



## 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.**

**International insolvency law deals mainly with cases of distressed corporations, where a cross border element is present. It can be that the debtor and creditor are from different states and/or the assets of the debtor are located in multiple states. The international law then tries to solve to conflicts between the individual state laws to deal with the topics of jurisdiction - where will be the proceedings opened, choice of law - which aspects of the insolvency proceedings will be applied and recognition of judgement.**

2

Question 2.2 [maximum 5 marks]

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

*The universality concept in cross border insolvency aims to unify the insolvency proceedings against a distressed debtor aiming to apply standardised principles of insolvency proceedings, single proceedings across all states where the debtor has operations and creditors applying a universal law, with the outcome being enforceable in all these states. The aim is to simplify the process and make it more cost effective while treating fairly all creditors (from multiple states). The difficulties in the application can be the existence of national legal systems with other related legislation that is not universal, like securities laws, labor laws etc. Also, the local political and social aspects, or preferences of the involved states have to be taken into consideration.*

*The concept of territoriality, contrary to the concept of universality, prefers separate insolvency proceeding in every state where the debtor has assets and/or creditors. Local insolvency laws apply in every state with possibly difference in procedures, roles, rights and remedies (as an example I mention the possibly of preference for a restructuring in one state, while a liquidation is preferred in the other state). This may lead to economic arbitrage situations, when a creditor claims his assets from the debtor in states where he is in a better position and has a higher chance of recovery (compared to other creditors of the debtor in that state) and surrenders his assets in other states where the terms of the local insolvency procedures do not favor him or would lead to a non-cost-effective process. Clearly, (in my view) this process may lead to unfair treatment of creditors but will probably be aligned with national legal requirements and socio-political aspects.*

**There is scope to elaborate with respect to recognition and effect in that for example, with universalism, recognition and effect requires that other States recognise that one set insolvency proceedings (that all agreed is the appropriate jurisdiction) and recognise it as having extraterritorial effect in their States.**

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.**

*In 2009 a comparative survey was performed covering Middle East and North African states which was based on World Bank's Principles for effective insolvency and creditors' rights systems as best practice. The report covers 11 states from the region (including the DIFC). The comparative survey mentions several interesting aspects supporting the need for upgrade and harmonisation. I found interesting the mention of a 3,5 year span to go through insolvency in the region while the OECD average is half of this, 1,7 years (and 3 months only in Ireland).*

**what impact did this have on reforming domestic insolvency laws or addressing international insolvency Issues in the Middle East?**



*Dubai International Financial Centre and Bahrain adopted the UNCITRAL Model Law on Cross-border insolvency in 2018 and 2019 respectively.*

*Saudi Arabia put in place its new bankruptcy law in 2018 in its efforts to catch up with the trends in the field and eventually keep / attract further foreign investments replacing its old fashioned and outdated legislation covering the insolvency topic.*

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.**

*The key differences between the objectives of insolvency for individuals and corporations come based on the fact that personal insolvency (also referred to as bankruptcy) has to take into account the target being a natural person while corporate insolvency is dealing with "artificial" legal persons. As such, a natural person cannot be dissolved and has to continue its existence after the insolvency proceedings and be discharged, while a legal person may be restructured and so potentially significantly change its operations or be dissolved and cease existence.*

#### *Individual debtor/natural person*

- The natural person therefore has to be allowed to start again with a new, clean bill with his/her past debts being forgotten,*
- There is a need to take into account the debtor's personal circumstances, such as dependants, necessary assets to continue living at certain level, etc.*
- The individual debtor is likely to continue earning income and contribute to the estate and possibly agree to a repayment plan.*

#### *Corporations*

- The magnitude of the involved stakeholder is likely to be broader, with some requiring preferential treatment (employees),*
- It is highly likely that a corporation will not continue in its present form, while the objective should be to preserve the business in some form of shape (to enable generation of income, delivery of unique goods and services/their maintenance and warranty, preservation of social aspects like employment, impact on society and nature etc).*
- In many instances the corporation will cease existence as these are wound up.*

*There is scope to elaborate, for example with respect to imposing personal liability on the responsible persons in a corporate context.*

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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 three recognised areas of potential difficulties in a cross-border insolvency situation.*

- *It is the choice of jurisdiction - the court in the particular state has to decide whether it will hear the matter. This will depend on where the matter was commenced, where are the involved parties based and have their centre of main interest (COMI), where are the assets of the debtor located and whether there have already been other related proceedings commenced in other states,*
- *The choice of law - once the court agrees to commence proceeding, the choice of law is likely to be determined by the forum (in common law system), state of the opening of proceedings according to the EIR Recast - but may not be if challenged by the parties. Some states may have an established public law based environment (for example adopted the UNCITRAL model law on cross border insolvency) and some will rely on private laws to cover certain aspects of the proceedings, and*
- *The recognition and enforcement of the decision - once a foreign court makes a judgement, it is a question whether and how this will be recognised and the enforced in the State. This will depend on the jurisdiction of the court that made the judgement, the law applied and the type of judgement (it may relate to winding up a debtor or a reversal of a transaction that was decided to be voidable).*

*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.**

*There have been many multilateral steps taken in the 21<sup>st</sup> century to harmonise domestic insolvency laws. These steps are a natural continuance of the evolution of the topic since its recognition as an matter of importance earlier in the 19<sup>th</sup> and 20<sup>th</sup> centuries, fuelled by increasing importance of international business and trade and the increased complexities attached. Assets of debtors are located in multiple states, under the umbrellas of holding companies and shell companies registered in further jurisdictions. The protection of the rights and interests of the creditors and debtors is becoming increasingly complex in environments applying only non-harmonised legal systems as these create opportunities for gaining undue advantages. During the 21<sup>st</sup> century,*

- the UNCITRAL prepared its *Legislative Guide on Insolvency Law* to support harmonisation of the national laws in states that wish to update or assess their national laws.
- The World Bank prepared its guidelines called “*Principles for Effective Insolvency and Creditor/Debtor Regimes*”. While being guidelines, these principles are regularly required as a condition precedent to providing World Bank and IMF funding to developing countries.
- The EU has issued a report on “*Harmonisation of Insolvency Law at EU Level*”.

*In my view all these efforts are very likely to achieve the objective of gradual harmonisation. No business can stay isolated within its state and no state wants to be left behind in its efforts to attract foreign investments/creditors. The business environment is global and so requires a global response to the important topic of insolvency proceedings (as a healthy self-regulation tool available). Without sufficient clarity and predictability this is hard to achieve.*

- *The example of World Bank shows how the harmonisation is mandatory to developing countries competing for development funding. A more strategic question would be to assess the appetite of such developing countries to adopt the harmonised environments in reality, as opposed to having these only on paper. Insolvency is probably just one of the many topics the World Bank (and other multilateral financial institutions) imposes on the developing countries as a precondition to funding. I have to accept that this is an effective tool to address development needs of developing states.*
- *The EU approach is rather strict on enforcing its harmonization efforts. However, within EU this can be expected as the member states had voluntarily agreed to be part of the harmonization process in many topics - insolvency naturally being one of them. The volume of cross border business with the EU does not allow for non-harmonized environments.*
- *The UNICITRAL’s approach is a rather liberal one - provides guidelines to states that want to upgrade their business environments (or just certain elements, on their journey to harmonisation) and allows for “adoption” of these to become full fledged members if they wish so. A possible disadvantage is the existence of states that have not adopted the guidance in full as these create a broader range of diverse ecosystems in the insolvency process application.*

5

Marks awarded 12.5 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.**

*It would be good to know whether Erewhon has also adopted the UNCITRAL Model Law on Cross -border Insolvency or whether there are some other bilateral treaties in place between Erewhon and Utopia. This would explain what the attitude of the Erewhon courts towards foreign proceedings and foreign claims is. It is also important that Nadir is a foreign entity from Erewhon court prospective. There is no need for reciprocity*

*The Erewhon liquidator can rely on the existence of the Cross-border Insolvency Act of Utopia as this covers the moratorium provisions in cross border situations. Therefore, he can ask for a stay at the Utopia court against Nadir, upon application to the Utopia court and producing the winding up order against Nadir in Erewhon.*

*The Utopia court will likely grant the stay and not open proceedings in Utopia and order Apex to claim its receivables under the Erewhon proceedings. The Erewhon liquidator will want to include the claim by Apex among the claims. Also, there are likely to be assets of Nadir in Utopia, where possibly its COMI is (the new headquarter indicates so). The Erewhon liquidator will want the Utopia assets of Nadir to be included in the list of assets for winding up and distribution. These actions will be also facilitated by the provisions of the Cross-border Insolvency Act.*

*Upon the decision made by the Erewhon court, the liquidator will want to make sure this is recognised and enforced in Utopia also. The Cross-border Insolvency Act will support the liquidator's recognition and enforcement efforts.*

4

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.**

*Under (a) I believe there would be no difference as the liquidator has already been appointed in Erewhon and would act - and stay the proceeding in Utopia.*

*Under (b) I believe there would already be a liquidator appointed in Utopia who would look to obtain global claims and assets and likely reached out to Erewhon creditors also. Depending on the type of insolvency legislation in Erewhon or cooperation treaties between Utopia and Erewhon, there would potentially be parallel proceeding in both states, or not, if Erewhon has adopted the UNCITRAL Model law also. In case of parallel proceedings, an agreement could be made between the courts on the procedures and the recognition and enforcement of the Utopia court decision.*

*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?**

*For the company's country of incorporation, I chose the Czech Republic (CR), as this is the country in which I had worked mostly throughout my career, although not in the field of insolvencies.*

*The first issue I see is the choice of jurisdiction. As the CR is member of the EU, the EIR will apply in all aspects as this an EU regulation applicable to all member states (except to Denmark). According to EIR the jurisdiction of the state where the COMI of the debtor is applies - in our case the CR jurisdiction would apply. The EU insolvency court with which the proceeding were initiated will check whether the COMI is within the jurisdiction - if it is not, it will reject the case. In case the COMI is the CR (in our case), the Act No. 182/2006 Coll., The Insolvency Act will apply.*

*The second issue could be the local socio-economic preferences. In case of employee relations, the insolvency representative would be faced with the rather strong employee protection provisions of the CR labor laws under Act No. 262/2006 Coll. - The Labour Code. Employee claims are treated as preferential claims, as per the Act No 118/2000 Coll, on the Protection of Employees in Case of Employer Insolvency and Amending Certain Acts, according to which the employees with unpaid wages from an insolvent employer would be satisfied by payments from the Labor office of the CR.*

*The third issue is the creditor participation. Where there are more than 50 Registered Creditors, the Registered Creditors must elect a creditors' committee. The creditors' committee has the right to approve certain significant contracts proposed by the insolvency representative.*

*The fourth issue might be the moratorium on creditor actions. In line with Act No. 182/2006 Coll., The Insolvency Act, the debtor may file for a moratorium within 15 days from the insolvency petition filed by the creditor and the court may grant this for up to 3 months. The moratorium applies to all creditors.*

Well answered.

7

Marks awarded 12 out of 15

**\* End of Assessment \***

**TOTAL MARKS 41/50**

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