



## 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: 6 out of 10

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

#### Question 2.1 [maximum 2 marks]

Explain what the term "international insolvency law" means.

The diverse set of insolvency laws and legal systems that are applied across jurisdictions with the objective of establishing a good legal framework that addresses the inability of debtors to pay their debts in different countries.

There is scope to elaborate.  
2

#### Question 2.2 [maximum 5 marks]

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

1. Universality – There should be one forum of insolvency proceedings in the jurisdiction where the assets are located, and different states need to accept that foreign law may apply in their jurisdiction.
2. Territoriality – There is more than one forum of insolvency proceedings in different jurisdictions where the debtor holds assets, which should be territorially limited and restricted to property with the jurisdiction where the proceedings are opened also the local insolvency law would be applicable respectively.

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.

3

### 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. A possible option or avenue for an insolvent debtor to be able to try restructure the company should a restructuring plan be approved by the Court and creditors or otherwise it must proceed into to be placed liquidation if the Court considers that restructuring is not possible. **Further detail is needed including with respect to connection to the Middle East**
2. Saudi Arabia has approved a new bankruptcy law, to enable the process of unwinding insolvent companies become easier by having set procedures for businesses which experience financial difficulty and establish a clear way of bringing affected parties together and working out whether a business could be saved or should be liquidated.
3. The protection of debtors from legal prosecution, decriminalize the financial obligations of the insolvent person and give them an opportunity to work, be productive and provide for their families. One or more qualified administrators will be appointed by the court to settle the financial obligations debtor. **Further detail is needed including with respect to connection to the Middle East**

1

Marks awarded 6 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.

1. As distinguished in Sealy and Hooley, the objective of insolvency for individuals is to protect the debtor from harassment by creditors, to enable the debtor to legitimately make a fresh start without any blame, to reduce further indebtedness by making contributions from present and future income to the estate while at the same time taking his personal circumstances into consideration. There are personal consequences herein.
2. The objective for corporations who experience financial distress is to possibly preserve the business, or some of its viable parts or assets – not necessarily the company itself - ensure that obligations are imposed where personal liability has been abused by responsible individuals although there are exclusions.
3. Therefore, in relation to individuals' systems allow the insolvent individuals to keep some of their assets required to maintain him or herself including family.

**There is scope to elaborate, for example with respect to exempt property**

4

#### Question 3.2 [maximum 5 marks]

Write a brief note on the difficulties that may be encountered when dealing with insolvency law in a cross-border context relating to pertinent differences in the relevant systems.

1. The assets and liabilities in different countries.
2. The international jurisdiction is the debtor's "centre of main interests"
3. universalism and territoriality
4. Recognition of security interests, processes related to the disbursement of assets, and different policy preferences underlying the protection of different

Further detail would be beneficial. For example, consideration of Westbrook's 9 key issues.  
3.5

**Question 3.3 [maximum 5 marks]**

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

The following steps have been taken – the uniform choice of law principles, the uniform recognition laws and co-operation and co-ordination to promote recognition and enforcement. I believe that the difficult issues are being addressed in international insolvency and provides harmonised solutions that enable clear rules and efficient insolvency proceedings, recovery of assets having fair legal frameworks that are inclusive encouraging the development of better trade between the different economies, lastly to allow equitable distribution to creditors without prejudice to the applicable law to the different jurisdictions.

Elaboration is warranted, please see the model answer.

2.5

Marks 10 awarded 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.

What is the country's legal system – insolvency proceedings may have international aspects and should establish clear rules pertaining to the jurisdiction thereof.

Type of contact – the liquidator may choose to continue if it will benefit the estate or stop the contract.

What assets will be included in estate? Once insolvency proceedings commence there are certain impacts that follow to protect the assets and not prejudice creditors.

**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 liquidator must know that there is an automatic stay of the court proceeding or moratorium to prevent any actions against the insolvent while placed under insolvency. Therefore, parties will make use of the legislative provision applicable to State where the debtor has the centre of its main interests and should be subject to that State's insolvency law. On the principle that the domestic courts of each home country should endeavour to cooperate with the courts of other countries in cross-border insolvency cases. The Apex corporation is free to follow the proceedings and in this instance submit their claim against the estate and herein the principle of pari passu would be used stating that similarly situated creditors are treated and satisfied proportionately to their claim out of the assets of the estate available for distribution to the creditors according to their ranking. As stated in UNICTRAL in the practice guide the obligation of a stay can ensure a fair and orderly administration of the liquidation proceedings, providing the insolvency representative with adequate time to avoid making forced sales that fail to maximize the value of the assets being liquidated and also an opportunity to see if the business can be sold as a going concern.

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

3

**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.
  - a. No, if the matter was not heard yet it would not make a difference.
  - b. Yes, the territorial jurisdiction of the State would be Utopia where the main proceedings would resume and allowing the law of the jurisdiction to regulate the matter.

**This sub-question requires you to refer to Article 29 on concurrent insolvency proceedings, under which the local proceedings in Utopia maintain pre-eminence over the foreign proceedings in Erewhon.**

1.5

**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?

In France, the issues for the insolvency representatives may be are the granting of access to courts to foreign insolvency representatives, secondly the recognition of foreign insolvency proceedings and co-operation an communication between the insolvency representatives and the courts. International solutions proposed that might apply in a local court considering multilateral approaches by way of incorporating hard law and influencing its regulation by way of soft law. Also introducing treaties and conventions as international instruments that influence domestic law accordingly. Treaties and conventions are written agreements through negotiations and discussions between states that jurisdictions voluntarily sign and ratify, and would be obliged to adhere to. Such agreements, which are also called statutes or protocols, govern the mutual relations between states and the broader foreign law. Notwithstanding the provisions that have been made to provide for recourse if any is required to conciliation, mediation or arbitration; others provide for recourse to the Court, either immediately or if other means of dispute settlement fail.

**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. Then apply the current French laws on CBI to such issues.**

4

Marks awarded 8.5 out of 15

**\* End of Assessment \***

**TOTAL MARKS 30.5/50**

**A satisfactory paper that identifies some of the issues raised, generally substantiating its answers satisfactorily. More detail would have strengthened a number of answers.**