



## 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 10 out of 10**

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

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

Explain what the term "international insolvency law" means.

Based on guidance from Wessels, it can be said to be a normative framework for insolvency processes in circumstances where the relevant domestic law cannot be properly applied in isolation of the international issues in a matter.

Another authoritative view point is credited to Fletcher in which he uses the term '*cross border insolvency*' synonymously with '*international insolvency*'. Guided by his views, it can also be said that the term international insolvency law relates to an insolvency scenario where the issues extend beyond the remit of a local legal system such that the domestic provisions are rendered deficient in the absence of due regard to the international aspects of a matter.

**2**

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

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

These are two converse theories for dealing with cross border insolvency.

Universality or universalism is an umbrella type approach focussed on (i) one action / insolvency proceeding; (ii) taken out in one state; (iii) under one insolvency law; (iv) to deal with all the debtor's assets; and (v) with a right to all creditors and interested persons to be heard on equal footing.

The choice of that one state can be influenced by the location of the debtor's centre of main interest.

Territoriality or territorialism, by contrast, is a scattered approach allowing for (i) multiple concurrent insolvency proceedings; (ii) in different states; and (iii) under different insolvency laws.

The choice of states can be influenced by where the debtor's assets are or its fixed interests. This approach thrives and depends on international cooperation and coordination.

**There is scope to elaborate with respect to recognition and effect in that for example, with universalism, recognition and effect requires that other States recognise that one set insolvency proceedings (that all agreed is the appropriate jurisdiction) and recognise it as having extraterritorial effect in their States.**

**3.5**

### **Question 2.3 [maximum 3 marks]**

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

In 2016 and 2019, the United Arab Emirates reformed its domestic insolvency laws. **More detail would have improved the mark awarded for this sub-question.**

In 2018 Bahrain adopted the UNCITRAL Model Law on Cross Border Insolvency while the Dubai International Finance Centre did so too in 2019.

**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.

Seal and Hooley speak of the objectives of insolvency for individuals as:

- (i) conferring some protection against harassment by creditors;
- (ii) allowing some leverage for a fresh start; and
- (iii) facilitating debt repayment from the individual's current and future means with due regard to their situational means.

Based on the views of Seal and Hooley the objectives of corporate insolvency can be said to be targeted at preservation of the company's business or the profitable components of it. Also, where there have been blameworthy wrongs by the company, to hold the natural persons involved personally liable.

Other differences between the two types of insolvency (natural person versus artificial person) include mode of commencement of proceedings; assets that can be affected; and possible effects of the proceedings.

Whereas commencement of insolvency proceedings against individuals typically require formal court process, insolvency proceedings against corporations can be commenced through court process or by administrative steps out of court (such as by a resolution of the company to begin business rescue proceedings or voluntary liquidation; as well as by exercise of a power of appointment contained in a deed e.g debenture holder appointing a receiver).

As for assets that can be affected, generally speaking, insolvency proceedings can affect all traceable assets of a corporation unless they are encumbered. On the other hand it is not unheard of for the laws of a land to give a blanket exemption of the essential household goods (of an individual) from execution.

Another area of distinction between the two is on possible effects. Insolvency proceedings can threaten the very existence of a corporation in that it can be dissolved after a winding up and its stakeholders (directors and shareholders) can suffer personal liability for the acts of the corporation. By contrast, an individual's existence cannot be terminated by insolvency proceedings but their capacity to lead a normal life can be affected e.g contractual capacity taken away and eligibility for public office and offices of a fiduciary nature can also be eroded.

**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 absence of uniformity and harmonisation between states in insolvency law; insolvency principles and cross border insolvency rules can pose difficulties.

Real differences in approach can be impacted: by the general orientation of their systems (e.g civil law versus common law); by their local legal culture; by the way they deal with security rights and labour issues; by their adopted terminology; by their policy considerations (eg pro-debtor versus pro-creditor).

Such differences can even result in the same debtor being found to be insolvent in one state but solvent in another. It can also make it difficult for a foreign representative to have access in another state and also impede efforts to coordinate and cooperate between courts and authorities of different states over the assets of a common debtor and general recognition and enforcement of their judgments and orders.

**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.

At multilateral level, the United Nations Commission for International Trade Law (UNCITRAL) has devised soft law solutions such as the UNCITRAL Legislative Guide on Insolvency Law in 2004, which serves as a useful benchmark for member states in their quest to frame or update their insolvency laws.

International organisations such as the World Bank also devised the Principles for Effective Insolvency and Creditor/Debtor Regimes in 2001 (later revised in 2005,2011 and 2015). The World Bank and UNCITRAL have collaborated to ensure uniformity in approach between the Legislative Guide and the ICR Principles. The two have been used by the World Bank as tools of law reform in states as part of the conditions for assistance. Such reforms where implemented arguably add the relevant states to the pool of uniformity comprising other states that have embraced the Legislative Guide and the ICR Principles.

Regional bodies such as the European Union have managed to implement hard law solutions such as promulgation of the European Insolvency Regulation in 2000, later recast in 2015 and amended in 2021.

The Legislative Guide and the ICR Principles are very comprehensive and practical materials such that if properly internalised and implemented by states they can be an

effective tool for a harmonised and orderly approach to international insolvency issues in many parts of the world, given the wide membership of the UN and wide coverage of the World Bank's work. However, there is need for sensitisation and awareness to foster buy-in from key stakeholders in states as they may be either oblivious to or unwilling to embrace the Legislative Guide and ICR Principles.

The regional hard law may be effective for a harmonised approach in the member states (e.g the European Union) but is of no application outside of the region and thus of limited impact in addressing international insolvency issues on a global scale.

**There is scope to elaborate regarding 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.**

**4**

**Marks awarded 12.5 out of 15**

#### **QUESTION 4 (fact-based application-type question) [15 marks in total]**

Nadir Pty Ltd (Nadir) is a company registered in Utopia. Originally it was incorporated in the neighbouring country of Erewhon before moving its registration and head office to Utopia one month ago. Apex Pty Ltd (Apex) is incorporated and has its head office in Erewhon. Apex and Nadir enter into a contract by exchange of emails between their head offices for Apex to supply goods to Nadir in Utopia. Nadir has failed to pay for the goods which have been delivered in accordance with the contract. Apex issues court proceedings against Nadir in Utopia for monies owing for the goods sold and delivered.

Meanwhile, Nadir also owes monies to creditors in Erewhon. One Erewhon creditor obtains a court winding-up order against Nadir in Erewhon and a liquidator is also appointed by that court.

If you require additional information to answer the questions that follow, briefly state what information it is you require and why it is relevant.

#### **Question 4.1 [maximum 5 marks]**

Assume the UNCITRAL Model Law on Cross-border Insolvency has been adopted by Utopia without modification, except as required to domesticate it. For example, the Cross-border Insolvency Act of Utopia names its local laws relating to insolvency and its competent court under the Act. The Erewhon liquidator's investigations detect that Apex is suing Nadir in Utopia. The liquidator would like to stop Apex court action against Nadir in Utopia. Advise the Erewhon liquidator on the potential relevance of the Cross-border Insolvency Act of Utopia.

Under the Cross-border Insolvency Act of Utopia, the liquidator would qualify as a foreign representative within the meaning of article 2(d). It would thus be possible and prudent to:

- (i) apply under article 15(1) for recognition of the Erewhon case as a foreign proceeding albeit a foreign non-main proceeding (under article 15(2)(b) ) since Nadia's centre of main interest appears from the facts to be in Utopia not Erewhon;
- (ii) after recognition, apply for a stay of continuation of the case in Utopia and of any execution against Nadia's assets in Utopia and for a suspension of any right of disposal of Nadia's assets in Utopia (pursuant to article 21(1)(a), (b) and (c) and article 23);
- (iii) if the stay of proceedings is refused, participate in the substantive case in Utopia as an intervener to ensure that nothing happens which would render the liquidation process in Erewhon academic as far as gathering and realising the assets of Nadia is concerned (pursuant to article 24);
- (iv) seek, pursuant to article 21(2) for an order to allow the liquidator to be entrusted to gather, realise and distribute Nadia's assets in Utopia after the winding up is complete in Erewhon; and
- (v) seek any necessary cooperation between the Courts of Erewhon and Utopia in ways provided under article 27 and for purposes of recognition and enforcement of the Erewhon court judgment and orders.

**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.

In the scenario under 4.2 (a) my advice would be different from 4.1 as it would be premature for then prospective liquidator to approach the Utopian Court since the definition of 'foreign representative' and standing conferred thereby (article 2(d) and recognition under article 15) is limited to actual appointees not intended appointees. I would thus advise that he gets his principal to fast track the Erewhon case up to point of formal appointment of the liquidator.

In the scenario under 4.2 (b) my advice would differ from 4.1 to the extent that I would end at recommending: (i) intervening and being heard in the winding up proceedings in Utopia (pursuant to article 24) to register and safeguard Apex's interests as a creditor; and (ii) also for cooperation between the Courts in the two states.

The different approach is because the centre of main interest of Nadia appears from the facts to be in Utopia such that the earlier case in Utopia would be a foreign main proceeding in relation to the case in Erewhon. Consequently, rather than taking the lead role for the Utopia case to cede to the Erewhon case like in 4.1, the Erewhon liquidator would (in scenario 4.2(b) ) do well to closely watch the Utopia liquidator play lead over the assets of Nadia but also to be on standby to take out any requisite application (pursuant to article 23) to curtail any occurrences detrimental to the interests of Apex as a creditor.

**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 selected country is Australia which (according to the Module 1 Guidance Text at p.8) has adopted the UNCITRAL Model Law on Cross-Border Insolvency (MLCBI).

Four key international insolvency issues at play for the insolvency representative in this scenario are:

- (i) different domestic insolvency laws - the domestic insolvency law of Australia may differ from the domestic insolvency laws in the other states in which the debtor has assets;
- (ii) choice of insolvency law - in terms of which insolvency law shall apply to govern the proceedings in Australia and any insolvency steps involving the assets of the debtor in the other states;

- (iii) recognition of forum and representatives - in terms of whether Australia would be recognised as the forum with jurisdiction to preside over the debtor's insolvency, whether the foreign representatives of creditors from other states would be recognised in the Australian court and whether the insolvency representative from Australia would be recognised in the foreign courts;
- (iv) cooperation and coordination - in terms of whether the judgment and orders of the Australian court would be recognised and enforced in the other states (in respect of the debtor's assets there) and whether the decisions of the courts of those states would be recognised and enforced in Australia.

In terms of assistance addressing the said issues:

- (i) the UNCITRAL Legislative Guide on Insolvency Law (the Legislative Guide) and the World Bank Principles for Effective Insolvency and Creditor/Debtor Regimes (the ICR Principles) can be of practical help to harmonise the legal systems of Australia and the other states, given the likely differences in domestic insolvency laws;
- (ii) the MLCBI (adopted by Australia) could be resorted to justify the choice of Australian law and of commencement of proceedings there since the debtors centre of main interest lies there (incorporation and head office) (article 2(b) and 20(1)(b)). The MLCBI could also be used to allow representatives from the other states to be recognised in the Australian court and to participate as foreign representatives (article 15,23 and 24). In a similar vein, the MLCBI could be used by the Australian insolvency representative to appear before the courts in the other states if need be; and
- (iii) the MLCBI allows for co-operation and co-ordination between the Australian court or the insolvency representative and foreign courts or foreign representatives (article 25,26 and 27). Also the IBA Cross-Border Insolvency Concordat (1996) and the Judicial Insolvency Network Modalities of Court to Court Communication could also serve as some useful practical guides.

**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.**

**4.5**

**Marks awarded 10.5 out of 15**

**\* End of Assessment \***

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

**TOTAL MARKS AWARDED 40.5/50**