



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 6 out of 10

QUESTION 2 (direct questions) [10 marks]

Question 2.1 [maximum 2 marks]

Explain what the term "international insolvency law" means.

As per the guidance text "international insolvency law" means law that governs all insolvency proceedings worldwide it takes precedence over domestic or local laws.

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

1

Question 2.2 [maximum 5 marks]

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

Proceedings

With universality there is only one insolvency proceedings covering all assets and debts worldwide. This mean no other insolvency proceedings can be sought.

Whereas with territorialism the insolvency proceedings will have to be heard in each jurisdiction the company holds assets or debts.

Trust

Universality requires a high level of trust in foreign insolvency proceedings since the outcome will affect all jurisdiction the company operates in.

Local interest

Territorialism addresses local interest and only evaluate local assets. However, the creditors may suffer challenges in participating in foreign insolvency proceedings.

Home state

With universality it is difficult to establish the home state where the single insolvency proceeding will occur. This can create uncertainty in the other jurisdiction as the court ruling of the home state may not be in their best interest of the other jurisdictions.

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.

Although there is no international insolvency law regulating cross-border insolvency in the Middle East some of the Gulf Co-operation Council countries have been working with the World Bank to develop this.

Through the cooperative work of the Hawkamah Institute of Corporate Governance, the World Bank, OCED and Insol they were able to launch a comparative survey of Insolvency system in the Middle East and North Africa.

what impact did this have on reforming domestic insolvency laws or addressing international insolvency Issues in the Middle East?

Recently several Middle East countries have amended their domestic insolvency laws while a few adopted the model law on cross-border insolvency.

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

1.5

Marks awarded 6.5 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.

With Individuals the objective is to help the person make a fresh start by offering protection from harassment by creditors. This is especially when they bankruptcy or insolvency was brought about by no fault of the individual for instance if the individual lost his/her employment because of the COVID pandemic.

For Corporation, if personal liberty has been abused the Liquidator can see legal action to seek reimbursement, this is not applicable to individuals.

The goal is to reduce the individual debts by way of taking the individual situation into consideration and allowing him/her to make payments they can afford at that point in time.

The system allows the individual to exclude or exempt certain asset to maintain himself or herself and dependents, this is not available to Corporation.

Individual may be granted a discharge which mean they are no longer obligated to his/her debts. This is not available to corporation instead the Company is wind-up and dissolved.

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.

Some difficulties that may be encountered are:

The standard of the insolvency law is low and outdated although they are being some progress with initiatives to provide international best practice standards to these countries. However, this continue to be a work in progress.

Reconciling the various national approaches to insolvency, for example distinguishing how an insolvency proceeding should provide for two jurisdictions with different system, where one can a be pro-creditor system and the other is a pro-debtor system.

If the debtor has multiple claims from multiple jurisdictions which is further complicated by protectionist laws, national laws, security agreement, set-off and netting agreements.

Obtaining moratorium or stay on creditors action in foreign jurisdictions.

The difference between legal system and laws of the countries, even in cases where the laws are not outdated, with the major obstacle being the lack of global harmonisation.

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.

The most notable step is the Insolvency Practitioners coming together and having a global debate regarding issues encountered and willingness to provide best practices.

Another multilateral step is treaties and conventions which become legally binding in both cross-border and domestic laws.

Also, there is many instances where multiple jurisdictions agree to co-operate with each other.

Although currently there is no global harmonisation of insolvency they are steps that help in addressing international issues, it creates a sense of precedence and it can be seen as a test model to jurisdictions who still need to update their laws and bring more parties to the discuss a way forward.

Also, with companies becoming more global with offices and assets in multiple jurisdiction it has created an environment where jurisdiction need to work together and resolve issues as they arise to satisfy their client.

It would be beneficial to consider UNCITRAL Legislative Guide on Insolvency Law (2004); World Bank Principles for Effective Insolvency and Creditor Rights Systems (2011); European Parliament report on Harmonisation of Insolvency Law at EU Level (2010).

2

Marks awarded 9.5 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.

The Erewhon Liquidators will first need to apply to the courts in Erewhon for a stay regarding any creditor's actions against Nadir. The reason for this is insolvency signify a collective procedure that is binding on all creditors.

The Liquidator will need to pool all assets which eventually become available to settle creditors' claims. First the Liquidator will need to determine if they are assets or claims in foreign jurisdiction, if so, they will need to apply to the courts in the foreign jurisdiction for an automatic stay.

The Liquidator will need to determine the total contractual obligation including those in a foreign jurisdiction. This will involve requesting all creditor both local and foreign to submit their claim.

The Liquidator will need to assess uncompleted contract prior to the commencement of the insolvency proceedings to determine if they should be full filled. Usually, the Liquidator will allow the contract to proceed only if it will increase the value of the company's assets or bring some benefit to the Company.

The Liquidator will need to determine if Nadir operate in any other jurisdiction and consider if there is any treaties or convention between Erewhon and that jurisdiction. If not, the Liquidator will need to apply to the courts in the foreign jurisdiction to enforce seizure of assets or performance of contractual obligation.

The question requires candidates to apply the relevant MLCBI articles to the facts provided in more detail than that above.

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.
- (a) Yes, because the Liquidator will need a court appointment to carry out their duties, especially those that involve the co-operation of foreign jurisdiction as they will not be obligated to comply without a court order.

(b) No, the Liquidator of Apex will need to follow the same cross-border insolvency approach even if they follow a law other than UNCTRAL model law.

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?

The country selected is United Kingdom which follows English Insolvency and has adopted the UNICTRAL Model Law on Cross-Border Insolvency.

Global Insolvency law

A key insolvency issue is there is no universal or global insolvency law mainly because insolvency is affected by local cultures and domestic systems in place such as pro-creditor or pro-debtor. This can affect the application of the ruling as United Kingdom who has a pro-creditor system while the other jurisdiction who may have a pro-debtor system.

UNCITRAL has provision that allows co-operation and co-ordination of concurrent proceeding between jurisdictions.

Pro-Creditor

As mentioned above the United Kingdom takes a Pro-Creditor approach, that is the creditors have priority over the claims to the Company's assets, however they may be a situation when the company has a subsidiary in America which usually take on a pro-debtor approach.

Under English Law the Liquidators have a duty to take all assets both tangible and intangible belonging to the Company in their control.

Terminology

Different jurisdiction has different terminology and interpretation of the law. Both English Law and UNICTRAL offer a description of their terminologies.

Multiple claims

The company can receive claims from creditors from multiple jurisdictions which can create a conflict of law and raise a question on which creditor claim will be prioritised. The issue can be overcome by the Liquidator requesting a stay in the other jurisdictions while they determine how the proceeds from the realised assets will be disbursed.

For an approach more closely applied to the facts, see the 'Model' Answer for four key international insolvency issues raised by the facts and facing the insolvency representative in this scenario. Then apply the current English laws on CBI to such issues.

3

Marks awarded 7 out of 15

* End of Assessment *

A satisfactory paper that identifies some of the issues raised, generally substantiating its answers satisfactorily. More detail would have strengthened a number of answers.

TOTAL MARKS AWARDED 29/50