



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.

[International insolvency law refers to the body of rules around certain insolvency proceedings or measures, which can't be fully enforced as the law that applies cannot be executed immediately and exclusively without first taking into account the international aspect of a given case/scenario. It is essentially the regulation of debtors with assets or creditors in more than one country who are experiencing financial distress. Law is more final as it can be immediately enforced and acts as a rulebook of measures to consider.]

2

Question 2.2 [maximum 5 marks]

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

[In cross-border insolvency there are two main approaches or theories, being universalism and territorialism. The theories are diametrically opposed to each other. Generally, the principle of universality is preferred. The universality concept relates to when there is only one insolvency proceeding which covers all the assets and debts of the debtor worldwide. Therefore, there should only be one forum and no other insolvency proceedings or execution of debtor's assets possible. The concept of territoriality applies when insolvency proceedings that commence in every State or jurisdiction where assets of the debtor are held, however territoriality is limited to property within the State's jurisdiction.]

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

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.

[Bahrain have adopted the UNCITRAL Model Law on Cross-Border Insolvency in 2018 as did the Dubai International Financial Centre in 2019. Domestic insolvency laws have been reformed in Saudi Arabia and Dubai in 2018/2019.]

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

2

Marks awarded 7.5 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.

[For individuals the objective is to protect the debtor from pressure by his creditors; to enable the debtor to start clean, particularly in cases where the debtor was not fully at fault or only partially to blame. Also to reduce indebtedness by making contributions from present and future income to the estate while at the same time taking their personal circumstances into consideration. For corporations, where it is possible to preserve the business or its assets, not necessarily the company; where personal liability has been abused, to impose personal liability on the responsible persons. Individuals and corporations however have the shared objective of ensuring pari passu distribution as far as possible, except in so far as creditors have priority; ensure that secured creditors deal fairly towards the debtor and the other creditors; to investigate reasons for fairly; to reclaim voidable dispositions where the insolvent debtor dealt improperly with assets. Only for individual insolvency does the concept of exempt or excluded assets applies, meaning some systems allow the insolvent individual to hold on to some of the assets to maintain themselves.]

There is some scope to elaborate

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 language concerning insolvency tends to differ between systems, eg. Some use 'insolvency' while others use 'bankruptcy'. The security also changes between systems - there is a floating charge concept in UK Law that is not in other States. Other systems have a single piece of legislation for bankruptcy whilst others use a municipality of legislation. The distribution rules for payment of creditors also differ, for example employees can be ahead of other creditors and even secured creditors in order of prioritisation. Another key difference could be whether the system allows for discharge provisions for the debtor or not at the end of the administration. The general applicable law of the jurisdiction differs which often has an effect on insolvency. Lastly, it is important to be mindful of Westbrook's 9 key issues in cross border cases which are: 1. Standing for the foreign representative 2. Moratorium on creditor actions 3. Creditor participation 4. Executory contracts 5. Co-ordinated claims procedures 6. Priorities and preferences 7. Avoidance provision powers 8. Discharges 9. Conflict-of-law issues.]

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 Legislative Guide on Insolvency Law (2004) for national authorities and legislative bodies to reference when preparing new laws and regulations or reviewing existing ones with the aim to create insolvency laws which had a harmonised and fair framework was implanted by UNCITRAL in 2004. Principles for Effective Insolvency and Creditor/Debtor Regimes was produced by the World Bank approx. 20 years ago and was revised a number of times, most recently in April 2021 (also in 2005, 2011 and 2015). The Harmonisation of Insolvency Law at EU level was published by the European Parliament in 2010 which details the differences between domestic insolvency laws within the EU and also notes areas of insolvency law where harmonisation may be achievable and important within the EU. The Action Plan on Building a Capital Markets Union released a final report in June 2020 which reiterated the fact that cross-border insolvency and restructuring proceedings need to come together for greater legal certainty and timely restructuring. The impact these are likely to have in addressing international insolvency issues is quite extensive in my opinion as they are being updated regularly to reflect the current insolvency space which increases both the speed and efficiency at which matters are brought to a close.]

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

4.5

Marks awarded 14.5 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.

[My advice to the Erewhon liquidator on the Utopia case would be that the Model Law on Cross-Border Insolvency (MLCBI) is quite relevant as the winding up order itself has been obtained in a different jurisdiction to the one that Nadir (the debtor) currently has its registered office with and its headquarters. A prominent example of this can be seen in the Maxwell Communications Corporation pls cross border insol case in 1991, in which concurrent principal insolvency proceedings in the US and England were coordinated through an Order and Protocol approved by the courts in the respective States. For the US they were Ch 11 proceedings and England were administration proceedings. In this case there was a single debtor but 2 primary insolvency proceedings initiated by that debtor. The US and English judges independently raised with their respective counsel the idea that an insolvency agreement between the two could resolve conflicts and facilitate the exchange of information.]

The MLCBI is said on the facts to be adopted by Utopia without modification, except as required to domesticate it. It would be beneficial to discuss that reciprocity is not needed and to discuss the relevant provisions regarding recognition and relief.

1.5

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.

[If Apex had filed proceedings to wind-up Nadir but the matter had not yet been heard then there would be no difference and nothing would change, as the same facts to the case still apply. However if Apex had done so prior to Erewhon's winding up order then circumstances would change, namely the concurrent insolvency proceedings could mean there would be a joint trial.]

It would be beneficial to discuss article 29 MLCBI in detail

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?

[CompanyABC Limited is assumed to be incorporated in the Cayman Islands for the purpose of this answer. The four key international insolvency issues facing CompanyABC Limited are detailed below:

1. The law applicable in the Cayman Islands will be different to other States and this which is important to note as the assets and creditors in each jurisdiction as well as any taxes will need to be accounted for; particularly if those assets are to be liquidated in an asset sale.
2. The ability/appropriateness for the liquidator to take the ownership/control of the assets, i.e. the assets are in multiple states/jurisdictions
3. The Directors being in different jurisdictions we would need to follow the UNCITRAL Legislative Guide for Director's Obligations.
4. The priority for revenue authorities and whether that will come into effect and the order of priority for distribution if it does.

The cross-border insolvency law in Cayman is very relevant as many businesses exclusively have their operations outside of Cayman. The Grand Court's powers to make orders in support of foreign insol proceedings are provided for in part XVII of the Companies Act. It is worth noting that Cayman is creditor-friendly. It takes universalist rather than a territorial approach to cross-border issues. Finally, the law does make a provision for Cayman official liquidators to enter into international protocols with foreign officeholders to promote the orderly administration of an estate of a company in official liquidation.]

For an approach more 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.

5

Marks awarded 7.5 out of 15

*** End of Assessment ***

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

MARKS AWARDED 38.5/50