



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 defined as a circumstance when insolvency occurs in one state; however it transcends the confines of a single legal system, so a single set of domestic insolvency law provisions cannot be immediately and exclusively applied without consideration of foreign aspects of law.

There is scope to elaborate

1.5

Question 2.2 [maximum 5 marks]

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

The concept of universality believes that there should be one insolvency proceeding covering all the debtors assets and debts worldwide. No other insolvency proceedings in other states should be allowed. Ideally there should only be one jurisdiction. All the debtors' assets would be included in the insolvent proceedings and the liquidator should be provided with the tools to control all assets regardless of the locality of assets and debtors. All creditors worldwide would have an opportunity to participate in the insolvency proceedings and be on equal footing with regard to their claims.

Territorialism on the other hand believes in the approach where multiple insolvency proceedings would simultaneously take place in various states wherever assets happen to be located. Those insolvency proceedings would be territorially limited in respect of where creditors can lodge their claims and the liquidator's mandate.

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.

The first regional, comparative survey of insolvency systems in the Middle East and North Africa was launched in 2009 as a joint initiative of the Hawkamah Institute for Corporate Governance, the World Bank, the OECD and INSOL International. It was based on the World Bank's Principals for Effective Insolvency and Creditor Rights Systems as an indication of best practise. **what impact did this have on reforming domestic insolvency laws or addressing international insolvency Issues in the Middle East?**

Many Middle Eastern nations have reformed their domestic insolvency laws such as UAE, Saudi Arabia and Dubai. In 2018 Bahrain adopted the Model Law on Cross-Border Insolvency. **More detail would have improved the mark awarded for this sub-question.**

2

Marks awarded 7 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.

For individuals the objectives would be the protection of the debtor from harassment from creditors and enable the debtor to make a fresh start. Another objective would be the reduction of the debtor's indebtedness to creditors by paying contributions from present and future income.

For corporations the objectives would be to preserve the business or assets of the corporation if possible not necessarily the company and where personal liability has been abused impose liability on the responsible persons.

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.

The problems that are encountered generally sovereign states govern their own insolvency laws and procedures. The standards of these insolvency laws in many countries are very low and these insolvency laws generally lack the structure to deal with cross-border insolvency cases. Generally there are insolvency proceedings running concurrently in multiple states and an unwillingness to recognise foreign judgements with the aim of protecting their local interests.

Further detail would be beneficial. For example, consideration of Westbrook's 9 key issues.
2.5

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 United Nations Commission on International Trade Law (UNCITRAL) has completed several insolvency texts in recent years including the UNCITRAL Model Law on Cross-Border Insolvency Guide to Enactment and interpretation in 2013

UNCITRAL Model Law on Recognition and Enforcement of Insolvency-Related Judgements with Guide to Enactment (2018).

The UNCITRAL Model Law on Enterprise Group Insolvency with Guide to Enactment (2019)

The UNCITRAL Legislative Guide on Insolvency Law, Parts One to Four

UNCITRAL Model Law on Cross-Border Insolvency: The Judicial Perspective

UNCITRAL Practise Guide on Cross-Border Insolvency Corporation

I believe that their impact would be minimal because they are only models that can be adopted or incorporated into the states domestic legal code. Their implementation is entirely optional by states.

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

2.5

Marks awarded 8.5 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.

If (**The use of the word 'if' here is confusing. The facts state to assume the MLCBI was adopted in Utopia**) Utopia adopted a cross border insolvency act based on the UNCITRAL Model Law, the liquidator appointed in Erewhon would be entitled to approach the court in Utopia in terms of Article 9 : Right of Access. The liquidator would be able to bring an application in terms of Article 11 and 15 to commence a proceeding. Thereafter in terms of Article 12 the liquidator would be able to participate in a proceeding regarding the Apex court action. In terms of Article 19 the Utopia court could grant interim relief to the liquidator by staying execution against Nadir assets. Or in terms of Article 20 recognise the liquidation of Nadir in Erewhon as the foreign main proceeding which one of the results would be the stay of execution of Nadirs assets in Utopia.

There is some scope for clearer phrasing and elaboration

4

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) In terms of Article 29 there could be domestic insolvency proceedings running against Nadir in Utopia filed by Apex and at the same time application for foreign recognition of the Erewhon liquidator. The commencement of local proceedings doesn't prevent the recognition of foreign proceedings.

(b) Article 25 & 26 would promote cooperation. **Article 29 is relevant here.**

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 this question I'm going to choose South Africa as the company's state of incorporation.

The four key international insolvency issues facing an insolvency representative would be access, recognition, relief and cooperation and coordination.

ACCESS:

Access is required to give the insolvency representative and creditors a right to access the court in a foreign state to seek assistance and authorise recognition of the foreign insolvency proceedings. There are currently no treaties or law which would automatically grant the insolvency representative, who was appointed in South Africa the right to exercise his powers in another state. According to Section 361(1) of the Companies Act 61 of 1973 after the granting of a winding up order by a South African Court, the property of the company will vest in the Master and the provisional liquidator, once appointed. There is no limitation on the definition of property, so all property of whatever kind falls under the custody and control of the liquidator. The South African liquidator would have to approach the various foreign courts, wherever the various assets are situated and apply for recognition of his appointment and the South African winding order.

RECOGNITION:

Recognition of a foreign proceeding is required in order to simplify the process. Provisions should provide for recognition of foreign orders from foreign courts. This recognition should satisfy specific requirements which would enable the recognition of foreign proceedings by a local court. As mentioned previously, the South African liquidator would have to approach the various foreign courts, wherever the various assets are situated and apply for recognition of his appointment and the South African winding order as there are no bilateral treaties which would automatically grant him the authority to act in a foreign state. Recognition of foreign insolvency proceedings would thus be regulated by principals of common law and private international law as developed by case law.

RELIEF:

Relief is required for the orderly and fair conduct to be available to the foreign insolvency representative to be granted by the foreign court where the application is made. Elements of the relief that should be granted is the recognition of the foreign insolvency proceedings, automatic stay of other proceedings. Foreign courts have ordered the recognition of South African insolvency orders and the powers of a foreign insolvency representatives in recent years. In this case the insolvency representative appointed in South Africa would have to apply for relief in the foreign courts where the assets are located.

COOPERATION & COORDINATION:

This issue promotes cooperation between courts of different states where the debtor's assets are located with the aim of coordinating concurrent proceedings. There should be communication between the courts and the foreign insolvency representatives. If there are concurrent winding up proceedings in court, the various courts should be made aware of them and provided with contact details of the various officials dealing with those matters in order for them to act collectively.

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.

4.5

Marks awarded 9.5 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 33/50