



## 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.**

- *States with developed legal systems enforce and follow policies and procedural rules with regards to insolvency / bankruptcy - referred to as "domestic insolvency law".*
- *These domestic / local policies and procedural rules differ by State.*
- *A consequence of international trade, cross-border debt, assets held outside of a company's local jurisdiction, business operations being located outside of a company's registered jurisdiction, cross-border structures etc., is that a stakeholder will likely benefit from cross-border insolvency proceedings.*

- *This often gives rise to certain cross-border insolvency law issues whereby a single set of local insolvency laws cannot be immediately applied.*
- *International insolvency law refers to the rules concerning certain insolvency proceedings that cannot be immediately applied in cross-border situations without considering the international implications of certain insolvency proceedings or measures.*

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Question 2.2 [maximum 5 marks]

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

*Certain opposing concepts of universality and territoriality with regards to cross-border insolvency are summarised below.*

***Number of proceedings***

*The universality approach deems that there is only one insolvency proceeding is commenced which will covers all insolvency matters worldwide.*

*For territorialism, insolvency proceedings may be commenced in multiple jurisdictions and run concurrently.*

***Location of proceedings***

*The "home" State for a universality cross-border insolvency can be determined be different approaches. A common approach is to commence proceedings where the centre of the debtor's interests is located. For example, where the majority of assets / creditors or business operations are based. An opposing view argues that the selection of an appropriate "home" State, particularly for a global business, can be difficult to establish.*

*Insolvency proceedings in a universality cross-border insolvency can be commenced in every jurisdiction where a debtor holds assets.*

***Debtors and creditors***

*For an effective universality approach, officeholders should be provided with the tools to control and obtain all assets. All assets are included in the proceedings and all creditors have the ability to participate in proceedings. However, there can be practical and economical hurdles for creditors to participate in foreign proceedings. All creditor claims are treated equally.*



*For territorialism, insolvency proceedings commenced in each State are restricted to property within that State and in respect of which creditors can file claims in that State. Officeholders control local assets and can prevent their transfer abroad, protecting local interests and local creditors. However, a situation can arise whereby the solvency position of a debtor is different by State - e.g., insolvent where their debt lies, but solvent where their assets lie. To resolve this issue, this requires co-operation between the different proceedings.*

**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**

3.5

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 2018 Saudi Arabia reformed its domestic insolvency laws by approving a bankruptcy law. The legislation includes general regulations, preventive actions, measures for financial restructuring, and settlement procedures. Prior to this, there was no single bankruptcy law in the jurisdiction and starting proceedings were challenging.*
- *In 2019 the United Arab Emirates announced the Federal Decree-Law No. (19) of 2019 on Insolvency (the "New Law"). This law aims to address financial concerns relating to individuals, in contrast to bankruptcy law existing prior to the New Law, which only applied to companies and institutions.*
- *To reform their approach to international insolvency, the Model Law on Cross-Border insolvency was fully adopted into the new Insolvency Law (Law No. 1 of 2019) of the Dubai International Financial Centre in 2019.*

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Marks awarded 8.5 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.**

*When a debtor is unable to pay their liabilities as they fall due, insolvency processes (both formal and informal) are available to individuals (consumer insolvency or bankruptcy) and corporations, the objectives of which differ.*

*An objective of insolvency for an individual is to protect the debtor from harassment by their creditors. Insolvency processes provide the debtor with breathing space while their debts are reduced by present and future income of the estate of the debtor.*

*The debtor's personal circumstances are considered and therefore not all income into the personal estate must be used for settling the individual's debt. In some cases, an individual's assets can be deemed "exempt" from the insolvency process and retained by the debtor in order for them to maintain them / their dependents. An equivalent concept is not available to corporations.*

*An insolvency process for an individual provides an opportunity for a fresh start, particularly in cases where the insolvency the debtor is not as a result of their poor conduct.*

*For corporations, to the extent possible, an objective of an insolvency process is to preserve the *business* in whole or in part. This does not necessarily mean preserving the *company*.*

*In situations where it is found that an officer of a corporation has acted improperly, an objective of the insolvency process is to impose personal liability on the responsible person.*

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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.**

*The prescribed application of domestic insolvency laws to cross-border matters can be limited. Therefore, when faced with an insolvency situation that requires international consideration, difficulties can arise.*

*Judgements given during the course of insolvency proceedings may not be "recognised" in foreign jurisdictions. Foreign judgements can raise questions with regards to which Court issued the judgement. This can present significant challenges for officeholders to carry out their duties. E.g., a Cayman Islands registered may hold millions of USD in a bank account in Hong Kong. Certain banking institutions in Hong Kong will not release cash assets overseas without being provided with a recognition order of the liquidation from the Hong Kong court. Recognition applications can be expensive and in some cases unsuccessful.*

*Differences in domestic insolvency laws with regards to debt, can impact the ranking of creditors in the order priority in which they will be paid. This can be made more complex when also dealing with security, set-off and netting-off arrangements, etc.*

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

3

Question 3.3 [maximum 5 marks]

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

*A number of steps have been taken in the 21<sup>st</sup> century to promote harmonisation of domestic insolvency laws. The following legislative framework has been set out by international bodies:*

- In 2004, UNCITRAL put into effect a *Legislative Guide on Insolvency Law*. This guide was to be referred to by individual States when drafting new insolvency laws or reviewing their existing insolvency laws.*
- In the early 21<sup>st</sup> century the World Bank also produced guidelines (which have been revised several times) - *Principles for Effective Insolvency and Creditor / Debtor Regimes*.*
- In 2010 the European Union published a report on the *Harmonisation of Insolvency Law at EU Level*. The report identified a number of key differences between domestic and insolvency laws of EU countries and where harmonisation of these would be beneficial.*

*I consider that the above steps taken to promote harmonisation of domestic insolvency laws have / will have a positive impact on addressing international insolvency issues. This is because it is generally in the interests of jurisdictions to align themselves with common practise to ensure they are economically competitive. Having sound insolvency laws facilitates a healthy business environment that encourages participation by foreign and domestic investors.*

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

4

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.***

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 UNCITRAL Model Law on Cross-border Insolvency ("MLCBI") sets out significant provisions that facilitate co-operation and co-ordination of concurrent proceedings.***

***Direct communication between local and foreign Courts are authorised. The Erewhon liquidator should write to the Utopian Court setting out that it has received an order to wind up Nadir in Erewhon.***

***The MLCBI is significant for its provisions on recognition and relief in 4.1. (Its provisions on cooperation and coordination are secondarily important as the liquidator is primarily seeking advice about staying court proceedings in Utopia.) The question requires candidates to apply the relevant MLCBI articles to the facts provided.***

1

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

(b) Yes - An agreement will have to be reached between the Erewhon and Utopian liquidators with regards to how to proceed with the insolvency of Nadir. The approval will require Court approval.

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

0.5

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?**

*[Type your answer here]*

Take care to answer each sub-question

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Marks awarded 1.5 out of 15

\* End of Assessment \*

TOTAL MARKS 29/50

A good paper on the questions answered. It identifies the issues raised, generally substantiating its answers satisfactorily.