



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 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 is the concept that insolvency proceedings including the actions taken by insolvency practitioners, cannot be completed in line with local laws and timelines without the incorporation of international aspects of a case. This means that local laws do not cover all aspects of the insolvency procedure and some cooperation is required to provide solutions on international issues raised.

2

Question 2.2 [maximum 5 marks]

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

Universality is the concept that there should only be a single insolvency proceeding covering all assets and creditors of the insolvent individual or corporate. In turn, this automatically means that there cannot be multiple proceedings and any actions in another jurisdiction must be ceased.

Territoriality on the other hand is opposed to universality. It outlines that it is better to bring insolvency proceedings in each jurisdiction that requires it. This may be because of the location of a debtor's assets, or creditors. The subsequent insolvency proceedings should be isolated to that particular jurisdiction that they are in.

On the other hand, universality states that one forum should have jurisdiction based on the centre of the debtor's interest, or other approaches including worldwide international law. Overall, the premise is that all assets are to be included in the

single unified insolvency proceeding and that foreign jurisdictions should allow the practitioner to implement the rules of the universal model. This should in turn mean that all claims are treated equally and asset realisations are maximised in the most cost efficient manner.

Territoriality on the other hand outlines that there could be multiple insolvency proceedings in relevant jurisdictions. The creditors allowed to lodge a claim in each proceeding would depend on their jurisdiction, and they would not be able to have their claim lodged in multiple proceedings.

The proposed benefits of universalism are that it may satisfy the interests of those involved better, with lower costs.

The proposed benefits of territoriality is that it helps local creditors who are faced with large practical and financial challenges in entering claims in foreign insolvency proceedings. Therefore, on a practical front, territoriality may be fairer.

The difficulties with universalism are that it requires a high level of cooperation between states, and trust in foreign legal systems. This may be particularly relevant where a certain country may have insolvency proceedings opened to allow the use of additional/reduced legal privileges against the insolvent subject. Creditors may feel that they are not getting the full investigations they deserve.

The difficulties with territoriality is that the debtor may be declared insolvent in one state, but not in another. This may mean it is difficult for the officeholder to pursue assets in another state, where the debtor is not insolvent. It is also deemed more expensive.

5

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.

A recent example of a development in the Middle East region is the comparative survey of insolvency systems in the Middle East and North Africa (MENA) region of 2009. The aim of this was to provide a guide to best practice. **what impact did this have on reforming domestic insolvency laws or addressing international insolvency Issues in the Middle East?**

Further, specific countries have reformed their domestic insolvency laws as follows:

- UAE in 2016 and 2019
- Saudi Arabia in 2018
- Dubai in 2019

Bahrain also adopted the model law on Cross-border insolvency in 2018.

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

2

Marks awarded 9 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 key difference between the objectives of insolvency for individuals and corporations is that for individuals, the process protects them from harassment by other creditors. However, corporates do not require the same protection (albeit a moratorium allows for the officeholder to deal with the estate in corporate).

The aim of the insolvency procedure for individuals is also to allow a fresh start for the individual, where this may not be case for corporate.

Personal insolvency also allows the reduction of indebtedness by making future contributions, whilst taking personal circumstances into consideration. Corporate insolvency often does not allow for future contributions but may have the sale of part of the business.

Corporate insolvency on the other hand, looks to preserve the business (or parts of it) rather than the company. This is a different concept to personal insolvency.

Corporate insolvency may also include the enforcement of personal liability where it has been abused. This is not the case in the corporate insolvency.

Finally, there is a key distinction in personal insolvency whereby some assets will be exempt or excluded from the procedure. This is not the case in corporate insolvency.

This answer displays a satisfactory understanding of the issues. To improve your responses, ensure they are commensurate with the mark allocation – while Q 3.1 asks for a brief note, it is for 5 marks.

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.

The first key pertinent difference relating to cross-border insolvency systems is the law on a moratorium on creditor actions. Should one country allow for a moratorium to prevent actions, but the other does not, this is likely to cause issues on whether the creditor can enforce against international assets.

There may also be difference in executory contracts between countries. This could mean that a contract is automatically void in one country but remains in another and will result in dispute.

Claims are a large part of a corporate insolvency procedure and may result in substantial recoveries into an estate. The law basis for these claims is likely to be different between countries, which may prove difficult should there be a cross-over in the location of the insolvency proceedings and location of the basis of the claim.

Discharges allow a bankrupt to be free of the insolvency procedure and move forward. The laws as to how this is enacted and the timeframes is likely to change between countries, which may cause a 'hangover' for the individual in bankruptcy, meaning they continue to be pursued in one country whilst being discharged in another.

There may be general conflicts of law between countries, where law does not match. This could impact many different areas of insolvency and cause difficulties for the insolvency practitioner.

There is likely to also be difficulties in ensuring foreign representatives are recognised in different countries, to complete their duties. This is likely to cause friction and increased costs for estates.

Further detail would be beneficial. For example, consideration of Westbrook's 9 key issues.
4

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 key step that have been taken to promote harmonisation of domestic insolvency laws in the 21st century is the 2004 UNCITRAL *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 laws and regulations". This has gradually been expanded and looks to harmonise domestic laws.

The World Bank also produced guidelines on the regulation of insolvency, entitled *Principles for Effective Insolvency and Creditor / Debtor Regimes*. This was revised in 2005, 2011, 2015 and 2021, and looks to provide guidelines to be used by all countries.

Additionally, the EU took steps towards aligning domestic insolvency laws in 2010 through the report 'Harmonisation of Insolvency Law at EU Level'. This outlines the similarities and differences between EU states, showing where improvement could be obtained.

My opinion is that these steps will provide some harmonisation, particularly in developing countries with insolvency laws in their infancy. However, it will be difficult to harmonise

countries with well-established insolvency laws, due to a lack of political appetite to create unity. Legislation typically takes substantial amounts of time to complete and with potential other benefits to countries of leaving existing insolvency laws (e.g. tax incentives), it may be difficult to change some countries.

It also requires a release of power from some countries, particularly where uniformity brings universalism and countries may lose control of insolvency proceedings that would previously have been dealt with internally.

However, where harmonisation would bring efficiencies to all countries involved, there is likely to be change. This is in particular to common test of insolvency, the formal aspects of lodging and dealing with claims, reorganization plans, rules around detrimental acts, the interrelationship between contractual rights of termination and insolvency, and directors' responsibilities.

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

4.5
MARKS AWARDED 12.5 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 liquidator should focus on the enforcement of a moratorium under the UNCITRAL Model Law. One of the features of the Model Law (and most international insolvency laws) is that upon the commencement of an insolvency proceeding, individual creditor actions against the debtor are stayed. For this reason, the Erewhon insolvency procedure must bind all creditors from enforcing, allowing distributions to be made to all creditors from the estate. If a single creditor were allowed to continue with their individual debt enforcement mechanism after commencement, that would render the collective proceeding ineffective.

Under the UNCTIRAL Model Law, the liquidator may then adjudicate all claims and recover all assets belonging to the company, for distribution to the creditors.

If the requirements of the CBI are met, then the Utopian court can recognise the foreign winding-up order and the appointment of the liquidator. The liquidator can also ask for relief by way of a local stay in Utopia of court proceedings by Apex to recover its debt.

3

Question 4.2 [maximum 2 marks]

Would it make any difference to your answer in question 4.1 in the following two alternative scenarios to Apex suing for its debt?

- (a) Apex had filed proceedings to wind-up Nadir, but the matter had not yet been heard.
- (b) Apex had obtained a court order to wind-up Nadir in Utopia prior to the Erewhon winding-up order.
 - (a) Should the proceedings to wind-up Nadir have been filed, but no heard then the answer is unlikely to change. This action is against the moratorium and the liquidator would likely look to cease any court action.
 - (b) If there is a valid court order to wind-up Nadir in Utopia prior to the Erewhon winding-up, it is likely that the liquidator will pass the insolvency to Utopia to commence.

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?

[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