



## 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.

International insolvency law means a body of rules which apply in circumstances where an insolvency occurs but involves international elements in that issues arising from the insolvency that cannot be addressed by a single set of domestic insolvency law provisions.

**There is scope to elaborate**

**1.5**

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

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

Universality and territoriality was two distinct concepts in cross-border insolvency. The concepts can be differentiated as follows:

1. The concept of universality prescribes that there should only be one insolvency proceeding covering all of the debtor's assets and debts worldwide. Territoriality on the other hand prescribes that insolvency proceedings may be commenced in every state or jurisdiction where the debtor holds assets, but that each proceeding should be territorially limited and restricted to property within that state; this means that it is possible to have multiple concurrent insolvency proceedings in respect of one debtor.
2. The distinction between the concepts means that:

- a. Universality requires a high level of trust in foreign legal system and insolvency proceedings as compared to territoriality; **There is some scope to elaborate here regarding recognition and effect**
- b. As universality involves one insolvency proceedings, creditors may suffer practical and economic challenges in participating in foreign insolvency proceedings, as compared to territoriality; and
- c. Under the territoriality concept, a debtor could be solvent in one state but insolvent in another, as compared to universality.

**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.

Three recent examples of developments in the Middle East region are:

1. Saudi Arabia's approval of new bankruptcy law in 2018
2. Dubai's enactment of a new Dubai International Financial Centre Insolvency Law in 2019
3. Bahrain's adoption of the Model Law on Cross-Border Insolvency in 2018

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

**2**

**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.

There are a number of differences regarding the objectives of insolvency for individuals and corporations, including:

1. Individuals are not "dissolved" after bankruptcy in the same way that a company is dissolved once its affairs have been wound up - insolvency for individuals must therefore account for the "continuation" of the individual;
2. The objective for individuals is to enable the debtor to make a fresh start without the burden of pre-bankruptcy debt; in comparison, corporations are normally dissolved after the winding up of the business;
3. The objective for individuals is to reduce indebtedness through contributions from present and future income and in some systems, the insolvent individual is allowed to keep some of the assets to maintain him or herself; in comparison, for corporations, the objective is to reduce indebtedness even if it will end the life of the corporation.

**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.

The difficulties that may be encountered when dealing with insolvency law in a cross-border context include:

1. The definition of insolvency - different systems may define the term insolvency differently. For example, some systems may consider a short term inability to service debts sufficient to commence insolvency proceedings, whereas other systems might require long term negative net worth to commence insolvency proceedings;
2. Differences in domestic norms that have an impact on the position of creditors and the priorities they assert in insolvency;
3. Differences in domestic laws as to the ability to avoid transactions;
4. Differences as to how domestic laws treat conflicts of laws issues.

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

**3.5**

#### Question 3.3 [maximum 5 marks]

What multilateral steps have been taken in the 21<sup>st</sup> century to promote harmonisation of domestic insolvency laws? In your opinion, how much impact are these likely to have in addressing international insolvency issues? Include reasons for your opinion.

The multilateral steps that have been taken to promote harmonisation of domestic insolvency laws include:

1. Work by the United Nations Commission on International Trade Law, including work by Working Group V on the development of mechanisms and solutions to resolve the insolvency of micro, small and medium-sized enterprises, the completion of various texts on insolvency (including the UNCITRAL Legislative Guide on Secured Transactions, UNCITRAL Legislative Guide on Secured Transactions Supplement on Security Rights in Intellectual Property and the UNCITRAL Model Law on Secured Transactions (2016); Guide to Enactment (2017) and Practice Guide (2019), and the completion of various UNCITRAL Model Law on Insolvency (including the UNCITRAL Model Law on Enterprise Group insolvency with Guide to Enactment 2019, the UNCITRAL Legislative Guide on Insolvency Law, UNCITRAL Model Law on Cross-Border Insolvency and UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation).
2. Work by the International Institute for the Unification of Private Law, including completed texts and work done pertaining to the harmonisation of rules in cases of an insolvency of a bank;
3. Work by the International Lawyers Association, including the proposal to develop an international convention in the field of international insolvency law
4. Work by the International Bar Association
5. Work by the international Insolvency Institute
6. Work by INSOL International

The steps are likely to have positive and influential impact in addressing international insolvency issues. This is because the work has been done collaboratively through the input of people through various jurisdictions and with different views. The creation of reference texts and Model laws, in particular, provide a reference point for practitioners and Courts in addressing international insolvency issues in a common manner.

**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.

The Cross-border Insolvency Act of Utopia will be relevant in the Erewhon liquidator applying to the Utopian Court for recognition of their appointment as liquidator in Erewhon (pursuant to Article 15 of the Model Law). The effect of recognition will be to stay the continuation of the Apex action against Nadir in Utopia (pursuant to Article 20(1)(a)). The Erewhon liquidator will also have the ability under Article 24 to intervene in any proceedings against Nadir in Utopia. The recognition will also mean that the Erewhon liquidator can request additional relief including the examination of witnesses and the stay of execution against Nadir's assets in Utopia.

**There is some scope to elaborate**  
**4**

#### **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 the event of 4.2(a), the Cross-border Insolvency Act of Utopia remains relevant in that Article 29 contemplates concurrent proceedings regarding the same debtor and provides

that the court shall seek cooperation and coordination. Apex's winding up proceedings will not however be stayed under the Cross-border Insolvency Act of Utopia.

In the event of 4.2(b), the Cross-border Insolvency Act of Utopia remains relevant in that Article 29 provides that the Utopian court shall seek cooperation and coordination where a foreign proceeding and a proceeding under Utopian law are taking place concurrently regarding the same debtor. The court order to wind-up Nadir in Utopia will not however be stayed under the Cross-border Insolvency Act of Utopia.

**2**

**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 company is incorporated in Singapore and the insolvency laws of Singapore are applicable. Four key international insolvency issues facing the insolvency representative in this scenario are:

1. How the insolvency representative is to take control of and realise the company's foreign assets. In this respect, the UNCITRAL Model Law would apply to allow the insolvency representative to apply for recognition of their appointment in the foreign jurisdictions where the company's assets are located.
2. How the insolvency representative is to examine directors for information in respect of the company, if they are based in foreign jurisdictions. In this respect, the UNCITRAL Model Law would apply to allow the insolvency representative to apply for recognition of their appointment in the foreign jurisdiction and for relief that the insolvency representative be entitled to examine the directors and for the delivery of information concerning the company's assets, affairs, rights, obligations or liabilities.
3. How the insolvency representative is to deal with creditors based in foreign jurisdictions. In this respect, the UNCITRAL Model Law would apply to allow the insolvency representative to apply for recognition of their appointment in the foreign jurisdiction which would have the effect of staying individual proceedings brought by creditors. In the event that creditors in foreign jurisdictions bring

winding up proceedings against the company in their foreign jurisdictions, the UNCITRAL Model Law provides for cooperation with foreign courts and foreign representatives.

4. How the insolvency representative is to deal with foreign appointed insolvency representatives that have been appointed over the company. In this respect, the Singapore Insolvency, Restructuring and Dissolution Act 2018 adopts the UNCITRAL Model Law and provides for cooperation with foreign courts and foreign representatives.

**This is answered well. There is some scope to elaborate.**

**7.5**

**Marks awarded 13.5 out of 15**

**\* End of Assessment \***

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

**TOTAL MARKS AWARDED 41/50**