



## 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.***

***It is a set of rules that governs cross-border insolvency cases where the debtor or the assets of the debtor are in more than one country.***

**More detail would have improved the mark awarded for this sub-question.**

1

Question 2.2 [maximum 5 marks]

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

*Those are two opposing approaches to cross-border insolvency. Universality advocates for one insolvency proceeding covering all the debtors' assets and debts, regardless of the location. All claims are treated equally, assets are treated as one estate. In theory this approach should limit costs and be more efficient in execution. Territoriality - contrary to the above, proposes that the insolvency proceeding should be open separately in every country that the debtor has assets. All jurisdictions handle those cases separately, not as a whole. This approach protects local creditors but multiplies costs and time effort.*

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.**

- *UAE - reform of insolvency laws in 2016 and 2019 introduction of Federal Law No. 9 that replaced previous commercial code. The law introduced provisions like the protection of debtors from prosecution, the possibility of financial restructuring outside formal insolvency proceedings, and the introduction of a bankruptcy trustee system.*
- *Saudi Arabia - 2018, reform of Bankruptcy law. A new code was introduced, with reorganization and liquidation as a form of bankruptcy proceedings.*
- *Dubai - 2019, The DIFC (Dubai International Financial Centre) adopted new insolvency law regime based on UNCITRAL Model Law on Cross-Border Insolvency.*

3

Marks awarded 7 out of 10

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

Question 3.1 [maximum 5 marks]

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

*The goals of both proceedings are different:*

- *For individuals, the main objective is to provide them with fresh start by discharging their debt, protect the debtor from potential harassment by creditors, at some cases allowing them to keep some of the assets required to*



*maintain day-to-day life. This individual at the end of a process should “go back” to the society, work, pay taxes, regain financial stability.*

- *For corporations, the main objective is to preserve the business or viable parts of it, not necessarily by saving the whole company. The creditors should be satisfied (even partially) by the assets of the corporation. The other goal is the assessment why the insolvency occurred, what led to it and, if there's a need - imposing personal liability on the responsible individuals.*

*In short: for individuals - second chance and rehabilitation, even if creditors' claims are not satisfied, for corporations - fulfilment of claims from the assets and investigation on reasons that led to insolvency.*

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.**

*Main difficulties can be divided into:*

- *Lack of statutory provisions, meaning that some jurisdictions lack solutions for cross-border insolvency matters, so local courts need to be approached for guidance and permittance for foreign insolvency representatives to manage assets within given jurisdiction.*
- *Different approach to policies and rules in various countries, resulting in the need for reconciliation of conflicting rules and procedures.*
- *Private international law - Issues such as determining the choice of forum, recognizing foreign proceedings, and choosing applicable laws add nuanced challenges, requiring careful legal navigation.*
- *Lack of co-operation and coordination - multiple concurrent insolvency proceedings can further complicate matters. It can hinder the efficient resolution of cross-border insolvency cases.*
- *Variability in Interests and Approaches. Different jurisdictions may have varying views on the interests that insolvency proceedings should prioritize. Some systems may be more pro-creditor, focusing on the interests of creditors in recovering their claims, while others may be more pro-debtor, considering the interests of the debtor in continuing their business operations.*

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.**

- *UNCITRAL Model Law on Cross-Border Insolvency: The United Nations Commission on International Trade Law (UNCITRAL) developed the Model Law on Cross-Border Insolvency in 1997. This model law provides a framework for the recognition and cooperation of insolvency proceedings that involve multiple jurisdictions. It has been adopted by many countries around the world.*
- *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.*
- 
- *European Union Insolvency Regulation: The European Union has implemented regulations to harmonize insolvency laws within its member states. The European Insolvency Regulation (EIR) was first introduced in 2000 and was later recast in 2015. It provides rules on jurisdiction, recognition, and cooperation in cross-border insolvency cases within the EU.*
- *Judicial Insolvency Network (JIN) Guidelines: The Judicial Insolvency Network (JIN) is an international network of judges that aims to promote cooperation and communication in cross-border insolvency cases. The JIN has developed guidelines on various aspects of cross-border insolvency, including communication between courts and coordination of proceedings.*
- *UNCITRAL Legislative Guide on Insolvency Law: UNCITRAL has also developed a Legislative Guide on Insolvency Law, which provides guidance to countries on the reform and modernization of their domestic insolvency laws. The guide covers various aspects of insolvency law, including the treatment of creditors, restructuring procedures, and the role of insolvency practitioners.*

*I think this is a great step for harmonisation of insolvency laws across multiple countries, but the perfect situation would be to create one, global insolvency code on which every country agrees to work on. At this point we have several agreements, proposals, guides that are being interpreted by every country independently. More effort should be put into integration of international insolvency laws.*

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

3.5

Marks awarded 12 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.**

*Based on the names of companies I would guess that both are based either in Africa or India. I do not have all the necessary information at this point and would like to know if:*

- *Are they a part of European Union, as this would indicate there would be an application of EIR Recast.*
- *Are there any bilateral or multilateral treaties between both countries, as this could affect the recognition and enforcement of the winding-up order / appointment of liquidator.*

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.**

*In this case the liquidator may commence a proceeding in Utopia seeking recognition of the Erewhon winding-up order and the appointment of the liquidator in Utopia as a "foreign representative" Once recognized, the foreign representative may seek a stay or suspension of the Apex court action in Utopia under Article 20 of the Model Law, which provides for the coordination of proceedings in different jurisdictions. The stay or suspension may be granted if it is necessary to protect the assets of the debtor or the interests of the creditors in the cross-border insolvency matter.*

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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 given scenario, the potential relevance of the Cross-border Insolvency Act of Utopia would be affected by the following alternative scenarios:*

- (a) In this scenario it means that no winding-up order has been issued by the court. Therefore, the Cross-border Insolvency Act of Utopia may not be directly relevant at this stage since there is no formal insolvency proceeding in place. The Erewhon liquidator may still commence a proceeding in Utopia seeking recognition of the Erewhon winding-up order and the appointment of the liquidator in Utopia as a foreign representative.*
- (b) In this scenario, it would indicate that there is an ongoing insolvency proceeding in Utopia. The Cross-border Insolvency Act of Utopia may be relevant in this case as it could potentially govern the recognition and effect of the Utopian winding-up order in Erewhon.*

**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?**

*I selected the Netherlands as the subject of this task. The complexities in this case stem from the multi-jurisdictional nature of the company's operations. A mix of domestic Dutch laws, EU regulations, and international instruments like the UNCITRAL Model*

*Law, will be instrumental in navigating the international insolvency challenges presented. These legal resources will guide the insolvency representative in recognizing foreign proceedings, administering overseas assets, handling international creditors, and dealing with directors' cross-border liabilities.*

*Issues and applicable instruments:*

*1. Recognition of Foreign Proceedings - Getting the insolvency proceedings in the Netherlands recognized internationally. Laws/Instruments: EU Regulation on Insolvency Proceedings (2015/848) and UNCITRAL Model Law on Cross-Border Insolvency for recognition in EU and non-EU states.*

*2. Administration of Assets Located Abroad. Managing and liquidating the company's international assets. Laws/Instruments: EU Regulation and UNCITRAL Model Law help in accessing and dealing with assets in various states.*

*3. Handling Foreign Creditors and Claims. Managing claims from creditors in different countries, ensuring fair treatment. Laws/Instruments: Dutch insolvency laws and EU Regulation for managing and prioritizing claims.*

*4. Dealing with Director's Liabilities Across Borders. Addressing the legal responsibilities of directors located in different countries. Laws/Instruments: Dutch laws and international agreements for evaluating and addressing directors' liabilities.*

8

Well answered

Marks awarded 14 out of 15

**\* End of Assessment \***

**TOTAL MARKS 40/50**

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