



## 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). no
- (b) Montevideo Treaty on International Commercial Terrestrial Law (1940). no
- (c) Montevideo Treaty on International Procedural Law (1940).
- (d) Havana Convention on Private International Law (1928).

#### Question 1.9

The Council Regulation on Insolvency Proceedings (European Insolvency Regulation) (2000), which applies in all European Union member states except Denmark, was reviewed after a decade's operation. An amended European Insolvency Regulation (EIR) Recast (2015) was adopted in 2015 and took effect in June 2017.

Which of the following aspects of international insolvency is **not** addressed in the EIR Recast?

- (a) Proceedings to restructure a debtor that is facing the likelihood of insolvency.
- (b) Definition of "centre of the debtor's main interests".
- (c) A centralised insolvency register of insolvency proceedings opened in member states.
- (d) Co-operation and co-ordination provisions applicable to corporate groups.

#### Question 1.10

An unsecured Creditor is owed monies by the Debtor for services it supplied locally. It has issued proceedings to recover the debt in the local Court. The Debtor has moved its registration and head office to the local country from its original place of incorporation in a

foreign country. The Creditor is incorporated and has its head office in that foreign country. The contract to supply, which was created by exchange of emails sent between the head offices, denominates the debt in the currency of the foreign country. The Debtor is being wound-up in the foreign country and the foreign liquidator seeks recognition and a stay in the local Court proceedings. What aspect is an international insolvency issue?

- (a) The local Court's jurisdiction over the Debtor.
- (b) The standing of the foreign Creditor to sue for its debt in the local Court.
- (c) The foreign liquidator's standing to request a stay of the local proceedings.
- (d) The fact that the debt owed to the Creditor is in a foreign currency.

**Marks awarded: 9 out of 10**

## **QUESTION 2 (direct questions) [10 marks]**

### **Question 2.1 [maximum 2 marks]**

Explain what the term "international insolvency law" means.

Wessels' definition of "international insolvency law" is:

*"a body of rules concerning certain insolvency proceedings or measures, which cannot be fully enforced, because the applicable law cannot be executed immediately and exclusively without consideration being given to the international aspect of a given case."*<sup>1</sup>

Fletcher, on the other hand, provides the following definition of international insolvency:

*"an insolvency occurs in circumstances 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 the issues raised by the foreign elements of the case."*<sup>2</sup>

The key point is that there is not one single insolvency law that can easily be applied because the debtor has, for example, assets, creditors or obligations spanning across one or more jurisdictions, which each have their own separate insolvency rules and regulations.

**2**

### **Question 2.2 [maximum 5 marks]**

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<sup>1</sup> B Wessels, *International Insolvency Law* (Kluwer, 2006), p 1.

<sup>2</sup> *Idem*, p 1 *et seq.*

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

Universalism (or universality) and territorialism (or territoriality) are the two main approaches or theories that have been put forward to address the problem of cross-border insolvency.

Proponents of universalism believe that there should only be one set of insolvency proceedings to deal with all of a debtor's assets and debts wherever they are located. The theory is that once insolvency proceedings are commenced in one jurisdiction, no insolvency proceedings can be commenced in any other jurisdiction. There will only be one insolvency proceeding relating to the debtor, which means that the liquidator or officeholder who is appointed will have control of all the debtor's assets on a global scale and will need the ability to be able to take possession and control of those assets.

The issues with universalism will be determining in which jurisdiction the single set of proceedings should be commenced, as well as which insolvency law will be applied.

Territorialism, on the other hand, is the theory that insolvency proceedings should be issued in each jurisdiction where the debtor has assets, but each set of insolvency proceedings will only relate to property that is located within that particular jurisdiction. This means that there could be a number of different insolvency proceedings operating concurrently.

**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.**

**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 UAE reformed its domestic insolvency legislation in 2016 and 2019. **There is scope to provide further details**

Saudi Arabia reformed its domestic insolvency legislation in 2018. According to an article on The National News by Dania Saadi,<sup>3</sup> there was previously no single bankruptcy law in Saudi Arabia. The new law was in the process for years.

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<sup>3</sup> <https://www.thenationalnews.com/business/economy/saudi-arabia-approves-landmark-bankruptcy-law-1.707236>, accessed 12 October 2022.



Dubai reformed its domestic insolvency legislation in 2019. According to a press release issued by the Dubai International Financial Centre ("**DIFC**") on 11 June 2019,<sup>4</sup> the new DIFC Insolvency Law, Law No. 1 of 2019, was to come into effect on 13 June 2019 and:

- introduced a new debtor in possession bankruptcy regime;
- provided for a new administration process where there is evidence of mismanagement or misconduct;
- enhances the rules governing winding up procedures; and
- incorporates the UNCITRAL Model Law on Cross-Border Insolvency with certain modifications.

Finally, in 2018, Bahrain adopted the UNCITRAL Model Law on Cross-Border Insolvency in order to address international insolvency issues.

**3**

**Marks awarded: 9 out of 10**

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<sup>4</sup> <https://www.difc.ae/newsroom/news/dubai-international-financial-centre-enacts-new-insolvency-law/>, accessed 12 October 2022.

### **QUESTION 3 (essay-type questions) [15 marks in total]**

#### **Question 3.1 [maximum 5 marks]**

Write a brief note on the differences regarding the objectives of insolvency for individuals and corporations.

The objectives of insolvency for individuals are, according to Sealy and Hooley:<sup>5</sup>

- the protection of the debtor from harassment by his creditors;
- to enable the debtor to make a fresh start, particularly in cases where the debtor is less blameworthy, where insolvency has not been brought about by his actions or conduct (a concept of discharge of debt); and
- to reduce indebtedness by making contributions from both present and future income to the bankruptcy estate, while also taking his personal circumstances into consideration.

In comparison, the objectives for corporations are:<sup>6</sup>

- where possible, to preserve the underlying business or viable parts of it, not necessarily the company itself; and
- to impose personal liability on responsible persons where personal liability has been abused.

The key difference is that corporations cannot be rehabilitated like individuals, and so companies are normally dissolved after they are liquidated, whereas individuals will need to be discharged from their debts after the bankruptcy process.

**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.

Insolvency in a cross-border context may arise where a debtor has assets, creditors and obligations within a number of different jurisdictions. This means that in relation to that particular debtor, insolvency proceedings can be issued in more than one jurisdiction, and there may potentially be parallel proceedings in more than one jurisdiction against the same debtor. As each jurisdiction has its own insolvency law, and its own conflict of laws rules, this can cause difficulties in the application across different jurisdictions. As Fletcher states,<sup>7</sup> there are three key questions:

1. In which jurisdictions can insolvency proceedings be commenced?

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<sup>5</sup> In M A Clarke et al, *Commercial Law* (Oxford University Press, 2017), chap 28.

<sup>6</sup> *Ibid.*

<sup>7</sup> I F Fletcher, *Insolvency in Private International Law – National and International Approaches* (Oxford: Oxford University Press, 2<sup>nd</sup> Ed, 2005), pp 3 to 5.

2. Which country's laws should be applied in relation to the different aspects of the case?
3. What international effects will be given to proceedings that take place in a particular forum (including issues of enforcement)?

Examples of the differences between the relevant systems of law include:

- the point at which an individual or company has been in debt for a long enough period of time for insolvency proceedings to be commenced in a particular state may differ;
- certain systems are pro-creditor, whereas others are pro-debtor and focus more on rehabilitation and discharge of the debtor;
- different systems afford different priorities to creditors in insolvency proceedings;
- some systems do not have any insolvency proceedings for individuals, or those individuals who do not trade, whereas others do; and
- different systems have different rules relating to avoidable dispositions.

**Further detail would be beneficial. For example, consideration of Westbrook's 9 key issues.**  
**3.5**

### **Question 3.3 [maximum 5 marks]**

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

In 2004, UNCITRAL published its Legislative Guide on Insolvency Law, with a view to assisting member states with the reform of their domestic insolvency legislation. This followed the introduction of the UNCITRAL Model Law on Cross-border Insolvency in 1997, which aimed to harmonise the treatment of cross-border insolvency issues.

Further, UNIDROIT is in the process of preparing a guidance document on bank insolvency, UNIDROIT's aim being to harmonise laws. The American Law Institute finalised Guidelines Applicable to Court-to-Court Communications in Cross-border Cases in 2001, as subsequently adopted by the International Insolvency Institute. The Judicial Insolvency Network issued Guidelines for Communication and Cooperation between Courts in Cross-Border Matters in 2016.

All these steps are intended to promote the harmonisation of domestic insolvency laws to resolve issues with differing laws in cross-border insolvency matters. I consider that the various steps themselves will have a great impact in addressing international insolvency issues if they are actually adopted, however the JIN Guidelines have only been adopted by courts in 11 states. It seems that there are too many different sets of guidelines and steps taken to try to promote harmonisation, and that different states have adopted different guidelines or approaches. For example, the BVI has not yet brought into force the part of

its insolvency legislation that adopts the UNCITRAL Model Law, but has adopted the JIN Guidelines. For there to be real impact, there would need to be consistency.

It is also problematic that the roots of insolvency law are different for different states. In particular, common law systems tend to be based on English law, whereas civil law systems are based on Roman law. This means that different legal systems have different approaches and emphasis, with some being pro-creditor and some pro-debtor. The upshot is that these differences mean that it will be difficult to achieve the complete harmonisation of domestic insolvency laws and therefore cross-border insolvency issues will remain.

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

**4.5**

**Marks awarded 13 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.

For the Erewhon liquidator to stop the court action in Utopia, the Erewhon winding up will need to be recognised by the Utopia court and the effect of recognition will need to be that

there is a stay on the proceedings issued against Nadir by Apex in Utopia. These issues may be dealt with by the Cross-border Insolvency Act of Utopia (the "**Act**").

The Act will be relevant because if it adopts the UNCITRAL Model Law on Cross-border Insolvency (the "**Model Law**") without modification, the Erewhon liquidator may be able to apply under Article 15 of the Model Law for recognition of the liquidation proceedings in which he has been appointed. Article 17(2) of the Model Law provides that foreign proceedings are recognised as either "foreign main proceedings", where they take place in the state where the debtor has its centre of main interests, or as a "foreign non-main proceeding" if the debtor has an establishment within the meaning of Article 2(f) in the foreign state. **It would be beneficial to note that the MLCBI as drafted by UNCITRAL does not require reciprocity so it does not matter whether Erewhon has adopted the MLCBI or not.**

Article 16(3) of the Model Law provides that in the absence of proof to the contrary, Nadir's registered office is presumed to be the centre of its main interests. Nadir's registered office is now in Utopia and so Utopia is the centre of Nadir's main interests under the Model Law. This means that the Erewhon proceedings cannot be a "foreign main proceeding" under Article 2(b) of the Model Law and therefore the Utopia action by Apex will not be automatically stayed under Article 20(1) of the Model Law.

In order to determine whether the Erewhon proceedings are "foreign non-main proceedings" under Article 2(c), it will need to be ascertained whether Nadir has an establishment in Erewhon, meaning a place of operations where Nadir carries out a non-transitory economic activity with human means and goods and services (Article 2(f)). If the proceedings are "foreign non-main proceedings", it is possible that the action in Utopia may be stayed at the discretion of the Utopia court under Article 21.

If Nadir does not have an establishment in Erewhon, it would seem that the Model Law and the Act would not provide the possibility of recognition of the Erewhon liquidation and therefore the Act may not be relevant and it may fall to Utopia's other private international laws to determine the question as to whether those proceedings can be recognised.

Note that Article 6 of the Model Law provides that the court may refuse to take action if it would be manifestly contrary to the public policy of Utopia, and so consideration would also need to be given to public policy under the laws of Utopia.

**4**

#### **Question 4.2 [maximum 2 marks]**

Would it make any difference to your answer in question 4.1 in the following two alternative scenarios to Apex suing for its debt?

- (a) Apex had filed proceedings to wind-up Nadir, but the matter had not yet been heard.

(b) Apex had obtained a court order to wind-up Nadir in Utopia prior to the Erewhon winding-up order.

In both of these situations, Chapter V of the Model Law as incorporated by the Act would be relevant in respect of concurrent proceedings.

In respect of the situation where Apex filed proceedings to wind up Nadir, but these were not yet heard, Article 29 of the Model Law provides that the Utopia court and the Erewhon court are to seek cooperation and coordination under Articles 25, 26 and 27.

If Apex had already obtained a court order to wind up Nadir in Utopia before the Erewhon winding-up order was made, again Article 29 of the Model Law provides that the Utopia court and the Erewhon court are to seek cooperation and coordination under Articles 25, 26 and 27.

2

#### **Question 4.3 [maximum 8 marks]**

##### **NB: This question is not related to Questions 4.1 and 4.2**

A court has ordered the commencement of an insolvency proceeding against a corporate debtor in the State of its incorporation and head office. The company has operated business in a number of States and has assets (real property or interest in land, other tangible assets and intangible assets); creditors (including taxation / revenue authorities) and directors in several States.

Select a country for the company's incorporation and, based on the insolvency laws of the country you select and the brief facts provided, describe four key international insolvency issues facing the insolvency representative in this scenario. For each issue, what domestic laws or international instruments apply to assist the insolvency representative address these four issues?

For the purposes of this question, I will choose the British Virgin Islands ("**BVI**") as the country of the company's incorporation.

One issue will be taking control of assets that are located in jurisdictions outside the BVI. The BVI has not brought the part of its Insolvency Act 2003 (the "**Act**") that incorporates the UNCITRAL Model Law on Cross-border Insolvency (the "**Model Law**") into force yet. However, the application of the Model Law is not reciprocal, and so if the insolvency representative seeks to be recognised in a foreign state in order to take control of assets, he can rely on the provisions of the Model Law in jurisdictions which have adopted it. The BVI has also adopted the Judicial Insolvency Network Guidelines for Communication and

Cooperation between Courts in Cross-Border Insolvency Matters, which means that where the insolvency representative is looking for recognition in a state that has also adopted these guidelines, the two courts can cooperate.

A second issue will be whether foreign revenue/taxation authorities can claim for their debts in a BVI liquidation. The BVI has adopted the English "Revenue Rule" principle set out in *Government of India v Taylor* [1955] AC 491. In *West Bromwich Commercial Ltd v Hatfield Property Ltd et al (No 2)* BVIHC (COM) 2020/0138, Jack J held that only provable debts can be admitted in a company liquidation and a foreign revenue debt is not provable in a BVI liquidation.

A third issue will be whether the insolvency representative can apply for an order for examination of a director or former director before the BVI court when such person is located in a foreign state. Sections 284 to 288 of the Act permit a liquidator to apply for and obtain such an order. In relation to the question of whether this requires an order for service out of the jurisdiction, the BVI court will have to look to common law principles.

Finally, the insolvency representative will need to know whether he can carry on the business of the company in a foreign state. Section 186 of the Act and Schedule 2 to the Act grants a BVI liquidator the power to carry on the business of the company in so far as it may be necessary for its beneficial liquidation. There will be issues relating to foreign employment and taxation laws, and whether the liquidator will be recognised in a foreign state as having authority to carry on the company's business. Again, the Model Law will assist where the foreign states have adopted it, otherwise the JIN Guidelines may also help.

**7**

**Marks awarded 13 out of 15**

**\* End of Assessment \***

**An excellent paper - a thorough response that addresses the questions asked and substantiates the answers well.**

**Marks awarded: 44 out of 50**