



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 2022.

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 2022**. The assessment submission portal will close at **23:00 (11 pm) BST (GMT +1) on 15 October 2022**. 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.

Wessels explains International insolvency legislation as being part of regulation which: "is often being expressed in international literature as a system of rules governing insolvency proceedings or procedures from which we are not in a position to fully imposed since the law that prevail cannot be enforced instantly and completely without considering the international implication and aspect which may arise to the case."

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

1.5

Question 2.2 [maximum 5 marks]

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

Territorialism would mean that the insolvency representative should be limited to the local asset and act in the interest of the local creditors only, paying little attention for proceeding in foreign countries. The insolvency representative duty would be more toward the local stakeholders. The insolvency representative would manage the local debtor's company and would not be able to enforce any right on the foreign asset and would not consider any foreign claim.

The quintessences of universalism is that only one bankruptcy law should apply to the whole insolvency process whether the company is found in one country or several countries. insolvency representative would recoup all the assets (both local and foreign) and after disposal, proceed with the distribution to all creditors (local and foreign) in pari-passu. Only one proceeding will prevail.

Both approach are opposite to each other.

These theories involve two key aspects of private international law - recognition and effect as well as jurisdiction: For example, with universalism, 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, recognition and effect requires that other States recognise that one set insolvency proceedings and recognise it as having extraterritorial effect in their States. There is scope to elaborate with respect to recognition and effect.

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.

Although it seems that no international insolvency rules or guidelines prevail in the Middle East, the Gulf Cooperation Council states which regroup Bahrain, Kuwait, Oman, Qatar, Saudi Arabia and the UAE have been collaborated with the World bank for the past forty years. The primary survey was initiated in 2009 as part of the "Hawkamah Institute for Corporate Governance, the World Bank, The EOCD and Insol International and was based on the World bank principle as best practice. . **[what impact did this have on reforming domestic insolvency laws or addressing international insolvency Issues in the Middle East?]**

Lately, the Middle East States and the Dubai International Financial Centre has rectified their insolvency laws and align with the Model Law on Cross Border Insolvency.

More detail would have improved the mark awarded for this sub-question.

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.

Natural person

Insolvency aims to safeguard the debtors from any persecution from creditors and is able to proceed with a fresh start particularly where the individual is not faulty and is able to decrease the liability from the use of present and upcoming income from consideration of his personal circumstances.

Legal entities

Enable companies to continue operation or save some viable part if not the full operation and sue the directors for personal abuse, voidable preference and wrongfulness and negligence in respect of the debts of the entity.

Norms

1. Distributions are made on a pari passu basis in both cases except when there are secured and priority rank creditors.
2. Individual are able to save some of their asset, but all the assets are disposed for corporate entities during insolvency process.

Another difference would be that company are dissolved at the end of the insolvency process, but dissolution does not apply for individual.

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.

As private insolvency law shall apply, there may be disagreement between the laws of the different states as follow:

The choice of forum which implies question on the jurisdiction. The court will have to decide whether it can proceed with the dispute and hence the court will examine the country of the parties to the case. The issue which may be raised in respect of foreign insolvency proceeding especially if an order have to be the liquidation of the entity.

Recognition and enforcement will be another difficulty which will arise with cross-border insolvency as the court will have to decide whether to accept foreign order and how to apply the judgement.

Finally, what law shall be applicable to the case whether it would be the local one or the foreign law. Another point to consider is whether common law or civil law shall be

applicable. For common law, the choice of law may be decided by the parties that would request it but for civil law, foreign law is supposed to be applied.

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.

There has been many draft before the 21st century like "EC Convention on Bankruptcy and Related Matters" and the "Model Bankruptcy Code" of IBA which were developed and used as guidance for new multilateral steps initiated in the 21st Century toward better domestic laws;

"The Legislative Guide on Insolvency Law of UNCITRAL" which aims to be used as reference to legislative institutions and national authorities on the preparation of new laws and analyse the appropriateness of the existing laws. It also provides a broad range of features of the insolvency law. The Legislative Guide has been broadened in following years with the inclusion of enterprise groups, and also the introduction of director's obligation when an entity is approaching insolvency and it also consider the obligation of directors for enterprise group entities The Guide also require that law in respect of insolvency should be contemporary, balanced and provide a fair frameworks to be able to deal with Cross-Border insolvency. It is also recommended that state consider the UNCITRAL Model law as part of their law.

The World Bank has also contributed to enhance the insolvency process by providing guidelines on the law of insolvency known as the "Principles for Effective Insolvency and Creditor/Debtor Regimes". After it was revised several times, the principles grew in importance as the International Monetary Fund and the World Bank called for developing countries to reform their insolvency law as a requirement for loan support.

As the mentioned principles also provide guidance on how to deal with Cross-Border insolvency, it will enhance the existing law and facilitate coordination and communication between court and insolvency representative. It will also help developing countries which are now incorporate Cross-Border insolvency in their actual law in means of guiding court how to deals with cross border insolvency, insolvency representative to learn on how to proceed with Cross-Border insolvency.

Regarding your opinion on how much impact these are likely to have in addressing international insolvency issues, there is scope to consider political pressure, foreign investor pressure and/or loan conditions.

4

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.

Additional question would be on the timing of the two cases as who has initiate their case first as we understand that only after investigation that the liquidator of Erewhon found that Apex has initiated legal action against Nadir.

If the "UNCITRAL Model Law on Cross-border Insolvency" forms part of the laws of Utopia, it would means that the prevailing law in Utopia enable co-operation and co-ordinations between the two states for concurrent proceedings and it is not required to have mutually. And with the expansion of the Model law, communication will also be encouraged between the liquidator and the Court of

Utopia. The liquidator may make a request to the Court appointing him to communicate with the Court in Utopia and request that all assets of Nadir be under his control and he will also consider foreign claims. He will sell the assets and distribution the proceed between all creditors (both local and foreign) in pari-passu.

Take care to read the facts carefully: you have been told to "Assume the UNCITRAL Model Law on Cross-border Insolvency has been adopted by Utopia without modification, except as required to domesticate it." Detailed application of the articles relevant for the recognition and relief, including on COMI/establishment and on foreign

main / non-main proceedings) was required for this fact-based application-type question.

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.

He may be in a difficult position to request for proceedings be stayed.

- (a) He will be able to make a request so that the proceedings be stayed, and the liquidator of Erewhon can proceed with his liquidation.
- (b) He may be in a difficult position to request for proceedings be stayed.

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 Country where the company is incorporated is Mauritius and the problem that the liquidator will face are as follow:

1. As the Friman, it is difficult to find a common language. Although it is easy to define insolvency in the local law, no agreement or instrument have define insolvency but more attention was on defining "insolvency proceeding" and also the local systems of different states deal with various procedures in respect of failure to settle debt.

2. Omar advance that above the issue of conflict of laws, the variances that exist in the local norms will also impact the creditors and the priorities given to the insolvency case.
3. Westbrook found that there are nine keys problems with respect to international insolvency among which are issue like:
 - To recognise the overseas representative;
 - The stay of creditors initiative;
 - The involvement of creditors;
 - Executory agreement;
 - The process for coordinated claims;
 - The importance of the case and preferences;
 - The laws that regulate avoidance provision;
 - The relief that the debtor will get; and
 - Conflict that exist between the different laws.
4. Flectcher question on the three below issue.
 - Where to initiate the insolvency proceeding;
 - Which law will be application to the several characteristic of the case; and
 - The consequences from an international level in respect to the legal case initiated at the forum.

The solutions would be:

To adopt the Model law, states can revise their actual insolvency law and include some international dimension whether hard or soft as it is in common law countries to enable superior courts to help in the enhancement of the cross-border insolvency.

. To adopt treaties and conventions and

The answer appears incomplete. More detail would have improved the mark awarded for this sub-question.

4.5

Marks awarded 8 out of 15

*** End of Assessment ***

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

TOTAL MARKS 35/50