



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.

Take care to select your chosen multiple-choice answer.

Question 1.5

The principles and requirements for avoidable dispositions and executory contracts are the same in all jurisdictions - hence these do not pose problems in a cross-border insolvency matter.

- (a) The statement is untrue, the requirements and principles do differ and pose problems in a cross-border case.
- (b) This statement is untrue because the insolvency laws of the State where the original insolvency order is issued will apply to all the other States involved in the matter.

- (c) This statement is untrue since avoidable dispositions and executory contracts do not pose any problems in a cross-border case.
- (d) The statement is untrue since avoidable dispositions and executory contracts may be disregarded in a cross-border case.

Question 1.6

The domestic corporate insolvency statute of a country makes no mention of the possibility of a foreign element in a liquidation commenced locally. The country has ratified a regional treaty on insolvency proceedings that contain provisions on concurrent insolvency proceedings over the same debtor in a neighbouring treaty state.

In a local liquidation commenced under the domestic corporate insolvency statute, to what law can the local court refer in order to resolve an international law issue that has arisen because of concurrent insolvency proceedings in the neighbouring state?

(a) Public International Law.

(b) UNCITRAL Legislative Guide on Insolvency Law.

(c) World Bank Principles for Effective Insolvency and Creditor Rights Systems.

(d) Private International Law.

Question 1.7

Which one of the following documents mandates co-operation or communication between courts in concurrent insolvency proceedings on the same debtor, which are being conducted in different nation states?

(a) ALI / III Global Guidelines Applicable to Court-to-Court Communication in Cross-Border Cases (2012).

(b) EU Cross-Border Insolvency Court-to-Court Communications Guidelines (2014).

(c) UNCITRAL Model Law on Cross-border Insolvency (1997).

(d) JIN Guidelines for Communication and Cooperation between Courts in Cross-Border Insolvency Matters (2016).

Question 1.8

Latin and Middle America states have ratified various multilateral conventions and treaties that address international insolvency issues. While they promote unity of proceedings in the treaty states where a debtor has a single commercial domicile, they acknowledge the possibility of concurrent proceedings.

Which of the following conventions and treaties does **not** provide for judicial co-operation where there are surplus funds remaining in a proceeding in one treaty state and there are concurrent insolvency proceedings over the same debtor in another treaty state?

- (a) Montevideo Treaty on International Commercial Law (1889).
- (b) Montevideo Treaty on International Commercial Terrestrial Law (1940).
- (c) Montevideo Treaty on International Procedural Law (1940).
- (d) Havana Convention on Private International Law (1928).

Question 1.9

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

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

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

Question 1.10

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

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

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

Marks awarded 7 out of 10

QUESTION 2 (direct questions) [10 marks]

Question 2.1 [maximum 2 marks]

Explain what the term "international insolvency law" means.

It may be described as body of rules which concern insolvency proceedings concurrently happening in different states. Considering the various treaties which the state may have ratified. There may be differences in their approach towards insolvency. International organizations like UNCITRAL ,World Bank and Courts are trying to devise solutions for dealing with these issues on a transnational basis to establish more effective and uniform approach.

2

Question 2.2 [maximum 5 marks]

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

These are the two diametrically opposite approaches or theories. Universalism is explained as to have one insolvency proceeding covering all assets of the Debtor and debts worldwide. Ideally one forum should have jurisdiction. The chosen state should be where the centre of Debtors interest is located. There could be an approach which favours a worldwide insolvency law. All Creditors should have the opportunity to participate in the proceedings with their respective claims. This principle relates to globalisation as there are large multinational corporations. This however has its own drawback namely that it will create uncertainty in the domestic market.

Territorialism is based on the principle of insolvency proceedings in every state /Jurisdiction where the debtor holds assets. This addresses the interest of the local

creditors who act in within domestic market. It may not be practical for these to participate in foreign insolvency proceedings. It may also be the case that the strongest creditors receive their payment.

Another important drawback is that the debtor may be declared insolvent in one state, where the debts are but not in the other where the assets are.

It is believed that the solution is a co-operative form of territoriality.

Also, note, these theories involve two key aspects of private international law - recognition and effect as well as jurisdiction:

For example, with universalism, (1) the jurisdictional aspect requires all States to agree on the place for the one set of insolvency proceedings in respect of the debtor and, to be successful, (2) recognition and effect requires that other States recognise that one set insolvency proceedings 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.

It seems there are no international insolvency instruments of regulation for cross border insolvencies in the Middle East.

MENA -Middle EAST and North Africa launched a joint initiative in 2009, with the effort of Hawkamah Institute for corporate Governance, The World Bank, OECD and INSOL International, based on World Bank's Principles for effective Insolvency. **what impact did this have on reforming domestic insolvency laws or addressing international insolvency Issues in the Middle East?**

UAE in 2016, 2019, Saudi Arabia in 2018, Dubai in 2019 have reformed their domestic Insolvency laws. **More detail would have improved the mark awarded for this sub-question.**

Bahrain adopted Model Law on Cross Border Insolvency in 2018. Dubai International Financial centre also adopted this.

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.

These objectives of insolvency for individuals and corporations have been distinguished by Sealy and Hooley:

In respect of Individuals: Debtor should be protected from harassment by his creditors. He should be given an opportunity for fresh start. The indebtedness may be reduced by

making contributions from present and future income to the estate. His personal circumstances also be taken into consideration.

In respect of Corporations: There should be an endeavour to preserve the business or parts thereof. Where personal liability has been abused, to impose personal liability on the persons found responsible for the same.

Principle of Pari passu distribution as far as possible should be held. Secured Creditors must be dealt with fairly towards the debtor and the other creditors.

This is well answered but there is some scope for elaboration

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.

A variety of difficulties may be encountered while dealing with cross border insolvency. The states may be having their own Domestic laws binding on them. Both national and international laws on insolvency show a lack of structure both formally and informally. Insolvency proceedings could be opened concurrently in more than one state. Each state would then apply its own laws, including 'its choice of law'. The state may have ratified certain treaties or conventions. Legislation in many Legal systems may vary in the way they treat corporations or companies as single entities. Separate insolvency applications for commencement may be required in respect of each company of the group. Some legal systems are pro debtor and a few are pro creditor. Strict territorial approach will cause difficulties, if there is lack of co-operation and Co-ordination.

Another difficulty is that standard of insolvency laws in many countries is relatively low. The laws are outdated.

The financial distress of Banks, Insurance companies and other institutions taking deposits from the public can pose systemic risk in the state or even across the world.

However the World Bank Principles for effective insolvency regimes, UNCITRAL Legislative guide on Insolvency laws and Project of European Commission called Bankruptcy and fresh start will guide states to get over many of the difficulties being faced.

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.

Harmonisation-This proposition is going to offer solution to many problems being currently faced. The fundamental differences between legal systems can be resolved.

Multilateral bodies have addressed these matters by Regional groupings as European Union. Treaties have been drafted to address the issue within their geographical region. Intergovernmental bodies such as UNCITRAL have been actively promoting soft law responses .

Multilateral Commercial bodies have worked on finding solutions. IBA,INSOL have adopted strategies for : Harmonising domestic laws, Uniform choice of law principles, Uniform recognition laws, Co-operation and Co-ordination to promote recognition and enforcement.

In 2004, UNCITRAL promulgated Legislative Guide on Insolvency Law. Enactment of UNCITRAL Model Law On Cross Border Insolvency is recommended.

World Bank -In 2000s -Principles for effective Insolvency and creditor/debtor Regimes produced and revised in 2005, 2011,2015 and 2021 for Best Pactices.

Capital Markets Union(CMU) 2015 stressed on the Convergence of insolvency and restructuring proceedings would facilitate legal certainty for cross border investors and timely restructuring in financial distress.

What is your opinion on how much impact these are likely to have in addressing international insolvency issues?

3.5

Marks awarded 11 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 Liquidator has to consider Relief to be granted upon recognition of foreign insolvency proceedings. He has to have access to courts and other relevant authorities. He has to cooperate with the international insolvency proceedings. There has to be no discrimination between the foreign and domestic creditors. Provisions of Model Law facilitate cooperation and Co-ordination between local courts and foreign courts. reciprocity is not required. The joint proceedings of the parties shall be applicable.

There is some scope to elaborate

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) Even if the matter was not heard it could be considered by Courts in Utopia.
 - b) Proceedings have to happen in joint 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?

A company incorporated in Country 'X'. The assets of X are in various states. International insolvency proceedings. Liquidators have a duty to take into custody and under their

control all the tangible and intangible property of the company. Their appointment as liquidator is recognised in the foreign state in which the assets are situated. Liquidators are also authorised to accept proofs lodged by foreign creditors. They are provided for co-operation and co-ordination where there are concurrent proceedings.

[Type your answer here]

Take care to answer each sub-question

0

Marks awarded 5 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 30.5/50