



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 9 out of 10

QUESTION 2 (direct questions) [10 marks]

Question 2.1 [maximum 2 marks]

Explain what the term "international insolvency law" means.

There is no single "international insolvency law", which can be fully enforced in different jurisdictions, so that it is too difficult to define the term. On the other hand, when a cross-border insolvency case happens, such multiple insolvency proceedings must be practically handled with co-ordination and co-operation between different jurisdictions under the appropriate principle to govern the situation, i.e., "international insolvency law". Therefore, the term "international insolvency law", may be deemed as notion or concept to govern cross-border insolvency cases globally.

2

Question 2.2 [maximum 5 marks]

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

The differences between universality and territoriality are how to treat cross-border insolvency cases. Universality is to govern a debtor's insolvency proceeding, including all of its assets and debts, under only one jurisdiction. The advantage of universality that all claims held by creditors can be treated equally may cause the disadvantage that foreign creditors may be unfairly treated in practice. On the other hand, territoriality is to govern such insolvency proceeding under jurisdictions related to debtor's assets. The advantage of territoriality is that creditors can be treated under its home jurisdiction, where there is a low risk that they are unfairly treated as foreign creditors. The disadvantage is, if there are critical differences related to insolvency law between jurisdictions, e.g., set-off and

executory contracts, the stakeholder may face the difficulties that only creditors under specified jurisdiction are treated unfairly.

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.

In Dubai, new Dubai International Financial Centre Insolvency Law has been introduced since 2019. This new regime includes (i) debtor in possession bankruptcy proceedings, (ii) new administration process related to mismanagement and misconduct and (iii) the enhancement of winding up procedure.

Furthermore, a new bankruptcy law has been approved by Saudi Arabia in 2018. This regime has introduced preventive actions, measures for financial restructuring and settlement procedures.

In addition, Bahrain has adopted the new bankruptcy law, which is based on the UNCITRAL Model Law in 2018.

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.

Although one of the major aims of insolvency for individuals is to make fresh start for individuals, there is not such objective for insolvency for corporations. It is considered that insolvency individuals need to live their lives even after the insolvency proceedings. On the other hand, in terms of corporations, although there is a function to keep and/or revive debtor's business in insolvency for corporations, there is no aim to keep its corporation's entity itself because corporations are just means to operate business. These characteristics between individuals and corporations are caused by the difference of the nature of the debtors.

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.

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.

There is no single set of insolvency systems in the world. Therefore, in dealing with cross-border insolvency cases, it is necessary to harmonise differences between each of the insolvency rules, which applies to a debtor. Not only insolvency law but also general law might cause such differences because, as insolvency law cannot cover all legal problems, there are some situations that issues between stakeholders under insolvency proceedings must be treated under general law. Therefore, the difficulties to treat insolvency matters related more than one state happen.

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

3

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 introduction of "soft law" has been taken as multilateral steps in 21st century. A *legislative Guide on Insolvency Law* by UNCITRAL and *Principles for Effective Insolvency and Creditor / Debtor Regimes* by the World Bank exemplify the soft law to harmonise domestic

insolvency laws. In my opinion, the significant impact of this soft law is to give a standard rule and best practice for insolvency cases to practitioners and this will make the harmonisation easier. Regardless of the adoption of the “soft law”, if there is no standard rule nor best practice which a practitioner should know, it must be very difficult to harmonise cross-border insolvency cases because such practitioner, who do not know the differences between standard rules or best practise and its own domestic insolvency rules or practise , does not have any idea about the way to coordinate the differences. On the other hand, practitioners who are familiar with the standard can find issues to be harmonised and/or to be reformed in cross-border insolvency cases. Therefore, the publicity of a *legislative Guide on Insolvency Law and Principles for Effective Insolvency and Creditor / Debtor Regimes* can have the big impact of the acceleration of the promotion of the harmonisation.

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

4

Marks awarded 10.5 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.

To stay the litigation in Utopia, the Erewhon liquidator needs to have the winding-up procedure in Erewhon recognised as the domestic procedure in Utopia. Under the Cross-border Insolvency Act of Utopia, the Erewhon liquidator can apply the relief to stay the execution against the Nadir's assets in Utopia to a court in Utopia. However, if the liquidation procedure in Erewhon is a foreign non-main proceeding because its head office is located in Utopia, whether the effect to stay the execution against Nadir's assets should be administered in the Erewhon's liquidation proceeding shall be reviewed by the court in Utopia.

There is some scope to elaborate

4.5

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.
- (b) Apex had obtained a court order to wind-up Nadir in Utopia prior to the Erewhon winding-up order.

With respect to (b), the proceedings to wind-up Nadir in Utopia is deemed as its commencement under the Cross-border Insolvency Act of Utopia. If so, as the relief to stay the execution against Nadir's debt must be consistent with the proceeding in Utopia under the law, the court might not issue the stay of the litigation in Utopia.

On the other hand, with respect to (a), the proceedings to wind-up Nadir in Utopia had not yet been commenced. Therefore, it does not give impact on the answer in question 4. However, if the proceeding in Utopia is commenced thereafter, the relief to stay the litigation in Utopian shall be reviewed by the court in Utopia and shall be modified or terminated if inconsistent with the proceeding in this 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?

Assuming that the company has been incorporated in Japan, the insolvency representative will face the international insolvency issues: how to deal with (i) automatic stay/moratorium, (ii) administration of assets, (iii) executory contracts and (iv) distribution.

At first, in facing these issues, the insolvency representative should consider whether the insolvency proceeding in Japan has the effect in the foreign countries where the corporate debtor has operated business and held its assets. If such foreign countries have adopted the UNCITRAL Model Law on Cross-border Insolvency (the "Model Law") and the insolvency proceeding in Japan has been regarded as main proceeding under the Model Law, the effect of the insolvency will be introduced in the foreign country by the application to the relevant authority and the cooperation between the insolvency representative in Japan, the Japanese court and the relevant authority will be required.

Once this application is successful, the automatic stay in the foreign country will have the effect, resulting in the suspension to transfer the corporate debtor's assets without any consent from the relevant authority. On the other hand, under the law of Japan, the creditor holding the security interest to the debtor's assets does not have any restriction related to the moratorium. Therefore, if there are different moratorium system in the foreign country, the insolvency representative should harmonise this issue with the relevant authority.

Likewise, although the court in Japan allows the insolvency representative to administrate all assets and the insolvency representative can sell the debtor's real estate to someone with the court's approval under the law of Japan, such power may be different from the law of foreign country. For example, under the law of foreign country, an insolvency representative may have the discretion to sell debtor's real estates. Therefore, if the debtor's real estate in the foreign country needs to be disposed, the harmonisation with the relevant authority should be required.

In addition, if there are an executory contract between the corporate debtor and the counterparty in the foreign countries, the differences between Japan and the foreign country should be considered. In Japan, the cherry-picking related to the executory contracts by the insolvency representative is available. If it is not available in the foreign country, the harmonisation among the relevant countries may be harmed.

Lastly, the timing of the distribution and the priority among the creditors depend on the jurisdiction. However, all creditors focuses on the equality in terms of the distribution amount. Thus, the universal distribution plan should be prepared through the cooperation between the jurisdictions.

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 11.5 of 15

*** End of Assessment ***

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

TOTAL MARKS AWARDED 39.5/50