



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.

"International insolvency law" refers to a body of law or legal rules in which insolvency cannot be determined with reference to only one national legal system, owing to a cross-border or international element in the case which requires consideration of a foreign legal system's rules.

**There is some scope to elaborate
1.5**

Question 2.2 [maximum 5 marks]

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

Universality or universalism is the doctrine which espouses the notion that there should only ever exist one set of legal proceedings dealing with a debtor's insolvency. This doctrine suggests that the entirety of a debtor's worldwide estate should be dealt with in one forum, such that all creditors and all assets are dealt with in a single proceeding.

Territoriality or territorialism, on the other hand, proposes that separate insolvency proceedings should be opened in every jurisdiction where a debtor possesses assets, with each proceeding dealing only with the property in such jurisdiction. In this way, multiple parallel proceedings are initiated, as compared to the single-proceeding approach adopted by universality.

The two doctrines are opposed in terms of the approach taken to the institution of proceedings. Similarly, the universalist approach requires a high degree of trust in the legal system of the country in which the proceedings are instituted, whereas a territorialist approach means that each jurisdiction in which assets are situated applies its own law to the local insolvency.

Universalism is often considered to be a more cost-effective approach, since the insolvent estate only bears the cost of proceedings in the "home" state. Territorialism, by contrast, requires that the insolvent estate meet the costs of multiple proceedings in multiple jurisdictions.

Finally, a territorialist approach can give rise to issues where a debtor is, for example, insolvent under the laws of one country in which it holds assets, but solvent in another country where it also holds assets. This concern does not arise in a universalist approach.

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.

1. The UAE reformed its domestic insolvency legislation in 2016 and 2019; **More detail would have improved the mark awarded for this sub-question.**
2. Bahrain adopted the UNCITRAL Model Law in 2018; and
3. The Hawkamah Institute, INSOL International, the OECD and the World Bank launched a comparative survey of domestic insolvency legislation in the Middle East and North Africa in 2009. **what impact did this have on reforming domestic insolvency laws or addressing international insolvency Issues in the Middle East?**

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.

According to *Sealy & Hooley*, some key differences include that the aim of individual insolvency is to allow the debtor a fresh start, having prevented harassment by his or her creditors in the meantime. On the other hand, aims in corporate insolvency include to ensure that valuable or viable aspects of the business is maintained, even if this is at the expense of the legal person involved.

Further, individual insolvency is concerned with pursuing the conduct of the person as an individual, whereas corporate insolvency focuses on the acts of the directors and officers of the company/entity where blameworthy conduct has taken place.

Typically speaking, the individual will be rehabilitated at some point after the winding up process, whilst (absent a corporate rescue procedure), a legal entity is dissolved at the end of the process.

There is some 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.

The first challenge that may be encountered is the very definition of insolvency itself. In some jurisdictions, balance sheet insolvency (i.e. where liabilities exceed assets) is required, whilst in other jurisdictions, cash-flow insolvency (i.e. an inability to satisfy debts, even if on a more short-term basis) is sufficient.

Further, difficulty arises in defining the rights of creditors in different jurisdictions, where differing local laws may give rise to different rights and interests for those persons. This is made more complex when considering local non-bankruptcy laws relating to security, etc.

The recognition of foreign office-holders is another area that may give rise to challenge, especially in a situation where the appointment of a validly appointed office-holder in one jurisdiction is not recognised in another jurisdiction, meaning he or she is unable to take steps there.

Another area that may give rise to difficulties in the cross-border context is the insolvency moratorium. This can arise either where the local laws have different moratorium scopes, meaning that actions prohibited in one jurisdiction may be allowed in others, or where a

moratorium has ostensible extraterritorial effect and a foreign Court is asked to recognise and give effect to that moratorium.

A final aspect that may prove challenging is where conduct stands to be set aside under one jurisdiction's laws, but not another.

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 UNCITRAL Legislative Guide on Insolvency Law was promulgated in 2004, with the aim of providing a framework for national legislators in relation to domestic insolvency legislation. The World Bank has also published (and, at various times amended) its Principles for Effective insolvency and Creditor - Debtor Regimes. The European Parliament published its Report on Harmonisation of Insolvency Law in 2010, dealing with harmonisation of differing domestic laws within the EU.

In my opinion, these sources can be useful in limiting areas of conflict between differing systems. However, there is unlikely to ever be a single global insolvency law system given the differing origins of legal systems around the world, differing policy aims of various governments and the need to respect the autonomy of elected governments around the world. In addition, having the resources available does not automatically mean that all governments will in fact adopt the proposals made, or even turn to consider existing domestic insolvency laws. Any "global" system is likely to be viewed as having been imposed by nations with larger and more powerful economies (e.g. the UK and USA), thus creating disharmony even if such a system were to be implemented. Finally, the different ambits and powers of judicial decision-makers in various jurisdictions will mean that, even if a perfectly uniform system can be implemented, this is unlikely to be uniformly applied the world over.

As such, whilst measures such as the Legislative Guide are helpful in homologising domestic systems, they are extremely unlikely to remove all of the issues currently faced at an international level.

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

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.

Under the Cross-Border Insolvency Act of Utopia, the proceeding in Erewhon is not a "foreign proceeding" for purposes of the Act as it is not a collective proceeding under a law relating to insolvency, but rather an ordinary claim for goods sold and delivered. There is no collective element, as Nadir is being sued by only one creditor. Further, there is no relief sought relating to liquidation or reorganisation in the Utopia proceeding.

The MLCBI is significant for its provisions on recognition and relief in 4.1 and these needed to be considered regarding the sought-after stay.

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.

Yes. Both of these situations could be foreign proceedings within the meaning of the Cross-Border Insolvency Act, so the Act would apply to those 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?

I have selected the laws of England and Wales as the law of the country of incorporation.

Four issues facing a liquidator as a matter of English law are:

1. Recognition: section 426 of the Insolvency Act 1986 would apply.
2. Conflict of laws: the English common law rules would apply.
3. The moratorium: the Insolvency Act 1986 would apply.
4. Recovery of revenue debts: the UNCITRAL MLCBI would apply.

More detail would have improved the mark awarded for this sub-question. It is for 8 marks.

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.

3.5

Marks awarded 7.5 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 32.5/50