



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**.

Commented [DB1]: Please read and follow the instructions – next time I will return your assessment unmarked.

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.

International Insolvency Law can be defined as the law regarding insolvency cases where there are international elements involved, as example assets or creditors located in a different jurisdiction. Those rules are not easily applied since you cannot enforce them on other jurisdiction and there is not a single set of insolvency rules that applies globally. Wessels defines international insolvency law as "[...] 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."

2

Question 2.2 [maximum 5 marks]

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

There are two main approaches in order to seek solutions on cross-border insolvency issues: Universalism and Territorialism.

The universalism consists in the idea of only one insolvency proceeding covering all of the debtor's assets and debts worldwide, which means, once the proceedings are opened, no other insolvency proceedings ought to be possible nor any other forms of execution of the debtor's assets. Only one forum should have jurisdiction and, consequently, will be dealing with assets and creditors situated in a different

jurisdiction. The creditors spread over different States should have the opportunity of participating in the proceedings with all claims being treated on an equal basis.

The territorialism, on the other hand, consists in the idea of commencement of insolvency proceedings in different State/ Jurisdiction where the debtor holds assets. However, in this theory, each State is limited in scope to its territory. It would be possible to have multiple insolvency proceedings running concurrently, independently, in regard to the same debtor. This theory sets the national interest should be protected before any assets are transmitted abroad. Also, creditors situated abroad may find difficulties on dealing with their claims, suffering practical and economic challenges in participating in foreigner insolvency proceedings, which could lead to the disparity among creditors.

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.

Middle East States have reformed their domestic insolvency laws, **More detail would have improved the mark awarded for this sub-question.**

where some countries as Bahrain, adopted the Model Law on Cross-Border Insolvency, so as did the Dubai International Financial Centre. Besides, in 2009 it was launched the first regional comparative survey of insolvency systems in the Middle East and North Africa, as a joint initiative of the Hawkamah Institute for Corporate Governance, the World Bank, the OECD and Insol Internation. **what impact did this have on reforming domestic insolvency laws or addressing international insolvency Issues in the Middle East?**

1.5

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.

According to Sealy and Hooley, the main differences regarding the objectives of insolvency for individuals and corporations are: (i) Individuals: Aims to protect the debtor from harassment by his creditors, to enable the debtor to make fresh start, reduce indebtedness by making contributions from present and future income to the estate while at the same time taking his personal circumstances into consideration, while a (ii) corporation: possible to preserve the business or viable parts thereof and impose personal liability on responsible persons where it has been abused.

There is scope to elaborate

3.5

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.

First of all, it must be said that there are numerous difficulties arising on cross-border insolvency context due to the non-existence of a global insolvency law system and a global court to deal with those matters.

According to Friman, the terminology "Insolvency" is already a problem since it can mean a situation where the combined total of the outstanding liabilities exceeds the measurable value of all the debtor's assets and some degree of durability of this state of negative net worth is normally required, also it can mean a short-term inability to service debts, for example, a liquidity crisis can be sufficient for the commencement of "insolvency proceedings".

Another difficulty that should be featured is the situation in conflict of law, differences in domestic norms and a variety of procedures to deal with non-payment of debt will raise issues on this matter, pro debtor or pro creditor system. In other words, differences between the legal system and the laws of countries are both the root problem of cross-border insolvencies and the major obstacle to their solution.

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.

On the 21st century, in order to promote harmonisation of domestic insolvency laws, UNCITRAL promulgated a “Legislative Guide on Insolvency Law” which intended to “be used as a reference by national authorities and legislative bodies when preparing new laws and regulations or reviewing the adequacy of existing law and regulations” .

The World Bank also produced guidelines on the regulation of insolvency entitled Principles for Effective Insolvency and Creditor / Debtor Regimes. This guideline gain significance in the context that the IMF and the World Bank sometimes require bankruptcy reform in developing countries as a condition of loan support.

The European Parliament published a report on the harmonisation of insolvency law at EU level, which outlined differences between domestic insolvency laws within the EU and identified a number of areas of insolvency law where harmonisation at EU level is believed to be worthwhile and achievable.

In my opinion those steps are important in order to seek improvements regarding transnational insolvency issues. The harmonization of laws facilitates the insolvency process, bringing greater legal certainty for creditors and debtors, ensures greater stability of the company and its creditors, facilitating the liquidation of assets and payment of the universality of creditors.

All of this has further consequences for the countries' economies. For this reason, many companies are currently seeking to establish their headquarters and/or branches in countries that have adhered to the UNCITRAL model law in their domestic legislation.

This is well answered. There is some scope to elaborate more on political pressure.

4.5

Marks awarded 11.5 out of 15

QUESTION 4 (fact-based application-type question) [15 marks in total]

Nadir Pty Ltd (Nadir) is a company registered in Utopia. Originally it was incorporated in the neighbouring country of Erewhon before moving its registration and head office to Utopia one month ago. Apex Pty Ltd (Apex) is incorporated and has its head office in Erewhon. Apex and Nadir enter into a contract by exchange of emails between their head offices for Apex to supply goods to Nadir in Utopia. Nadir has failed to pay for the goods which have been delivered in accordance with the contract. Apex issues court proceedings against Nadir in Utopia for monies owing for the goods sold and delivered.

Meanwhile, Nadir also owes monies to creditors in Erewhon. One Erewhon creditor obtains a court winding-up order against Nadir in Erewhon and a liquidator is also appointed by that court.

If you require additional information to answer the questions that follow, briefly state what information it is you require and why it is relevant.

Question 4.1 [maximum 5 marks]

Assume the UNCITRAL Model Law on Cross-border Insolvency has been adopted by Utopia without modification, except as required to domesticate it. For example, the Cross-border Insolvency Act of Utopia names its local laws relating to insolvency and its competent court under the Act. The Erewhon liquidator's investigations detect that Apex is suing Nadir in Utopia. The liquidator would like to stop Apex court action against Nadir in Utopia. Advise the Erewhon liquidator on the potential relevance of the Cross-border Insolvency Act of Utopia.

The relevance of the cross-border insolvency act of Utopia regards its jurisdiction over the debtor and their claims, since there is located the "COMI" - centre of main interests. That being said, the liquidator must be aware that jurisdiction may be an issue on this case, making it difficult the recognition and enforcement of insolvency related judgments. Another point is the conflict of laws which could be another issue that the liquidator will have to deal eventually.

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

3.5

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.

It could affect on the Utopia's Court decision on the matter. The court could refuse to grant a local winding-up order over the same company and instead give effect to the foreign proceedings by recognising the authority of the foreign liquidator to gain control over local assets.

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

It would be different since Utopia recognizes itself as the competent jurisdiction to start a insolvency proceeding, according to UNCITRAL Model Law on Cross-border Insolvency, the court of Erewhon would be a secondary proceeding. In this case co-ordination and cooperation between the States would be essential.

If Erewhon adopts the universalism approach, the parts assume that all the debtor's assets should be included in the insolvency proceedings and the officeholder should be provided with the tools to control and obtain all the assets. All creditors should have the opportunity of participating in the proceedings with all claims being treated on an equal basis.

On the other hand, if the approach adopted by Erewhon is the territorialism, the debtor may be declared insolvent on both states.

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?

Country of choice: Brazil

Brazil has recently adhered to UNCITRAL - Model Law on Cross Border Insolvency, in order to adjust your domestic legislation in an effort to promote harmonization and cooperation between countries in cases of international insolvency.

The four key international issues are:

- 1- The recognition and effect accorded foreigner proceedings in the same matter; article 167-J and 167-L Act 11.101/2005
- 2- The choice of law to apply in the matter - UNCITRAL Legislative Guide on Insolvency Law
- 3- Creditor Participation - Art. 167 §2°, II Act 11.101/2005
- 4- Co-ordinated claims procedures: Article 167-A §2° and 167-P Act 11.101/2005

More detail would have improved the mark awarded for this sub-question. For another approach that is 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.

3

Marks awarded 7.5 out of 15

*** End of Assessment ***

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

TOTAL MARKS AWARDED 34.5/50