvency Cooperation of 2009.

Although not adopted strictly in the 21<sup>st</sup> century (1997), I think the UNCITRAL Model Law on Cross-Border Insolvency have the broadest impact on addressing international insolvency issues, due to the quantity of jurisdictions that adopted the UMLCBI into their domestic legislation. As an example, my home country, Chile, adopted the UMLCBI in 2014, with the first relevant cross-border case arising in 2016. However, with the aperture of Chapter 11 in the United States of Latam Airlines Group in 2020, the adoption of the Model Law by Chile showed the relevance and practical utility, because it permitted Chilean creditors and courts to quickly stands in the Bankruptcy Court of the Southern District of New York and establish a protocol of coordination and communication, as Model Law mandates, using the ABA/ALI and JIN guidelines as a model for the protocol, considering also that the United States have adopted the UMLCBI. So, the impact is huge and is easy to note the practical relevance of the multilateral instruments to address the issues.

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

**4.5**

**Marks awarded 12 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.

If Utopia have enacted the UMLCBI, that means it would be easier to the Erewhon liquidator to stand at Utopia courts and seek for the recognition of Erewhon proceeding in Utopia. According to the Model Law, the liquidator, as foreign representative, needs a certified copy of the decision commencing the foreign proceeding (in this case, the Erewhon proceeding) and a certificate of the Erewhon court about the proceeding and the representative. On the application for recognition, the liquidator can ask for the staying execution against the debtor assets relief, and once the Erewhon proceeding is recognized by the Utopian courts, the continuation of individuals actions and proceedings against the debtor is stayed (this is one effect of the recognition according to the Model Law).

**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.

Scenario (a):

Here, it is important to know where Apex had filed the proceedings.

If the proceeding had been filed in Erewhon (making this proceeding a foreign proceeding under the UMLCBI), the answer is yes, it makes a difference, because if the matter had not yet been heard, that means there is no decision on the commencement of the proceeding, and the requirements of the Model Law cannot be fulfilled. In this case, the liquidator must wait for the order of the court.

If the proceeding had been filed in Utopia, as the domicile of the debtor is located in this country, once the order is issued by the Utopian court, this would be the main proceeding under the rules of Model Law, and all the orders issued in the Erewhon proceeding must conform to the Utopia proceeding, but the Erewhon proceeding still can be recognized as a foreign non-main proceeding, making no difference with the first answer.

Scenario (b):

On this scenario, the Utopia proceeding is the main proceeding, and according to Model Law, the Erewhon proceeding (which would be a non-main proceeding), must conform to the main proceeding. But, we don't know if Erewhon has enacted the UMLCBI. This is important to know if the concurrent proceedings rules of the Model Law shall apply, specifically about cooperation and coordination between courts. Generally, it doesn't make a difference with the first answer, because the Erewhon liquidator still can ask for the Erewhon proceeding recognition.

**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?

I choose the United States as the country of company incorporation.

As the United States have incorporated the UNCITRAL Model Law on Cross-Border Insolvency, the insolvency representative can seek for the recognition of the main proceeding in the other jurisdictions, applying the rules of the Chapter 15 of the United States Bankruptcy Code. This addresses one (first) issue, the standing and the recognition of the foreign representative.

Also, if the other jurisdictions have incorporated the Model Law or have similar rules (for example, the European Insolvency Regulation), the recognition of the main proceeding leads to the stay on other proceedings and individual actions against the debtor in these jurisdiction (second issue). Also, the cooperation and coordination that the Model Law promotes and sometimes mandates, address another issue, which is the coordination of the creditors claims, and in a more general sense, the creditors rights (participation, priorities and voidable dispositions) (third issue). Additionally, the representative can use soft law instruments, like guidelines and guides to look for a protocol for creditors and courts cooperation, that can regulate the participation and conflict of law issues (fourth issue).

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

**4**

**Marks awarded 8.5 out of 15**

**\* End of Assessment \***

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

**TOTAL MARKS 36.5/50**