



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 are various definitions but to summarise the definition provided by Fletcher (and referred to by Wessels), it is a situation which goes beyond the remit of a single legal system so that the single set of domestic insolvency law principles cannot be applied immediately and exclusively without consideration of the issues raised by the foreign aspects of the particular case.

There is further scope to elaborate in your own words.

2

Question 2.2 [maximum 5 marks]

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

Universality is the principle of only one insolvency proceedings which covers all of the Debtor's assets and debts worldwide. This means that, once proceedings are commenced in one forum, no other insolvency proceedings should be commenced elsewhere, nor should any other form of execution against the Debtor's assets occur. The premise of universality is that all the debtor's assets should be included in the proceedings based in that one forum and the officeholder should have the tools to control, obtain and distribute those assets. All creditors worldwide should be able to participate in the proceedings on an equal basis.

There are difference approaches to the way in which this could take effect. For example, the State with jurisdiction could be that in which the Debtor's Centre of

Main Interests is located. Alternatively, there could be an insolvency law which applies worldwide.

Territoriality is based on the opposite principle, namely that proceedings may be commenced in any jurisdiction or State in which the Debtor has assets but that the proceedings must (i) be limited to property in that State in which the proceedings are commenced and (ii) those proceedings should be territorially limited. As such, there may be multiple insolvency proceedings worldwide against the same Debtor.

There is scope to elaborate with respect to recognition and effect in that for example, with universalism, recognition and effect requires that other States recognise that one set insolvency proceedings (that all agreed is the appropriate jurisdiction) and recognise it as having extraterritorial effect in their States.

4

Question 2.3 [maximum 3 marks]

Describe **three** recent examples of developments in the Middle East region to reform domestic insolvency laws or to address international insolvency Issues.

- (1) The Model Law on Cross-Border Insolvency was adopted by Bahrain in 2018 and by the Dubai International Financial Centre in 2019 to address international insolvency issues
- (2) The UAE enacted the domestic Federal Law by Decree (no.9) of 2016 on Bankruptcy and Federal Decree Law No.(19) of 2019 on Insolvency in 2016 and 2019 respectively
- (3) Saudi Arabia enacted a new domestic Bankruptcy Law in 2018

There is scope to elaborate.

2.5

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.

Sealy and Hooley describe the difference, which can be summarised as follows:

- (1) In individual bankruptcies; on the one hand, to protect the bankrupt from individual creditors harassing him or her for payment and to enable the bankrupt to make a fresh start (unless there is some reason for preventing or postponing the same in cases of blameworthy conduct). On the other hand, to reduce his or her indebtedness to creditors from assets and present and future income, whilst taking into account his or her personal circumstances.
- (2) In corporate insolvencies; on the one hand to preserve the business, whether entirely or in part (which will not necessarily include preserving the company itself) and on the other hand to reduce its indebtedness to its creditors, which may include imposing personal liability on responsible people.

There is some scope to elaborate

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.

It may be difficult to define a common insolvency language. For example, the definition of "insolvency" in one jurisdiction may differ from another, particularly where the definition is dependent on, for example, the degree of a state of illiquidity.

There is also a clear dividing line between 'pro-creditor' and 'pro-debtor' systems, which is difficult to reconcile across jurisdictions because of the inevitable impact this has on the importance placed on the interests of creditors and debtors, for example the balance of the interest of recovering the debt owed to creditors as against the interest in encouraging and enabling the debtor to continue to do business.

Some jurisdictions may have a particular emphasis in their insolvency laws on areas of political and social importance, such as the emphasis on labour laws in France.

Some jurisdictions may be more willing to protect the interests of local creditors as opposed to those based in foreign States.

There may also be a reluctance to promote the collection of foreign public claims, including taxes of a foreign State, especially if such claims might be deemed to take priority over the claims of, for example, a local creditor.

There is an additional complicating factor in that insolvency proceedings relate not only to aspects of procedural law but also areas of both private and public substantive law which will inevitably differ widely across States.

Further detail would be beneficial. For example, consideration of Westbrook's 9 key issues.
3.5

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.

In 2004, the UNCITRAL adopted Parts one and two of the Legislative Guide on Insolvency Law, which was designed to be used as a reference point for national authorities and legislative bodies when revising and creating new insolvency laws and regulations. Part one of the Guide emphasised the need for a harmonised framework to address instances of cross-border insolvency.

From 2000, the World Bank published guidance (which was subsequently revised) in the Principles for Effective Insolvency and Creditor/Debtor Regimes which referred to its own principles as well as the Legislative Guide to promote a convergence of insolvency laws.

In 2010, the European Parliament published a report on the Harmonisation of Insolvency Law at EU level. This identified areas in which domestic insolvency laws of member states differ and identified a number of areas in which harmonisation of those laws was deemed worthwhile and achievable. The report led to an action plan, which takes a further step towards harmonising domestic laws and lessening the impact of insolvencies crossing State borders.

The guidance necessarily affects different States as there is no one organisation or Treaty which can provide guidance (or indeed policy) which applies to all States worldwide. Where these steps only identify areas of potential harmonisation, or provide guidance only, it might be said that they lack force in achieving real change. However, the fact that these steps were taken across a number of different organisations worldwide at a similar time demonstrates a concerted worldwide effort to harmonise international insolvency law. The impact that the guidance has had, in particular the Legislative Guide, can also be seen as reflected in the increased number of States adopting the UNICTRAL Model Law on Cross-Border Insolvency. These steps alone will obviously not result in harmonisation of domestic laws worldwide, however, they are resulting in approval of principles of co-operation and communication across States, even across those with diverse domestic insolvency laws.

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

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 question does not state whether Erewhon has also adopted the UNICTRAL Model Law on Cross-border Insolvency or whether the cross-border element is outside the ambit of the MCBI

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

The effect of the Cross-border Insolvency Act of Utopia is as follows:

- (1) The Court of Utopia will recognise winding up proceedings of a foreign Court and will refuse, if requested, to grant a local winding up order
- (2) The Court of Utopia will co-operate with the Court and liquidator of Erewhon in external administration matters and will recognise the power of the liquidator in Erewhon to gain control over local assets

3.5

Question 4.2 [maximum 2 marks]

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

- (a) Apex had filed proceedings to wind-up Nadir, but the matter had not yet been heard. In this case the Court of Utopia would recognise the winding up proceedings of the Erewhon Court and would refuse to grant a local winding up order.
- (b) Apex had obtained a court order to wind-up Nadir in Utopia prior to the Erewhon winding-up order.

Yes, the Court of Utopia would have jurisdiction to wind up Nadir in Utopia even though it was incorporated in a foreign state.

Apply the MLCBI provisions on concurrent insolvency proceedings (see Article 29)

0.5

Question 4.3 [maximum 8 marks]

NB: This question is not related to Questions 4.1 and 4.2

A court has ordered the commencement of an insolvency proceeding against a corporate debtor in the State of its incorporation and head office. The company has operated business in a number of States and has assets (real property or interest in land, other tangible assets and intangible assets); creditors (including taxation / revenue authorities) and directors in several States.

Select a country for the company's incorporation and, based on the insolvency laws of the country you select and the brief facts provided, describe four key international insolvency issues facing the insolvency representative in this scenario. For each issue, what domestic laws or international instruments apply to assist the insolvency representative address these four issues?

[INCOMPLETE]

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 32.5/50