



## 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 2023.*

## 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 2023. The assessment submission portal will close at 23:00 (11 pm) BST (GMT +1) on 15 October 2023. 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 a body of rules that governs a situation in which an insolvency occurs in circumstances which transcends the confines of a single legal system such that a single set out of domestic insolvency law provisions cannot be exclusively applied without regard to issues raised by the foreign elements present in that situation.**

**This seems to be a reference to an authoritative quote. Take care to reference it.**  
2.5

Question 2.2 [maximum 5 marks]

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

***The concept of universality dictates that there should only be one insolvency proceeding covering all of the debtor's assets and debts worldwide.***

***On the other hand, the concept of territorialism is based on the premise that insolvency proceedings may be commenced in every State or jurisdiction where the debtor holds assets but that they should be territorially limited and restricted to property within the State / jurisdiction where proceedings have been commenced.***

Also, note, these theories involve two key aspects of private international law - recognition and effect as well as jurisdiction:

For example, with universalism, (1) the jurisdictional aspect requires all States to agree on the place for the one set of insolvency proceedings in respect of the debtor and, to be successful, (2) recognition and effect requires that other States recognise that one set insolvency proceedings and recognise it as having extraterritorial effect in their 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.***

***A number of Middle East states have reformed their domestic insolvency laws. For instance, Saudi Arabia has reformed its bankruptcy law to, amongst other things, make the process of unwinding insolvent companies easier. In addition, Dubai has also introduced a new debtor in possession bankruptcy regime in line with international best practice.***

***In relation to international insolvency, Bahrain and the Dubai International Financial Centre have adopted the Model Law on Cross-Border Insolvency.***

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.***

***In the case of insolvency for individuals, the general objective is to protect the debtor from harassment by creditors to enable the debtor to make a fresh start and to allow the debtor to reduce his indebtedness by making contributions from present and***



**future income to the estate while at the same time taking his personal circumstances into consideration.**

**On the other hand, in the case of corporations, the general objective is to preserve the business (or viable parts of it) and to impose personal liability on responsible persons (e.g., directors / officers of the company) where statutory or fiduciary duties have been breached.**

**This fundamental difference in objectives results in the notion of exempt or excluded assets which applies in some jurisdictions exclusively in relation to individual insolvencies.**

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.**

First, **both national and international laws on insolvency traditionally show a lack of structure, both formally and informally, to deal with cross-border insolvency cases. The standard of insolvency law in many countries is also relatively low.**

Second, **it is difficult to reconcile the various national approaches to insolvency. For instance, whilst some jurisdictions are pro-creditor, others might be pro-debtor. Additionally, some systems may give more weight to certain interests over others (for example, labour rights) or show a reluctance to recognise the foreign claims (for taxes, social security etc) or a desire to protect local creditors.**

Lastly, **States are typically more willing to export than import insolvency proceedings.**

**This answer displays a satisfactory understanding of the issues. To improve your responses, ensure they are commensurate with the mark allocation – while Q 3.2 asks for a brief note, it is for 5 marks. Further detail would be beneficial. For example, consideration of Westbrook's 9 key issues.**

3

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 the harmonisation of domestic insolvency laws include initiatives aimed that the harmonisation of domestic insolvency laws (for instance, the Legislative Guide on Insolvency Law promulgated by the UNCITRAL which includes recommendations on applicable law in insolvency**

*proceedings) and the adoption of co-ordination agreements to facilitate co-operation and co-ordination of concurrent proceedings (including, amongst others, the JIN Guidelines and the UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation).*

*In my opinion, whilst the steps taken will undeniably address international insolvency issues in theory by first, reducing the discrepancies between various domestic insolvency laws and second, enhance coordination and cooperation between foreign courts to facilitate the efficiency of parallel proceedings in an international insolvency, the practical impact of these steps will ultimately hinge on whether they are being accepted and implemented by various States. As these measures are still fairly recent, it remains to be seen whether they will achieve the requisite buy-in from various jurisdictions.*

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

**3.5**

**Marks awarded 11.5 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 is relevant to the extent that the Erewhon liquidator will be able to seek recognition of the winding up proceedings against Nadir in Erewhon (as well as the order appointing him as liquidator) as the foreign main proceeding. Whilst a presumption applies under the Cross-border Insolvency Act of Utopia in favour of the place of incorporation of Nadir (i.e., Utopia) being the centre of main interests, there is a strong argument that the presumption should be disapplied in favour of Erewhon given factors including the location of Nadir's creditors. Once the winding up proceeding in Erewhon is recognised as the foreign main proceeding, an automatic moratorium would apply which would serve to stop the Apex court action against Nadir in Utopia.**

The question requires candidates to apply the relevant MLCBI articles to the facts provided in more detail than that above.

3.5

Question 4.2 [maximum 2 marks]

**Would it make any difference to your answer in question 4.1 in the following two alternative scenarios to Apex suing for its debt?**

- (a) Apex had filed proceedings to wind-up Nadir, but the matter had not yet been heard.**
- (b) Apex had obtained a court order to wind-up Nadir in Utopia prior to the Erewhon winding-up order.**

**The alternative scenarios in (a) and (b) would not make a difference to my answer.**

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

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Question 4.3 [maximum 8 marks]

NB: This question is not related to Questions 4.1 and 4.2

**A court has ordered the commencement of an insolvency proceeding against a corporate debtor in the State of its incorporation and head office. The company has operated business in a number of States and has assets (real property or interest in land, other tangible assets and intangible assets); creditors (including taxation / revenue authorities) and directors in several States.**

**Select a country for the company's incorporation and, based on the insolvency laws of the country you select and the brief facts provided, describe four key international insolvency issues facing the insolvency representative in this scenario. For each issue, what domestic laws or international instruments apply to assist the insolvency representative address these four issues?**

***I have selected Singapore as the country for the company's incorporation.***

***The 4 key international insolvency issues facing the insolvency representative are as follows:***

- (1) The recognition of the insolvency representative and the winding up order in the relevant States / jurisdictions where the company has assets and creditors;***
- (2) The moratorium on creditor action in the relevant States / jurisdictions (besides Singapore);***
- (3) Issues of conflicts of laws and the possibility of concurrent insolvency proceedings being commenced in the other relevant States / jurisdictions;***
- (4) Rights, duties and liabilities of the directors of the company.***

***In relation to issues 1 to 3 above, the question ultimately depends on whether the relevant State / jurisdiction in which recognition of the Singapore insolvency proceeding is sought have adopted the UNCITRAL Model Law on Cross-Border Insolvency. If so, a presumption will apply that the company's centre of main interest is in Singapore would be the foreign main proceeding and as a result the insolvency representative and the winding up order would be recognised and relevant orders would be made in relation to the assets in the relevant foreign State / jurisdiction. An automatic moratorium would also apply against all creditor action in the relevant States / jurisdiction. Concurrent proceedings that are commenced in other States / jurisdictions are likely to be regarded as non-main proceedings.***

***Given that the company is Singapore incorporated, the rights, duties and liabilities of the directors would be determined by Singapore law notwithstanding that the directors are located outside of Singapore.***

***For an approach more 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.***

**5.5**

**Marks awarded 9 out of 15**

**\* End of Assessment \***

**TOTAL MARKS 35/50**

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