



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: 8 out of 10

QUESTION 2 (direct questions) [10 marks]

Question 2.1 [maximum 2 marks]

Explain what the term "international insolvency law" means.

A system of rules and regulations governing insolvency proceedings, the effectiveness of which depends upon different states' insolvency rules being applied on a particular insolvency situation by means of voluntary (or sometimes mandatory) cooperation between states.

There is scope to elaborate.

1.5

Question 2.2 [maximum 5 marks]

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

Proponents of universality argue for one jurisdiction's rules to apply in an insolvency situation, so that only one set of proceedings exist and apply to an insolvent estate to the exclusion of others. Those proceedings will have global effect. Under the concept of universality, all creditors participate equally on the basis of the applicable rules. Proponents of territoriality argue that different sets of insolvency proceedings should be able to be commenced in more than one jurisdiction where the insolvent entity or individual has assets, on the basis that those proceedings will be restricted by territory. Under the concept of territoriality, the rules of the particular jurisdiction where the asset is located should apply to those assets and local creditors' claims are preferred.

There is scope to elaborate regarding recognition.

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 has enacted the Federal Law by Decree No 9 of 2016 on Bankruptcy and Federal Law by Decree No 19 of 2019 on Insolvency.

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

- Saudi Arabia has enacted the Saudi Arabian Bankruptcy Law in 2018.

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

- Bahrain adopted the Model Law on Cross Border Insolvency in 2018.

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.

Sealy and Hooley observe the following as differences in the objective of insolvency for individuals and corporations:

- In the case of individuals the objective is to protect the debtor from creditor harassment and enable them to have a fresh start. An individual's personal circumstances are important and the insolvency process should take account of those circumstances, which will impact, for example, the assets that are permitted to be made available for the satisfaction of debts.
- In the case of corporations the main aim is to keep the business, or as much of it as possible, as a going concern. The insolvency of corporations has an impact on a wider pool of stakeholders, such as employees, so the preservation of the business as far as possible is an important consideration.

There is some scope to elaborate.

4

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.

Difficulties include:

- Inconsistency in the standard of insolvency laws across different jurisdictions;
- Outdated insolvency laws in some states;

- Some states take a less helpful approach to cooperating with other states and may be less likely to apply insolvency rules to proceedings in their jurisdiction that do not originate to their own jurisdiction;
- Some systems are pro-creditor, others pro-debtor;
- Different cultural and political considerations being favoured across jurisdiction can create problems, such as the emphasis placed on labour rights by some states compared with others.

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.

In 2004 UNCITRAL introduced the Legislative Guide on Insolvency Law. Its purpose is for use by national authorities and their legislatures in preparing new laws or reviewing existing laws. It recommends adoption of the UNCITRAL Model Law on Cross Border Insolvency. Although influential on many states, without the guide being compulsory it can only have a limited impact on the development of new laws in compliance with its recommendations by those states who have adopted it. It is of course of little relevance to states who have not adopted it at all.

The World Bank has also introduced the Principles for Effective Insolvency and Creditor/Debtor Regimes. As the IMF and World Bank sometimes require developing countries to reform their insolvency laws in accordance with these principles as a condition of their lending, compliance with the Principles globally is being encouraged. This is likely to have a great impact on addressing international insolvency issues. The more harmonisation of insolvency laws and regimes there is globally the less conflict that there is likely to arise on an insolvency situation with an international element, if the rules that apply across the various jurisdictions are similar or the same. It will ultimately reduce the time and costs involved which will ultimately benefit the insolvent estate.

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

4
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.

If the Erewhon liquidator wants to stop action in Utopia, the fact that Utopia has adopted the UNCITRAL Model Law on Cross Border Insolvency means that the court hearing the Utopian proceedings is under a mandatory requirement to apply the UNCITRAL rules to facilitate coordination of the Utopian proceedings with the Erewhon winding up. The liquidator can seek an order from the Utopian Court directly (per Article 9 Model Law) that the Utopian proceedings be stayed whilst the winding up proceedings are underway, and the Utopian court will be under an obligation to consider the liquidator's application despite the winding up proceedings being in another jurisdiction. The Erewhon liquidator can also seek an order for recognition by the Utopian court that the winding up proceedings are the 'main proceedings' and upon such recognition, commencement or continuation of individual actions or individual proceedings concerning the debtor's assets, rights, obligations or liabilities is stayed (Article 20.1(1)).

A good understanding of the issues and the answer could be strengthened by more detail.

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.

a) Yes, as the Erewhon liquidator would not yet have been appointed. Under the Model Law, foreign representative is defined as 'a person or body, including one appointed on an interim basis, authorized in a foreign proceeding to administer the reorganization or the liquidation of the debtor's assets or affairs or to act as a representative of the foreign proceeding'.

Therefore to have the benefits of applying to a foreign court under Article 9 the person applying needs to come within this definition.

b) If a winding up of Nadir is already underway in Utopia, the Erewhon liquidator can intervene in the Utopian winding up proceedings (Article 24). The Utopian court would still be under an obligation to cooperate with the Erewhon court. An agreement could be implemented to provide for the facilitation of both sets of proceedings.

Apply the MLCBI provisions on concurrent insolvency proceedings (see Article 29)

1

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?

In this situation I have assumed that the company is incorporated in England. England and Wales has adopted UNCITRAL Model law on cross border insolvency by implementation of the Cross-Border Insolvency Regulations 2006 (SI 2006/1030).

1. Issue 1: the standing and recognition of the liquidator in the other states. If the states in which the other assets and creditors are situated have adopted the UNCITRAL Model Law, the English liquidator will be able to apply for recognition in that state. If they have not, whether the liquidator is recognised and has standing there will

depend on the state's particular domestic laws or international instruments adopted.

2. Issue 2: moratorium on creditor actions. Part 1A of the Insolvency Act 1986 provides for the directors to apply for a short moratorium on certain creditor actions against English companies whilst they explore ways in which to rescue the business or apply themselves for its winding up. Overseas creditors will also be prevented from applying to wind up the company whilst the moratorium is in place.
3. Issue 3: priorities and preferences of creditors. Under common law, English Liquidators are authorised to accept proofs of debt lodged by foreign creditors.
4. Issue 4: conflict of law issues. Under the Insolvency Act 1986, English law applies to matters of procedure and substance.

There is scope to elaborate and provide further detail.

6

Marks awarded 11 out of 15

*** End of Assessment ***

A very good paper that generally addresses the questions asked and substantiates its answers.

TOTAL MARKS AWARDED 38/50