



## 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 9 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 body of rules regarding insolvency proceedings or circumstances by which the applicable laws of one state cannot be immediately and exclusively executed without taking into consideration the international elements of the case (potential conflict of laws, etc.)<sup>1</sup>

**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.

The differences between the concepts of universality and territoriality in cross-border insolvency are as follows:

- Universality allows for only one insolvency proceeding (where the centre of the debtor's interest is located) to deal with the debtor's assets and debts worldwide under one law regardless of whether the debtor holds assets in various jurisdictions; therefore, creating a unity of proceedings. This differs from territoriality which allows multiple insolvency proceedings to be commenced in various jurisdictions where the debtor holds assets with the restriction of each proceeding dealing with only the property in that state.
- Universality allows for the provisions of one insolvency law to deal with the main proceeding (or pending proceedings) in the COMI state and it to have worldwide (extraterritorial) effect in other jurisdictions falling outside of that state which promotes unity

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<sup>1</sup> B Wessels, International Insolvency Law (Kluwer, 2006), p1

of proceedings by having one law regulate the liquidation/administration. Territoriality enables multiple laws to regulate various proceedings opened in the various states and these proceedings may run concurrently in relation to the same debtor.

- Territorialism deals with the protection of local creditors and interests within the domestic market before the debtor's assets are transmitted abroad while universalism addresses international creditors and worldwide interests from those involved in cross-border insolvency cases, international markets whom the company may have conducted international transactions with and can participate in the proceeding while being dealt with on an equal basis.
- In territorialism, a debtor can be declared solvent in one state and be hopelessly insolvent in another where his debts are which isn't the case under universalism as all assets and liabilities of the debtor are disclosed in the main proceeding with the participation of the international creditors.
- There is a consensus that universalism creates uncertainty in domestic markets and the COMI state's standards may open doors for manipulation if indeterminate unlike territorialism which allows the laws of the various states to deal with their local creditors and address the assets and liabilities of the of the debtor from a local law perspective.
- Civil law countries favor the territorialism while common law countries are more inclined to universalism. Territorialism is found to be expensive and universalism has been found to be politically and practically difficult to achieve between states.

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### 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 to reform domestic insolvency laws or address international insolvency issues are:

- UAE – reformed their domestic insolvency laws in 2016 and 2019
- Bahrain – adopted the Model Law on Cross-Border Insolvency in 2018
- Dubai - reformed their domestic insolvency laws and adopted the Model Law on Cross-Border Insolvency in 2019
- Saudi Arabia - reformed their domestic insolvency laws in 2018

There is some scope to elaborate

3

Marks awarded 9.5 out of 10



### **QUESTION 3 (essay-type questions) [15 marks in total]**

#### **Question 3.1 [maximum 5 marks]**

Write a brief note on the differences regarding the objectives of insolvency for individuals and corporations.

The objectives of insolvency for individuals differ from those pertaining to the insolvency for corporations in many ways. Firstly, the aim of insolvency of individuals is to protect a debtor experiencing harassment by its creditors once in financial difficulties as well as enabling a debtor to make a fresh start. Another objective relating to an insolvent individual is the notion of reducing indebtedness of the debtor by making contributions from present or future income while taking any personal circumstances of him into consideration. Moreover, individuals benefit from the notion of exempt or excluded assets while insolvent which allows individuals to keep some assets to maintain himself and any dependants while experiencing such financial hardship. Conversely, one of the main objectives of insolvency for corporations is to preserve the business or parts of the business while protecting or taking into consideration the interests of the creditors. Another objective of insolvency for corporations is imposing personal liability on responsible persons (i.e. directors) in instances where there's an abuse of the company like fraudulent trading or mismanagement of the company's affairs which adds to the company becoming hopelessly insolvent. Lastly, another major difference regarding the objectives of corporate insolvency is the possibility of a potential rescue mechanism for the company to restore itself to profitability but if impossible, it allows a representative to realise all assets belonging to the estate and distribute cash proceeds to creditors in a fair and equitable manner. It doesn't allow for corporations to keep assets like individual insolvency which is probably due to the fact that companies may have greater liabilities and more creditors which after they recover some of the debt owed it leaves nothing or very little behind for the company's shareholders.

**There is some scope to elaborate**

**4.5**

#### **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.

There are many difficulties encountered when dealing with insolvency law in a cross-border context. Firstly, a major issue is finding a common insolvency language among the various jurisdictions. For instance, some states don't have legislation to dealing with insolvency proceedings or they may be operating off an outdated system as opposed to other states with more advanced systems dealing with insolvency matters regularly. This further raises the conflict of laws issue because the relevant legislation applying to one state's insolvency matters may be in contravention of another jurisdiction's laws or would cause a domestic court to act outside of its powers within the jurisdiction if they were applied. Domestic law systems deal with insolvency proceedings differently and have a different impact on creditors' positions and priorities. For instance, while many jurisdictions may use a common law approach when dealing with insolvency issues other states may use a civil law approach in the same proceedings which raises the issue of one state being pro creditor and the other being pro debtor. Coordinating claims procedures can also pose problems in the cross border context because while some states may be fans of universalism other states may be strong advocates for territorialism which makes the insolvency process more difficult for debtors with assets in conflicting jurisdictions and deciding which laws to follow when dealing with the assets. Lastly,

recognition of foreign representatives in other states in another difficulty faced when dealing with insolvency matters, as the powers may differ and cause a representative to not be able to administer the estate of the debtor as smoothly because what powers may be appropriate to have in one state may be illegal to do in another. Hence, it's not clear cut when dealing with insolvency proceedings which has a cross-border element involved.

**Further detail would be beneficial. For example, consideration of Westbrook's 9 key issues.**  
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### **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 taken in the 21<sup>st</sup> century to promote harmonisation of domestic laws are UNCITRAL Legislative Guide on Insolvency Law (2004) and World Bank Principles for Effective Insolvency and Creditor Debtor Regimes revised in 2021. These guides are likely to be very effective in addressing international insolvency issues for many reasons. Firstly, if adopted by states globally, they provide a basis for having a consistent approach for dealing with insolvency matters which will avoid the conflict of laws between various legal systems. Also, countries will be able to cooperate, coordinate and communicate effectively which would speed up recognition and enforcement of insolvency proceedings and the administration of insolvency matters while potentially reducing costs in the whole process. These also have the effect of promoting non-discrimination between foreign and local creditors while dealing with cross-borders issues efficiently. Moreover, these multilateral steps can aid in the reduction of insolvencies falling into another state's boundary and various courts having to solve international insolvency issues.<sup>2</sup>

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

**4.5**

**Marks awarded 13 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.

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<sup>2</sup> Professor Andre Boraine and Professor Rosalind Mason, Module 1 Guidance Text, Introduction to International Insolvency Law 2022/2023, p54

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.

Since Nadir's centre of main interest is in Utopia, the Cross-border Insolvency Act of Utopia is of great relevance and the primary law in dealing with insolvency issues regarding Nadir. However, having implemented the UNCITRAL regime, the Erewhon Liquidator would have to apply for recognition in Utopia for the foreign proceeding and as the appointed representative in the order made by the Erewhon court against Nadir. This means cooperation and communication between the parties, local and foreign courts and the Erewhon liquidator is needed and will usually be achieved by both states entering into a Protocols or Cross-border Insolvency agreement in order to coordinate all proceedings or in this case, the Utopia court will stay the proceedings against Nadir in Utopia and allow the Erewhon liquidator carry out its duties and administer the estate of Nadir fairly and efficiently.

This harmonisation will essentially will maximise the value of Nadir's estate and minimise expense, waste and jurisdictional conflict between Utopia and Erewhon.

**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.

No difference in my answer, as a the Erewhon liquidator would still have to apply for recognition in and get relief to stay proceedings or come to an agreement with the foreign court

(b) Apex had obtained a court order to wind-up Nadir in Utopia prior to the Erewhon winding-up order.

Yes, the main proceedings in Utopia will most likely stand and therefore, it will be difficult for the Erewhon liquidator to stay proceedings in Utopia considering the fact a Utopia liquidator may be already appointed so that order is liable to take priority. Erewhon court can possibly come to a Cross-border Insolvency Agreement with Utopia to deal with the assets located in Erewhon but it may be refused if it will interfere with the administration of the main proceedings or restricted to the assets within Erewhon so long as it doesn't contradict the laws of Utopia. Local and foreign courts still able to enter into a Protocols or Cross-border Insolvency

agreement to manage the insolvency proceedings and ensure that the administration of Nadir's estate is dealt with in the best interest of the creditors.

**Refer to Article 29 on concurrent insolvency proceedings, under which the local proceedings in Utopia maintain pre-eminence over the foreign proceedings in Erewhon.**

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 country I've selected for the Company's incorporate is Bermuda. The main pieces of legislation regulating insolvency issues in Bermuda are the Companies Act 1981 and the Companies (Winding-Up) Rules 1982. Bermuda can be described as a creditor friendly jurisdiction.

For key issues an insolvency representative faces here are as follows:

- Conflict of laws – Bermuda has no statutory equivalent to other foreign states who may have implemented the UNCITRAL MLCBI. Nonetheless, the Bermuda Supreme Court does recognise foreign representatives and does its best in cooperating and communicating with foreign states to assist foreign courts (and get assistance in return) in international insolvency matters so long as it's in accordance with the domestic laws of Bermuda (Singularis Holdings Limited v PricewaterhouseCoopers [2014] UKPC 36 and PricewaterhouseCoopers v Saad Investments Co Ltd.)
- Recognition of the foreign representative and granting of access to a foreign court – in Bermuda, a foreign representative will get its powers to administer the liquidation by virtue of section 170(2) of the Companies Act 1981. However, to seek recognition in a foreign court requires the liquidator file a letter of request application in the Bermuda court and the court think it's fit to grant such order for it to reach out to the foreign court and seek assistance.
- Realising assets forming part of debtor's estate in the various jurisdictions and the non-discrimination of foreign and domestic creditors – subject to section 225 of the Companies Act 1981, an insolvency representative must ensure that after realising assets in a winding-up the distribution of the Company's property or proceeds to creditors must be done on a pari passu basis or in accordance with the creditor rankings.
- Directors in several states – once a representative is appointed in Bermuda, the powers of the directors and officers of the Company cease as per section 208(2) of the Companies Act 1981. The Directors must always in the best interest of the company

while in office. However, where a company is insolvent, the directors don't have to file liquidation proceedings but must act in the best interests of the company's creditors. If they do not and for instance, continue trading with the insolvent company they can incur personal liability for breach of their fiduciary duty (section 97 of the Companies Act 1981), fraudulent trading or misfeasance under sections 246 and 247 of the Companies Act 1981 respectively.

- **For another approach that is closely applied to the facts, see the 'Model' Answer for four key international insolvency issues raised by the facts and facing the insolvency representative in this scenario.**

**6.5**

**Marks awarded 12.5 out of 15**

**\* End of Assessment \***

**An excellent paper - a thorough response that addresses the questions asked and substantiates the answers well.**

**TOTAL MARKS AWARDED 44/50**