



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 7 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 is the overarching term that defines insolvency proceedings spanning over different territories. It is a collection of rules which cannot be enforced without taking the international aspects, rules and ramifications of a particular case in account]

This draws on relevant information from the Module's materials. It would be improved if it also included more information in your own words to indicate your personal understanding.

1.5

Question 2.2 [maximum 5 marks]

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

The concept of universality or universalism relate to the premise that one insolvency proceeding should cover and cater for all of the debtors debts and assets regardless of the fact that the debtors assets or debts may be located in more than one jurisdiction. Furthermore as soon as insolvency proceedings are initiated in a certain jurisdiction, no other insolvency proceedings should be allowed to take place in other jurisdictions and therefore execution of the debtors assets must only be governed in terms of one forum in one jurisdiction. In order to determine which jurisdiction, the proceeding should take place in, one would need to determine the location based on where the centre of the debtor's interests is located.

Furthermore all creditors of the debtor, regardless of where in the world they are situated, should have the equal opportunity to be part of the proceedings and all claims will be treated equally.

The principle of territoriality or territorialism is the complete opposite to the principle of universalism. In terms of this principle, it states that insolvency proceedings can commence in every jurisdiction where the debtor possesses assets. However, an important distinction is that the proceedings is limited and restricted to assets of the debtor which is situated within a certain state. A practical example is that should an insolvent/debtor own property in South Africa and England then insolvency proceedings commencing in South Africa can only deal with the assets which the insolvent/debtor owns in South Africa and not any of the assets which the insolvent/debtor owns in England. this principle therefore allows for multiple insolvency hearings commencing concurrently within different jurisdictions although being limited to winding up of assets which are situated in the jurisdiction within which the insolvency proceeding commences. The concept of territorialism protects in the interests of local creditors and prevents such creditors from being unable to recover some of their assets due to the massive financial and logistical challenges when faced with foreign insolvency proceedings.

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.

In 2009 the first regional comparative survey of insolvency systems in the Middle East and North Africa was launched. The survey was based on the world bank's principles for effective insolvency and creditor rights systems which was used as an indicator for best practises. **what impact did this have on reforming domestic insolvency laws or addressing international insolvency Issues in the Middle East?**

In 2016 and 2019 the UAE introduce the Federal Law by Decree 9 of 2016 on Bankruptcy as well as Federal Decree Law 19 of 2019 on Insolvency.

In 2019 Saudi Arabia approved a new bankruptcy law which published the kingdoms legal framework Containing regulations, preventative actions, measures for financial restructuring and settlement procedures. This law also made the process of unwinding insolvent companies much easier.

Furthermore in 2019 the Dubai International Financial Centre introduced new insolvency law and regulations which included a new debtor bankruptcy regime which was brought in line with the best practice globally. The law also incorporates the UNCITRAL Model Law on Cross Border insolvency proceedings

3

Marks awarded 8.5 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.

The objectives of insolvency for individuals and corporations are different and have different consequences. The objectives of insolvency for individuals is to reduce the indebtedness of the insolvent/debtor whilst at the same time protecting the insolvent/ debtor from being pressurised and bombarded by its creditors for repayment. It also allows a debtor to begin a new start in terms of being debt free, after imposing conditions on the debtor in order to prevent a further declaration of insolvency. It furthermore allows for financial contributions to be made using past, present, and future income to the estate. The monetary contributions would differ from person to person dependent on their own personal circumstances at the time of insolvency. Furthermore, individual insolvents in certain circumstances are able to retain some of his/her assets which will be required in order to maintain the insolvent and its dependants ie: family home.

The objectives of insolvency for corporations differ in the sense that if there is a possibility to save certain aspects of a business or to preserve a business, this can be done. Preservation of a business or parts of a business may be necessary in an instance where a person or persons have misappropriated or contributed to the company's demise in the personal capacity by abusing their powers for personal gain which in turn leads to the winding up of a company. The winding up of corporations differs from individual insolvency in that the company is not allowed to retain some of its assets unless all of its debts have been satisfied and there is a surplus.

There is some scope to elaborate

4.5

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 major difficulty that may be encountered when dealing with insolvency law in a cross-border context is that there is no global insolvency law system or designated international/global insolvency court in which to adjudicate cross border insolvency cases. Furthermore, another difficulty faced is by finding a common proceeding in which to wind up the estate in a cross-border context and thereafter finding common ground as to the definitions and interpretations of insolvency as different jurisdictions have different definitions for what constitutes insolvency and therefore the ramifications may differ dependent on each jurisdiction's definition of insolvency. international insolvency laws, conventions and regulations are also not very helpful as most do not even attempt to define the terms of insolvency which creates further confusion in a cross-border insolvency situation. Another difficulty encountered is that due to each jurisdiction adopting its own laws and guidelines as to the position of creditors, conflicts between laws of different jurisdictions are often experienced due to differing qualifications, presence and the protection of security available to creditors in terms of their own legal insolvency system. JL Westbrook has however identified nine issues which needs to be considered in cross border cases. the issues are:

- standing for (recognition of) the foreign representative;

- moratorium on creditor actions;
- creditor participation;
- executory contracts;
- co-ordinated claims procedures;
- priorities and preferences;
- avoidance provision powers;
- discharges; and
- conflict-of-law issue

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 first steps taken in the 21st century to promote harmonisation of domestic insolvency laws come from the UNCITRAL legislative Guide on Insolvency Law. This guideline was intended to be the reference point for different jurisdictions in compiling their own laws and regulations or to review their current laws and regulations to bring it up to international standards. In 2011, the World Bank also published guidelines on the regulation of insolvency law entitled Principles for Effective Insolvency And Creditor Right Systems. These guidelines outlined various overarching principles and factors that must be considered in order to achieve a successful cross border insolvency procedure. Furthermore in 2010 The European Union published a Policy document on citizens' rights and constitutional affairs Relating to the harmonisation of insolvency law at EU Level.¹ This policy document was extremely important as it identifies and outlines the differences between national insolvency laws and cross border activities. It Furthermore identifies various problems which may occur should there be no common principles and rules related to insolvency of corporate corporates and liability of shareholders. It Furthermore more importantly identifies areas of international insolvency law where harmonisation at EU level can be done it finally evaluates the extent to which harmonisation of insolvency law could further incorporate same into the company laws of the European Union countries. On 10 June 2020 the European Commission published a report on the capital marks union titled 'A new Vision for Europe's capital markets'². In this report the Commission agreed that the converging of insolvency proceedings would give much clearer legal certainty for cross border investors and reduce the difficulties experienced when dealing with national laws in a cross-border insolvency context. The establishment of these guidelines, policy documents, and regulations Have a very positive impact on addressing cross border insolvency issues. Though these documents are only recommendations as to how cross border insolvency proceedings should be conducted It serves as an important basis an useful tools in the fight for a global insolvency document and a unified global cross border insolvency procedure.

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

4.5

Marks awarded 14 out of 15

¹ https://www.eesc.europa.eu/sites/default/files/resources/docs/ipol-juri_nt2010419633_en.pdf

² https://ec.europa.eu/info/news/cmu-high-level-forum-final-report_en

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.

In order for the Erewhon liquidators to attempt to stop the matter proceeding in Utopia they would need to adopt the provisions listed in the UNCITRAL Model Law on Cross Border Insolvency which has been adopted by Utopia.

The MLCBI as drafted by UNCITRAL does not require reciprocity so it does not matter whether Erewhon has adopted the MLCBI or not.

In terms of Article 15 of the Model Law a foreign representative may apply to the court for recognition of the foreign proceeding in which the foreign representative has been appointed. This is extremely important as should the foreign proceeding be recognised, then in terms of Article 20(1)(a) Commencement or continuation of the action proceedings concerning the debtor's liability is stayed. Furthermore, in terms of Article 20(1)(b) execution against the debtor's assets is also stayed and as per Article 20(1)(c) transferring or otherwise disposing of any assets of the debtor is suspended.

In terms of article 21(2) the Erewhon Liquidator's may request that the Utopia court entrust the distribution of the debtors assets located in Utopia to the foreign liquidator.

The court in Utopia must co-operate with the liquidators of Erewhon to the maximum extent possible as stated in Article 25.

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.
= No
- (b) Apex had obtained a court order to wind-up Nadir in Utopia prior to the Erewhon winding-up order. = Yes

**More detail would have improved the mark awarded for this sub-question.
Apply the MLCBI provisions on concurrent insolvency proceedings (see Article 29)**

0.5

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?

[Type your answer here]

Take care to answer each sub-question

0

Marks awarded 4 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 33.5 / 50