



## 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 7 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 refers to the system of rules that regulate the treatment of financially distressed debtors where these debtors have assets or creditors in more than one jurisdiction.

**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 principle of universality provides that only one forum should have jurisdiction over the debtor. In other words, there should be a *single* insolvency proceeding regulating the administration of the debtor's assets and debts worldwide. Accordingly, once insolvency proceedings are commenced in one jurisdiction, insolvency proceedings cannot be commenced in any other jurisdiction, nor can there be any other forms of execution of the debtor's assets. The sole forum with jurisdiction over the debtor should be the State where the centre of the debtor's interests is located.

According to the concept of territoriality, insolvency proceedings may be commenced in every jurisdiction where the debtor has assets, but the reach of these proceedings should be territorially limited to assets within the State where the proceedings are opened. Thus, it is possible to have multiple concurrent insolvency proceedings in relation to the same debtor.

**There is some 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.**

**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.

1. Bahrain adopted the UNCITRAL Model Law on Cross-Border Insolvency in 2018, with the Dubai International Financial Centre doing the same in 2019.
2. In 2018, Saudi Arabia approved a new bankruptcy law which was aimed at attracting foreign direct investment, boosting credit growth and easing the process of winding up insolvent companies.
3. The UAE adopted a new bankruptcy law in 2016 (Federal Law by Decree No. (9) of 2016 on Bankruptcy) and a new insolvency law in 2019 (Federal Decree Law No. (19) of 2019 on Insolvency). **There is scope to elaborate.**

**3**

**Marks awarded 8.5 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.

According to Sealy and Hooley,<sup>1</sup> there are a few key differences between the objectives of insolvency for individuals and corporations.

The objective of insolvency for individuals is threefold: to protect the debtor from harassment by his creditors, to enable the debtor to make a fresh start, especially in less blameworthy cases, and to reduce indebtedness by contributing the debtor's present and future income to the estate, while also considering the debtor's personal circumstances. To that end, there is a greater consideration of personal circumstances and livelihood where individual insolvency is concerned.

The objective of insolvency for corporations is to preserve the business as a going concern where possible, and to impose personal liability on persons responsible for the corporation's insolvency where personal liability has been abused.

There are also a few similarities regarding the objectives of insolvency for individuals and corporations. These are to ensure *pari passu* distribution as far as possible except where priority creditors are concerned, to ensure that secured creditors deal fairly with the debtor and other creditors, to investigate the reasons for the insolvency, and to reclaim voidable dispositions where the insolvent debtor has dealt improperly with assets.

**There is some scope to elaborate**

**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 numerous difficulties that may be encountered when dealing with insolvency law in a cross-border context. These difficulties tend to arise from pertinent differences in the relevant systems.

First, the standard of insolvency laws across different countries is inconsistent, with the standard in many countries being relatively low. Many of these laws are outdated or otherwise framed in a way that is not suited to modern day trade and investment. As such, there is a general lack of structure when dealing with cross-border insolvency cases.

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<sup>1</sup> In M A Clarke *et al*, *Commercial Law* (Oxford University Press, 2017), chap 28.

Second, the fact that there are various national approaches to insolvency is a difficulty. A basic dividing line between the various systems is the general view as to the interests that insolvency proceedings should provide for. A common distinction is that between pro-creditor and pro-debtor systems. Some systems may also emphasise other interests important in a domestic context, such as labour rights (e.g. France), or other public policy reasons, such as an unwillingness to recognise foreign public claims for tax or social security reasons. In this way, cross-border insolvency proceedings can be complicated by the fact that they intersect with questions of substantive law (both private and public law).

Third, finding a common insolvency language is a challenge. The definition of “insolvency” may differ at the international level. For example, a more short-term inability to service debts, for example a liquidity crisis, is sometimes considered sufficient for the commencement of “insolvency proceedings”.

Apart from those difficulties mentioned above, Westbrook<sup>2</sup> also identifies nine key issues in cross-border insolvency cases:

1. Standing for (recognition of) the foreign representative;
2. Moratorium on creditor actions;
3. Creditor participation;
4. Executory contracts;
5. Co-ordinated claims procedures;
6. Priorities and preferences;
7. Avoidance provision powers;
8. Discharges; and
9. Conflict-of-law 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.

Multilateral insolvency treaties and conventions have been introduced. When signed and ratified by a State, the insolvency treaty or convention becomes part of the domestic law enforceable in the courts of the State. For example, though not a convention, the European Insolvency Regulation (EIR) (2000) has influenced broader multilateral developments in international insolvency law. The EIR has been reviewed and amended multiple times since then. Outside of the EU however, the impact of insolvency treaties and conventions to promote harmonisation of domestic insolvency laws in the 21<sup>st</sup> century has been limited.

Instead of treaties and conventions as “hard law”, more success has been gained through “soft law” options. The Hague Conference on Private International Law (the Hague Conference) was established in the 19<sup>th</sup> century and has continued to work towards the

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<sup>2</sup> J L Westbrook, “Global Insolvency Proceedings for a Global market: The Universalist system and the Choice of a Central Court” (2018) 96 *Texas Law Review*, p 1473.

progressive unification of private international law well into the 21<sup>st</sup> century. The Hague Conference coordinates its activities with the International Institute for the Unification of Private Law (UNIDROIT) and the United Nations Commission on International Trade Law (UNCITRAL). For example, the Hague Conference cooperated with UNCITRAL to prepare the UNCITRAL Legislative Guide on Insolvency Law (2004).

The most successful “soft law” instrument is the Model Law on Cross-border Insolvency (MLCBI), which has been adopted (either with or without modification) in many countries. Evidently, the MLCBI is gathering momentum as an influential response to international insolvency law.

**While adoption of the MLCBI may harmonise various domestic insolvency laws in so far as they address international insolvency issues, the question addresses more broadly the harmonisation of domestic insolvency laws in general. See the ‘model’ answer on this sub-question.**

Based on the above, it appears that soft law is more likely to have a greater impact than hard law in addressing international insolvency issues. The key reason for this is that soft law allows States the latitude to modify the soft law instrument according to domestic interests and needs before enacting it in domestic law. In doing so, soft law incrementally harmonises domestic insolvency laws, while also striking a balance with domestic insolvency interests.

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

**3.5**

**Marks awarded 13.5 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.

The Cross-border Insolvency Act of Utopia facilitates cross-border insolvency proceedings. Under the Cross-border Insolvency Act of Utopia, the Erewhon liquidator may apply to be recognised as foreign representative and for recognition of the Erewhon insolvency proceedings in the Utopia court. The Cross-border Insolvency Act of Utopia would mandate that the Utopian court cooperate with the Erewhon liquidator and support the Erewhon liquidation proceedings.

Given that Nadir has moved its registration and head office to Utopia, the Erewhon liquidation proceedings will likely be recognised as a foreign non-main proceeding, *ie*, a foreign proceeding where Nadir has an establishment within the meaning of Article 2(f) (Article 17(2)(b) of the Cross-border Insolvency Act). The Erewhon liquidator may then apply to stay the Apex court action against Nadir in Utopia under Article 21(1)(a) of the Cross-border Insolvency Act of Utopia.

#### 4.5

#### 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.

The analysis in question 4.1 would be the same in the first but not the second alternative scenario. The first alternative scenario would be the same - the Erewhon liquidator may apply under Article 21(1)(a) of the Cross-border Insolvency Act of Utopia to stay the continuation of the winding-up matter. The second alternative scenario would involve the Erewhon liquidator applying under Article 21(1)(b) of the Cross-border Insolvency Act of Utopia to stay execution against the debtor's assets.

#### Consider article 29.

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?

Assume that the company is incorporated in Singapore. Four key international insolvency issues faced are:

1. Ensuring that the Singapore liquidation is recognised in the other States where the company has operated business;
2. Ensuring that a moratorium is imposed on creditor actions in the other States where the company has operated business;
3. Ensuring that the company's assets in the other States are preserved and not dissipated; and
4. Enabling the Singapore-appointed liquidator to examine and take evidence from the directors in the other States where the company has operated business.

For all the issues, the relevant domestic law is the Insolvency, Restructuring and Dissolution Act 2018 ("IRDA"). Given that this case has a cross-border element, the Third Schedule of the IRDA which incorporates the UNCITRAL Model Law on Cross-Border Insolvency ("MLCBI") is of particular relevance.

I assume that all the States in which the company has operated business have, like Singapore, adopted the MLCBI in their applicable insolvency legislation. I turn to consider how the MLCBI applies to assist the insolvency representative in addressing each of the four issues.

First issue

The insolvency representative appointed by the Singapore court may apply to the various States for recognition of the Singapore insolvency proceeding under Article 15 of the MLCBI. Given that the insolvency proceeding was commenced in the State of the company's incorporation and head office, the presumption in Article 16(3) of the MLCBI applies and Singapore is presumed to be the company's centre of main interests. Accordingly, the Singapore insolvency proceeding will be recognised as a foreign main proceeding in the other States.

Second issue

Given that the Singapore insolvency proceeding is a foreign main proceeding, automatic relief will be granted under Article 20 of the MLCBI. This means that, under Article 20(1)(a) of the MLCBI, all creditor actions commenced in the other States against the company will be automatically stayed.

#### Third issue

Upon application for recognition under Article 15 of the MLCBI, the Singapore insolvency representative may also apply to the various courts under Article 19 of the MLCBI for interim relief. In particular, the insolvency representative may apply under Article 19(1)(c) read with Article 21(1)(c) for an order from the various courts suspending the right to transfer, encumber or otherwise dispose of any of the company's property. This allows for the company's assets to be preserved pending the hearing of the recognition application.

Once the Singapore insolvency proceeding has been recognised as a foreign main proceeding, any disposal of the company's property will be automatically prohibited under Article 20(1)(c) of the MLCBI.

#### Fourth issue

Upon application for recognition under Article 15 of the MLCBI, the Singapore insolvency representative may also apply to the various courts under Article 19 of the MLCBI for interim relief. In particular, the insolvency representative may apply under Article 19(1)(c) read with Article 21(1)(d) for an order to examine the directors in the other States.

Once recognition is granted, the insolvency representative may also apply to examine the directors and/or take any evidence from the company's offices in any of the States under Article 21(1)(d) of the MLCBI.

**8**

**Marks awarded 13.5 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 42.5/50**