



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 10 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 a body of laws, comprised of both hard and soft laws, meant to address instances in which an insolvency proceeding transcends national borders. International insolvency law is inherently limited because it cannot be enforced directly, but rather must be adopted into the domestic laws of each state in order to be enforceable.

Fletcher is an authoritative source. It would be beneficial to elaborate in your own words as well.

1.5

Question 2.2 [maximum 5 marks]

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

Universality relies on the idea that a Debtor's insolvency and attendant legal issues should be addressed by a single proceeding that governs all disputes, assets, and liabilities, regardless of their location. Some suggest that this can be achieved through the universal adoption of a single body of insolvency law, while others suggest that foreign states should adopt and enforce the result of the single proceeding governed by the domestic law of the jurisdiction where the proceeding occurred.

Conversely, territoriality relies on the idea that the effect of a proceeding should not reach beyond its borders and rather than establishing one insolvency proceeding, a new proceeding should be initiated in every relevant jurisdiction where domestic law will govern the asset or liability contained within that state's borders.

Less strict variations of each concept exist. For example, modified universalism relies on the idea that, rather than a single proceeding, a primary proceeding would be opened with secondary proceedings in foreign jurisdictions supporting the work of the primary proceeding.

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.

3.5

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.

Recently, the Model Law on Cross-Border Insolvency (MBCLI) was adopted in Bahrain and Dubai. Such model law is intended to foster cross-border cooperation in insolvency proceedings. **More detail would be beneficial**

Additional developments have transpired in the UAE, specifically a new insolvency system that applies to individuals, which became effective in late 2019. Baker McKenzie, "The New Insolvency Regime in the UAW" https://www.bakermckenzie.com/en/-/media/images/insight/publications/2020/02/the_new_insolvency_regime_in_the_uae.pdf (Accessed 13 October, 2022).

Additionally, and in response to Covid19, the UAE further amended their insolvency laws to provide for protections in emergency situations to facilitate consensual restructurings. Freshfields Bruckhaus Deringer, "Restructuring in the Middle East: developments in the UAW and KSA" <https://transactions.freshfields.com/post/102h5y2/restructuring-in-the-middle-east-developments-in-the-uae-and-ksa> (Accessed 13, October 2022)

3

Marks awarded 8 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.

Individual insolvency focuses on the protection of the individual debtor and ensuring their fresh start. Conversely, corporate insolvency focuses on rescuing viable portions of the business, but does not necessarily value the continued operation of the business itself. Corporate rescue also does not focus on protection of the officers or directors. While an individual debtor's circumstances, especially circumstances reducing their culpability, may be taken into account in directing the insolvency proceeding, corporate insolvency may have a specific objective of imposing blame on

misbehaving officers or directors, depending on the circumstances. Finally, in support of the objective of protecting an individual debtor and ensuring they receive a fresh start, individual insolvency proceedings will remove or exempt certain needed assets from the insolvency estate, such as a home or retirement savings. In corporate insolvency, there is no notion of exempt assets.

There is some scope to elaborate

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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.

Dealing with insolvency law in a cross-border context may be challenging because each domestic system has its own values, goals, and definitions. At the most basic level, the definition of what it means to be insolvent may differ. For example, balance sheet insolvency may qualify a debtor for relief in one country, while simple cash flow insolvency may be enough in another jurisdiction. This would be particularly difficult where the potential debtor was insolvent under one definition and not the other. Furthermore, different insolvency systems may have different goals and values - for example, some countries have an insolvency system that is very pro-debtor, with a broad and sweeping discharge, while others may be more pro-creditor. Another example may be how different creditor rights are treated, such as the rights of employees or a secured creditor. Furthermore, actions available to the estate, such as the ability to avoid certain transfers, may vary between jurisdictions. Finally, the ability or desire of the domestic courts to collaborate, cooperate, and recognize the validity of each other's judgments may vary, making cross-border insolvency quite unpredictable in some contexts.

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

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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.

In the early 21st century, UNCITRAL's *Legislative Guide on Insolvency Law* was prepared and released in order to guide international legislatures to adopt best practices in their domestic insolvency laws and create more uniformity across varying domestic insolvency laws. The *Legislative Guide* has been a prolific resource for insolvency practitioners and legislatures. The World Bank also promulgated guidelines for insolvency laws, outlining best practices. The European Commission has similarly identified areas for increased harmonisation amongst the countries of the European Union.

In my opinion, I believe that these guides and suggestions for best practices will primarily increase harmonisation across countries that either (a) lack existing insolvency law, or (b) are governed by an overarching supranational body, like the European Union. I think this is the most likely outcome because countries with existing insolvency regimes, which may be based on entirely differing principles and historical roots, will be unmotivated to overhaul their insolvency regimes absent additional motivating circumstances, like the common governance of the EU or the possibility of economic investment from more developed countries. Additionally, because insolvency regimes often reflect national values (for example - France's value for labour rights), I think individual value-shifts are unlikely absent additional motivation.

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

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Marks awarded 12 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.

Because the UNCITRAL Model Law on Cross-Border Insolvency was adopted in Utopia, the Utopian Court will be required to cooperate and communicate with both the foreign

Court in Erewhon and the Erewhon Liquidator, as representative. For this reason, I would recommend to the Erewhon Liquidator that they approach Nadir and negotiate a Protocol for coordinating the insolvency case and collection case or staying the Utopian collection case.

The MLCBI is significant for its provisions on recognition and relief in 4.1. (Its provisions on cooperation and coordination are secondarily important as the liquidator is primarily seeking advice about staying court proceedings in Utopia.) The question requires candidates to apply the relevant MLCBI articles to the facts provided.

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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.

If the wind-up proceedings in Nadir had been filed, but the matter had not yet been heard, this would not affect my answer because no insolvency proceedings have been commenced in Utopia.

Assuming the Erewhon had similar laws requiring the coordination, communication, and cooperation with foreign courts, I would advise the Erewhon liquidator that the Utopian proceeding should be the primary proceeding and the Erewhon Liquidator should approach the Utopian court or liquidator about staying the Erewhon case or putting a Protocol in place. This is because, under the MLCBI approach, the Utopian case would better represent the centre of main interest for Nadir because it is registered in Utopia, has its principal place of business in Utopia, and has at least one creditor in Utopia.

Refer to Article 29 on concurrent insolvency proceedings, under which the local proceedings in Utopia maintain pre-eminence over the foreign proceedings in Erewhon.

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?

For the purposes of my answer, the country of incorporation is France. One key international insolvency issue facing the insolvency representative is the issue of executory contracts for labour/employment. Under French law, these contracts will be highly protected, whereas under laws that apply to other establishments of the debtor may not protect the contracts. Because France is a member of the EU, the European Insolvency Regulation (EIR) will assist the insolvency representative in selecting applicable law.

Additionally, the issue of concurrent proceedings in foreign jurisdictions will face the French insolvency representative. Again, the EIR, which allows for concurrent independent proceedings or secondary proceedings, will assist the French insolvency representative in coordinating the various concurrent proceedings.

Applicable law will be another issue facing the French insolvency representative. The company has multiple types of assets, including real property and intangible assets, and creditors from multiple jurisdictions. The EIR will guide the French insolvency representative in selecting the applicable law with regard to each type of asset or claim.

Finally, the effect of the French insolvency proceeding in other jurisdictions may affect the French insolvency representative's strategy. Amongst European countries, the EIR will guide the insolvency representative. To the extent there are assets or creditors outside of the EU, other model laws, treaties, agreements, and domestic laws will affect the insolvency representative's strategy.

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.

6

Marks awarded 10 out of 15

*** End of Assessment ***

A very good paper that generally addresses the questions asked and substantiates its answers.

TOTAL MARKS AWARDED 40/50