INSOL INTERNATIONAL

# FOUNDATION CERTIFICATE

IN INTERNATIONAL INSOLVENCY LAW

## 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 8 out of 10

QUESTION 2 (direct questions) [10 marks]

Question 2.1 [maximum 2 marks]

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

***The starting point is that there is no single set of insolvency 'laws' that apply at an international level. Rather "International insolvency law", also referred to as "cross-border insolvency", should be considered more as a concept or notion, which arises where there are insolvency proceedings involving issues "which in some way transcend the confines of a single legal system, so that a single set of domestic insolvency law provisions cannot be immediately and exclusively applied without regard to issues raised by the foreign elements of the case"[1]. Globalisation, international trade and movement of assets across borders, have led to various approaches and policies being developed at a regional and***

[1] I Fletcher, as quoted in B Wessels, *International Insolvency Law* (Kluwer, 2006), p1

*international level to devise solutions and guidelines as to how to deal with insolvency issues on a transnational basis.*

2

Question 2.2 [maximum 5 marks]

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

*"Universality" considers that that there should only be one insolvency proceeding covering all of a debtor's assets and debts worldwide. There are different views on how this would be applied in practice. Some advocate for a chosen state to be the forum that has jurisdiction (e.g. the state where the debtor's interests are located), whereas other advocate for a "worldwide insolvency law" (i.e. no single state forum). Regardless of the approach, creditors worldwide would have the opportunity to participate in a single set of proceedings.*

*"Territoriality" on the other hand, is based on the premise that insolvency proceedings may be commenced in every State or jurisdiction where the debtor holds assets, and that they should be territorially limited and restricted to property within the state where the proceedings are opened. As such, local interests and local creditors would be addressed.*

*Both concepts have advantages and drawbacks. While universality provides a solution to equally satisfy interest of those involved in cross-border insolvency cases, potentially avoiding inefficiencies created by duplication and conflicting judgments, it may create uncertainty in how the single forum is established. It also requires a high degree of trust in foreign legal systems and foreign insolvency proceeding. Territoriality's major drawback is that it may give rising to conflicting proceedings; however, proponents of this concepts argue that this can be resolved through co-operative forms of territoriality.*

**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.***

*There are currently no international insolvency instruments regulating insolvencies across borders in the Middle East. However, examples of developments in recent years include:*

*(i) UAE's Federal Law by Decree No. (9) of 2016 on Bankruptcy and Federal Decree Law No.(19) of 2019 on Insolvency, reforming and providing legal frameworks to help distressed companies deal with financial obligations and individuals facing financial difficulties;*
*(ii) DIFC introduced a new insolvency regime in 2019; and*
*(iii) In 2018 and 2019 Bahrain and DIFC respectively adopted the Model Law on Cross Border Insolvency.*

3
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.***

*Sealy and Hooley [2] distinguish objectives of insolvency for individuals and corporations as follows:*

*Individuals: protect a debtor from their creditors, particularly in cases where insolvency has not been brought about by the action or conduct of the debtor and reduce indebtedness by making contributions from present and future income to the estate. In some jurisdictions insolvent individuals will be allowed to keep some of the assets required to maintain him or herself and their dependents (the notion of 'exempt / excluded assets').*

*Corporations: where possible preserve the business, or viable parts thereof (which may not mean preserving the company). If relevant to also impose personal liability to those responsible for causing the insolvency.*

*There is some overlap between objectives, namely ensuring pari passu distribution as far as possible, expect where there are creditors that have priority. Most systems will also have procedures for investigating reasons for the individual / corporate insolvency and methods of reclaiming voidable transactions.*

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.***

[2] In M A Clarke *et al*, *Commercial Law* (Oxford University Press, 2017), chap 28

*Although all States with a developed legal system have some form of bankruptcy/insolvency systems / debt collecting procedures, there are wide differences in approaches, policies and procedural rules. Certain aspects of insolvency law are affected by local legal culture, basic rights, socio-economic policies and politics. Aspects of insolvency beginning from how insolvency is defined, to how insolvency procedures are commenced to how distributions should be made and voidable transactions addressed will differ greatly from one State to the next.*

*As such, in situations where there are cross-border aspects to an insolvency dealing with the insolvency across borders will be difficult and may result in conflicting outcomes.*

*One example could be the enforcement of secured assets across different States (this can be common in situations where a multinational company has granted security over assets located in various local subsidiaries). Dealing with the distribution rules in respect of payment to secured creditors in such situations will be challenging, given the important differences between the types of real security found in various States, whether States reserve a "prescribed part" to be distributed to secured creditors and whether states recognise any contractual subordination.*

**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 21st 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.***

*Over the years there have been attempts at enacting uniform laws into domestic law, such as the first draft of the EC Convention on Bankruptcy and Related Matters in 1970 and the IBA Model Bankruptcy Code in 1997. Neither of these attempts were successful but they fed into UNCITRAL's 2004 Legislative Guide on Insolvency Law which is intended "to be used as a reference by national authorities and legislative bodies when preparing new laws and regulations or reviewing the adequacy of existing laws and regulations". The World Bank also produced guidelines on the regulation of insolvency, entitled Principles for Effective Insolvency and Creditor/Debtor Regimes. Such latter forms of soft law promote a convergence of insolvency law and set best practice standards for the development or reform of existing insolvency regimes.*

*An example of how such multilateral steps have promoted greater uniformity in domestic insolvency laws across States include the most recent reforms that have been enacted in EU jurisdictions following the recent 2022 EU directive aimed at*

*harmonising certain aspects of insolvency law in 2022 (consider reforms in Germany, the Netherlands, Italy and France).*

*In my opinion multilateral approaches can be successful where there is large buy-in by States, creating pressures from foreign investors. However, there are important limitations particularly where there isn't harmonisation of recognition and enforcement. For instance, the rule in Gibbs in England & Wales will continue to conflict with Article X of the Model Law on Cross-Border Insolvency.*

5

Marks awarded 13.5 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.***

*Where the Model Law on Cross Border Insolvency ("Model Law") has been adopted, it mandates that States co-operate and co-ordinate with foreign courts or foreign representatives.*

*In this scenario, we don't know whether Erewhon also adopted the Model Law.* There is no need for reciprocity *However, the Erewhon liquidator will be aware that the Utopian court or insolvency representative will look to coordinate with the Erewhon*

*liquidator to ensure that Nadir's estate is administered fairly and efficiently. This may involve the Utopian court / representative seeking to enter into protocol or agreement, whereby the two courts agree to cooperate to achieve a set of common goals. These goals may include maximise the value of the estate and harmonising the proceedings.*

**The MLCBI is significant for it provisions on recognition and relief in 4.1 and on concurrent insolvency proceedings in 4.2. Its provisions on cooperation and coordination are secondarily important as the liquidator is primarily seeking advice about staying court proceedings in Utopia.**

**Note that the Apex has issued court proceedings against Nadir in Utopia for monies owing for the goods sold and delivered – not insolvency proceedings.**

1.5

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.***

*No, in each case, the Utopian court would look to communicate and coordinate with Erewhon liquidator to achieve the agreed set of goals.*

**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

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?***

*The Company is incorporated in England & Wales. My answers assumes the Company has operating subsidiaries in different jurisdictions.*

*(1) Concurrent insolvency proceedings commenced in another jurisdiction where the Company operates. Under the Cross-Border Insolvency Regulation 2006, and the application of the Model Law, the English court would consider, together with the foreign court which of the proceedings are foreign main proceedings and then seek to cooperate with the foreign court in order to ensure the estate is administered fairly and preserving the maximum value.*

*(2) Local concurrent proceedings of the Company's foreign subsidiaries, which may result in claims over the English Company's English assets. The English Court would first need to consider whether it can enforce any such claims according to certain criteria. If it accepts that these can be enforced, it will need to look to the Insolvency Act and application of the Cross-Border Insolvency Regulations in order to cooperate with the foreign court.*

*(3) Foreign creditors lodging proofs of debt under foreign law. Under s426 of the Insolvency Act 1986, an English liquidator will look to the relevant foreign law to establish the validity of a claim that is governed by foreign law.*

*(4) Pursuing avoidance transaction in a foreign jurisdiction, conducted by foreign directors. Again this will require cooperation with the relevant foreign courts.* Elaboration is warranted regarding examination

**For an approach more closely applied to the facts, see the 'Model' Answer for four key international insolvency issues raised by the facts and facing the insolvency representative in this scenario.**

**5**

**Marks awarded 6.5 out of 15**

* End of Assessment *

**A good paper that correctly identifies many of the issues raised and satisfactorily substantiates several answers.**

TOTAL MARKS 36.5/50