



## 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 9 out of 10

QUESTION 2 (direct questions) [10 marks]

Question 2.1 [maximum 2 marks]

**Explain what the term "international insolvency law" means.**

*There have been a number of attempts to define "international insolvency law", with all acknowledging the limitations of such an exercise, given that any definition must exist within a national framework. In general, "international insolvency" refers to an insolvency situation which transcends a single legal system, where a single Court cannot dispose of proceedings without reference, to some degree, to another legal system. For example, Wessels<sup>1</sup> describes it as a "body of rules concerning certain insolvency proceedings or measures, which cannot be fully enforced, because the applicable law cannot be executed immediately and exclusively without consideration being given to the international aspect of a given case."*

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<sup>1</sup> *International Insolvency Law* (Kluwer, 2006) p. 1

This is an authoritative quote. The answer would be improved if it also included information in your own words to indicate your personal understanding of the explanation also.

1.5

Question 2.2 [maximum 5 marks]

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

*Universality is a concept that advocates for one set of insolvency proceedings governing all worldwide aspects of the debtor's insolvency. This would mean that once one set of proceedings is underway (typically in the debtor's centre of main interest) no others could be commenced. Universalism seeks to address the reality of many businesses being multi-national. However, in practice, it is thought to be impractical, as each State will be reluctant to completely cede power.*

*Territoriality, in contrast, is the principle that insolvency proceedings could (or should) be commenced in every State where the debtor has an interest, with each State's courts applying its own rules to the relevant assets within its jurisdiction, without any reference to concurrent foreign proceedings. This would also mean that creditors would be restricted as to where they could file their claims. Territorialism has the obvious drawback of inconsistent treatment of creditors and added costs. There may also be issues such as different States applying different definitions of "insolvency" such that the debtor is insolvent in one State but not another.*

*In practice, a hybrid approach of "modified universalism" has emerged, which acknowledges that there can be concurrent insolvency proceedings in different States, but that there will be a "main proceeding" in the debtor's centre of main interest, to which other proceedings are subordinate.*

*These theories also involve recognition and effect (as well as jurisdiction) in that for example, with universalism, recognition and effect requires that other States recognise that one set insolvency proceedings (that all agreed is the appropriate jurisdiction) and recognise it as having extraterritorial effect in their States.*

3.5

Question 2.3 [maximum 3 marks]

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

*There are currently no international insolvency treaties regulating cross-border insolvencies in the Middle East. However, some recent developments include:*

- 1. A comparative survey of international insolvency systems in the Middle East, which was launched in 2009 and based on best-practice principles found in the World Bank's Principles for Effective Insolvency and Creditor Rights Systems*



(2005). It was a joint initiative between the World Bank, OECD, INSOL International and Hawkamah Institute for Corporate Governance.  
what impact did this have on reforming domestic insolvency laws or addressing international insolvency Issues in the Middle East?

2. The UAE reformed its domestic insolvency law in both 2016 and 2019.  
More detail would have improved the mark awarded for this sub-question.
3. Bahrain and the Dubai International Financial Centre both adopted the UNCITRAL Model Law on Cross-Border Insolvency ("Model Law") in 2018 and 2019 respectively.

1.5

Marks awarded 6.5 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 an individual's bankruptcy, the Courts are usually keen to protect a debtor from harassment from creditors and enable them to "wipe the slate clean". There will also be an acknowledgment that some assets (such as assets essential for the maintenance of the debtor and their family) should be protected from the insolvency.*

*For corporations, most system will, where possible, seek to preserve the business (acknowledging it usually has more value as a going concern) or where this is not possible, preserve the viable parts of the business. It may also be appropriate to apportion personal liability (e.g. on a director) where that person's position has been abused.*

*In both cases, the aim is to ensure a *pari passu* distribution amongst creditors (except those with priority or security), ensure secured creditors are dealt with fairly and to maximise the value of the estate (e.g. through investigating voidable transactions).*

There is some scope to elaborate

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#### 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 a multitude of difficulties that may rise in a cross-border insolvency situation. At the outset, different State's may have different tests for "insolvency". For example, it may be just on a "cash flow" basis (e.g. unable to pay debts as they fall due) or there may be a "balance sheet" test, looking at the debtor's assets versus its liabilities. Without a consistent definition, the situation may arise where insolvency proceedings have commenced in one State but the debtor is not deemed insolvent in another State where they hold significant assets.*

*Differences may also arise depending on whether a State is "creditor-friendly" or "debtor-friendly", which is likely to affect the local legislation and tools available to an insolvency practitioner - this includes categories such as:*

- *voidable dispositions;*
- *the effectiveness of certain types of security;*
- *whether there is a moratorium on creditor actions;*
- *which creditors are considered "preferred" - e.g. differences in public policy approaches to salaries due to employees; and*
- *the extent to which creditors can participate in the insolvency (and the co-ordination of their claims).*

*Additionally, States will have different approaches to the recognition of foreign insolvency representatives and the recognition of foreign insolvency judgments, leading to potential difficulties in enforcement.*

*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.***

*One of the most important developments in international insolvency is the continuing adoption by States of the **UNCITRAL Model Law**. Although the Model Law pre-dates the 21<sup>st</sup> Century, it continues to be relevant by virtue of more and more States adopting its provisions/recommendations (which focus on increasing the co-operation and co-ordination efforts of insolvency Courts). This is reflected in a number of bodies issuing guidelines which accept or advocate the Model 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.*

- *The American Law Institute ("ALI") **NAFTA Principles** (applicable in North America) developed at the beginning of the century were designed to be complementary to the Model Law. The Principles were accompanied by an*

appendix entitled, *Guidelines Applicable to Court-to-Court Communications in Cross-border Cases*.

- In 2012, a report commissioned by the ALI and International Insolvency Institute ("ALI-III") considered the ways in which the ALI NAFTA Principles could be applied worldwide (leading to the *ALI-III Global Guidelines, for Court-to-Court Communications in International Insolvency Cases*, designed to enhance co-ordination and harmonisation between States).
- In 2009, UNCITRAL issued a *Practice Guide on Cross-Border Insolvency Cooperation*, providing (non-prescriptive) advice to judges and insolvency practitioners on practical aspects of cross-border insolvencies.
- In 2016, the Judicial Insolvency Network ("JIN") (a network of judges from across the world), launched its inaugural conference in Singapore. The participants in that conference contributed to drafting the *Guidelines for Communication and Cooperation between Courts in Cross-Border Insolvency Matters* ("JIN Guidelines"). The JIN Guidelines have been adopted by courts in the Americas, Asia and the UK. JIN has also initiated a number of projects since 2016, aimed at different aspects of cross-border insolvency.
- A number of other UNCITRAL "Model Laws" have developed. A key one is that the *Model Law on Recognition and Enforcement of Insolvency-Related Judgments with Guide to Enactment* (2018), which was prompted by the *Rubin v Eurofinance* case, where the UK Supreme Court declined recognition of a foreign insolvency judgment. Another text is the *Model Law relating to Enterprise Groups* (2019). Which seeks to provide for the complexities of multi-national corporate groups and the challenges this brings in an insolvency context.

The impact these various measures are likely to have depends on the extent to which they are taken up by States. In the case of the Model Law, this is already well underway and it may well be that its influence continues to grow. In the case of other projects, there is a risk of a "too many cooks" situation, with numerous guidelines/principles being adopted by some States and not others. There are many more projects, reports and guidelines than those outlined in this response. Each of these projects is likely to be influential to the group of States that adopt them as their key focus. However, significant changes to international co-operation are likely to need some unification of the various project groups to avoid a piecemeal development of the practice area.

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

3.5

Marks awarded 11 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 effects of the Cross-border Insolvency Act largely depend on whether the Erewhon winding-up proceedings would be recognised by Utopia as "foreign main proceedings."*

*Under Article 17(1) of the Model Law (all articles references in this response are to the Model Law and assume that Utopia has enacted them in identical terms), a foreign proceeding "shall" be recognised if:*

- It is a foreign proceedings within the meaning of Article 2(a) (on the surface it would appear that the winding-up proceedings in Erewhon meet this requirement);*
- The foreign representative applying for recognition is a person or body within the meaning of Article 2(d) (based on the information we have, it appears the Erewhon liquidator is authorised to administer the reorganisation of the debtor's assets/affairs);*
- The application meets the requirements of Article 15(2) (we would need to advise the liquidator that these requirements will need to be met); and*
- The application has been submitted to the court referred to in Article 4 (as above, we would need to advise the liquidator the application will need to be submitted to Utopia's competent court or authority).*

*Assuming that the conditions of Article 17(1) are met, the court of Utopia will then need to determine whether the foreign proceeding is a "main" proceeding (that is, it is taking place in the State where the debtor has its main centre of interest) or it is a*

"non-main" proceeding (where the debtor has an "establishment" in the foreign State).

"Establishment" is defined as "any place of operations where the debtor carries out a non-transitory economic activity with human means and goods or services."

This distinction is important as it determines the effects of the recognition of the proceedings.

Pursuant to Article 16(3): "In the absence of proof to the contrary, the debtor's registered office, or habitual residence in the case of an individual, is presumed to be the centre of the debtor's main interests." Thus the presumption would be that Nadir's main centre of interest is Utopia. However, we know that it only moved its registered office the previous month, so we would need to analyse the position as to the extent to which it does its business in the two jurisdictions.

If the Erewhon proceedings are recognised by the Utopian court as main proceedings, then by virtue of Article 20(1) there is an automatic stay on individual actions (such as Apex's claim). If it is a non-main proceeding then the Utopian court "may" order a stay "where necessary to protect the assets of the debtor or the interests of the creditors". It would therefore benefit the liquidator for Erewhon to be recognised as main proceedings.

5

Well answered

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 either case, the Model Law allows for concurrent proceedings as long as the debtor has assets in the jurisdiction where the "non-main proceedings" are taking place.*

*In the case of a), there is no difference to the ability to apply for recognition in Utopia. However, the moratorium on individual actions would not be of any effect as Apex has not commenced such an action. Under Article 20(3) Apex could still commence such an action in order to protect its claim (even though such a claim could then be stayed)*

*With regard to b), then there are already proceedings on foot in Utopia but the question still remains whether the court will acknowledge the Erewhon proceedings as "main" proceedings. Again, this depends on whether the Utopian court applies the presumption that Utopia is the centre of main interest. The two sets of proceedings would proceed concurrently, with whatever local rules about collective restructuring of assets apply.*

*It would be beneficial to note that more information would be of assistance*

2

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?***

***Law applied: Cayman Islands***

- 1. Stay of proceedings: Under section 97(1) of the Cayman Islands Companies Act ("CA"), there is a statutory stay of any proceedings against the company, except with the leave of the court. This provision has extra-territorial effect, thus it could be invoked to prevent any individual creditors commencing or continuing proceedings in other jurisdictions (albeit to some extent it will depend on whether that other jurisdiction recognised the stay under Cayman law).***
- 2. Creditors in other jurisdictions: Under the Cayman Islands Companies Winding-Up Rules ("CWR") Order 5 r.3, the official liquidator must publish notice of its appointment in the Cayman Islands Gazette and whatever newspaper(s) the winding-up petition was advertised. The advertising rules under the CWR for petitions include (for a company carrying on business outside the Islands) "a newspaper having a circulation in the country or countries in which it is most likely to come to the attention of the company's creditors". A liquidator will therefore need to consider the location of creditors.***
- 3. Tax debts: Under section 139(2) CA, foreign taxes are, as a general rule, not provable as a debt in a Cayman Islands liquidation, nor are tax judgments of***

*other countries enforceable by the Cayman Islands court. A liquidator faced with a foreign tax debt will therefore have to decide whether the tax debt should be "voluntarily" paid - for example, if the tax authority might be able to enforce against other companies in the group it might be advisable to make the payment.*

4. Claims against directors: *If the official liquidator considers it may have claims against the company's directors (e.g. for breach of fiduciary duty), then consideration will need to be given as to the likelihood of successful enforcement action. The Cayman Islands Grand Court Rule, O.11, r.1(1)(ff) permits service out of the jurisdiction of claims brought against directors or former directors of a Cayman company where the subject matter of the claim relates in any way to the company.*

See the model answer, this was answered well but there is some scope for further consideration

7

Marks awarded 14 out of 15

**\* End of Assessment \***

**TOTAL MARKS 40.5/50**

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