



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 Course Administration page of the course web pages after the submission date on 15 October 2021.

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: 202122-514.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 2021**. The assessment submission portal will close at **23:00 (11 pm) BST (GMT +1) on 15 October 2021**. 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 **9 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 10 out of 10

QUESTION 2 (direct questions) [10 marks]

Question 2.1 [maximum 2 marks]

Explain what the term "international insolvency law" means.

It means a set of rules that try to deal with aspects or matters of insolvencies which involve more than one jurisdiction or state. There is no single set of international insolvency law that applies globally and can be fully enforced across all jurisdictions, as different local states may take and adopt different approaches in resolving matters of insolvencies which involve foreign aspects.

2

Question 2.2 [maximum 5 marks]

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

The concept of universality or universalism argues that there should only be one insolvency proceeding (and ideally in one forum) that covers the debtor's assets and debts across different states or jurisdictions, and the prevailing insolvency laws of the *lex concursus*, the state where the insolvency proceeding is commenced, shall be applied.

On the other hand, the concept of territoriality or territorialism argues that in cross-border insolvencies, there can be multiple proceedings commenced in multiple states or jurisdictions, where each proceeding shall only deal with properties or parties that are located in the respective state or jurisdiction in which such relevant proceeding is commenced, applying the prevailing insolvency law in such respective state or jurisdiction.

There is scope to elaborate upon 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.

4

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.

The regional comparative survey of insolvency systems that was launched in 2009; **[some elaboration is warranted regarding what impact this had on reforming domestic insolvency laws or addressing international insolvency Issues in the Middle East]**

-
- Bahrain and Dubai International Financial Centre adopting the UNCITRAL Model Law on Cross-Border Insolvency, in 2018 and 2019 respectively; and
- Recent reform in domestic insolvency laws by UAE (in 2016 and 2019), Saudi Arabia (in 2018) and Dubai (in 2019). **[some elaboration is warranted]**

2.5

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.

Corporations may end up getting dissolved following insolvency proceedings, while individuals or natural persons in modern-day insolvencies shall live on. As such, the need to preserve the debtor's well-being beyond the insolvency proceedings underpins the objectives for individual insolvencies; collective debt-collecting mechanism to stop harassment against the debtors, discharges of debts to allow a fresh start, mechanism to allow orderly resolution of the debtor's debt while maintaining the debtor's subsistence in the form exempt assets.

On the other hand, the objectives for insolvency proceedings of corporations are leaning towards the collective interest of the creditors and stakeholders; collective debt-collecting mechanism to avoid unfair collection by or distribution to a creditor (or one group of creditors) at the expense of the other creditors or stakeholders, preservation of the debtor's business if by doing so the interests of the creditors or stakeholders (such as society, in the case of jobs preserved when a business is rehabilitated) is better served.

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.

Given that there are different principles and systems of international insolvency laws adopted by different states or jurisdictions, these different principles and systems may not be consistent with one another, and in many cases they may even be conflicting with one another. As such,

a particular body of rules concerning certain aspects of insolvency may not be fully enforced and applied when the enforcement or application need to go beyond the jurisdictional borders of the state in which the proceeding is held. Consequently, the issues around enforceability and applicability of an insolvency law in a cross-border context will result in less predictability and more uncertainty of outcomes when there is a cross-border element in an insolvency proceeding.

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 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.

Numerous multilateral organisations, agencies, as well as international professional organisations have attempted and promoted harmonisation of insolvency laws. These attempts are made through; (i) treaties and conventions, which when ratified become hard-laws (such as the EIR Recast by the European Union); (ii) promotion of soft-laws such as the UNCITRAL Model Law on Cross-Border Insolvency and the UNCITRAL Legislative Guide on Insolvency Law; (iii) promotion and exchange of leadership thoughts, best practices, and cooperation through professional organisation and international association such as the Judicial Insolvency Network.

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 legislative guide is relevant. Well done for raising it.

In my opinion the harmonisation attempts by these separate multilateral groups, agencies, and organisations, have made some fruitful headways. It is evident that certain uniformities can be observed in certain regions such as the Europe and Latin America, and soft-law approaches have also been quite successful in promoting harmonisation in the adoption of best practices and principles. However, there still remain many aspects of domestic insolvency law that are rooted in the legal history or socio-economic development of the respective jurisdiction, that may be difficult to be harmonised.

3.5
Marks awarded 11.5 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.

Given the Erewhon liquidator is seeking potential way to stop/stay Apex's lawsuit, the Cross-border Insolvency Act of Utopia is very relevant and the Utopian court in adjudicating Apex's lawsuit will have to refer to this law (which is modelled towards the UNCITRAL Model Law) and other domestic Utopian laws, in deciding whether courts in Utopia shall recognise the insolvency proceedings in foreign forums (and whether the particular Erewhon court has had competent jurisdiction in the first place - it is not clear from the narrative of Question 4 above, where Nadir's centre of main interests is located), and allow the enforcement of decisions or rulings ruled by courts outside of Utopia, such as the winding-up order by the Erewhon court.

If Apex's lawsuit becomes insolvency or bankruptcy lawsuit, the Utopian court will also need to decide whether it has jurisdiction to preside over insolvency proceeding on Nadir as there is already a winding-up order by Erewhon court.

A reasonable understanding of the issues and the answer could be strengthened by more detail. The question requires candidates to apply the relevant MLCBI articles to the facts provided in more detail than that above. See the model answer.

3

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.

The question in 4.1 was on whether the Cross-border Insolvency Act of Utopia is potentially relevant. As such, in the two alternative scenarios, this Act is still very relevant with the following differences;

- (a) Where Apex had filed winding-up proceeding in Utopia but had not yet been heard, the Utopian court will have to refer to the Cross-border Insolvency Act of Utopia to decide if it has jurisdiction over Nadir (not clear from the narrative in the question, where Nadir's centre of main interests is located), or whether even if Utopia has jurisdiction, whether it should consolidate the wind-up proceeding with Erewhon (after establishing that Erewhon has competent jurisdiction in the first place).

(b) Where Apex had obtained winding-up court order in Utopia prior to Erewhon's court order, the Cross-border Insolvency Act of Utopia will guide whether the Utopian court's order should prevail given that it is an earlier ruling, and whether in such instance, the Erewhon's court would not have had competent jurisdiction (and as such its court order would not be recognised in Utopia).

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

.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?

The debtor is incorporated in the Republic of Indonesia. The Laws No. 37 of 2004 ("Laws 37/2004") is the prevailing bankruptcy and insolvency code. The key international insolvency issues that the Insolvency Representative ("IR") will likely face;

- The Indonesian court has jurisdiction over the debtor's insolvency proceeding based on the Laws 37/2004, however the IR, appointed by the Indonesian court, may have to deal with concurrent insolvency proceeding commenced by creditor(s) in other jurisdiction(s). The Laws 37/2004 is silent on whether the IR should acknowledge or cooperate in the proceeding commenced outside Indonesia. Indonesia is also not signatory to any treaty or convention with regards to insolvency proceedings. As such the IR can only rely on the Indonesian private international laws to deal with this issue, and the principle of *forum rei sitae*, as found in the Indonesian private international laws, may be applied to justify cooperation with foreign proceedings in jurisdictions where the debtor's assets are located.
- The IR will have to deal with claims submitted by foreign creditors (including foreign taxation / revenue authorities), and/or claims submitted that are based on contracts governed by foreign laws. Laws 37/2004, the Indonesian Civil Code, and the Indonesian private international laws will provide discretion to the IR to admit or reject the respective claims (and where rejected, the creditors can follow the appeal mechanism).
- The IR will have to deal with security or collateral or encumbrance that are established under the laws in which the underlying assets are located (such as mortgage over the debtor's real properties in another jurisdiction), and the IR will thus have to decide whether the corresponding claims with such security will be considered as secured or unsecured creditors while the IR may not have access or control over these assets (unlike assets located in Indonesia). The Laws 37/2004 again is silent on this, and as such the IR will likely reject such claim that does not provide reciprocal value-add to the insolvency/bankruptcy estate.
- The IR will have to carry out his/her mandate to liquidate the debtor's assets that are located outside the Indonesian borders, to where the debtor's assets are located. Given

the absent treaties or conventions that Indonesia has, the IR can be guided by the Indonesian private international laws to deal with this issue, and the principle of *forum rei sitae*, as found in the Indonesian private international laws, may again be applied to justify seeking cooperation with foreign courts and/or authorities.

6
Marks awarded 9.5 out of 15
MARKS AWARDED 39.5 /50

*** End of Assessment ***