



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 Course Administration page of the course web pages after the submission date on 15 October 2021.

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: 202122-514.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 2021**. The assessment submission portal will close at **23:00 (11 pm) BST (GMT +1) on 15 October 2021**. 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 **9 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.

Mark 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.

The term "*international insolvency law*" arises in an insolvency process involving parties or assets in two or more jurisdictions, such that the insolvency process crosses more than one legal system, requiring the consideration of multiple domestic legal systems and international or bilateral treaties for cooperation.

2

Question 2.2 [maximum 5 marks]

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

The concept of universality refers to insolvency processes with extra-territorial effect, meaning that there could be only one insolvency process initiated in the centre of the debtor's main interests recognised in further jurisdictions. The officeholder should then be empowered to control the process and realise all relevant assets. Although the concept relates well to larger multinational corporations, in lowering costs and satisfying multiple cross-border interests, difficulties arise in the priority of distributions and questions over the choice of governing law. Additionally, the concept may be vulnerable to strategic manipulation, which might otherwise increase costs where disputes arise.

Conversely, the concept of territoriality limits the consequences of the insolvency process, and the legal provisions applied to that process, to the originating jurisdiction. Accordingly, you could end up with one entity subject to multiple processes in multiple jurisdictions, subject to

the local law in each jurisdiction, without reference to further processes. Territoriality therefore protects national interests before officeholders may transfer assets abroad.

Note however, a debtor may be declared insolvent in one jurisdiction but not another, causing problems in the most effective recovery and realisation of assets for creditors. An increase in the number of insolvency processes and officeholder appointments across each jurisdiction will normally lead to increase costs for the debtor's estate (and accordingly a reduction in the distribution available to creditors).

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.

- Saudi Arabia adopted a new debtor-friendly bankruptcy law and bankruptcy implementing regulations in August and September 2018 respectively (together, "**Bankruptcy Law**"). The effect of the Bankruptcy Law, mirroring Chapter 11 of the United States Bankruptcy Code, was to move away from the jurisdiction's focus on pure liquidation processes to a more rescue-focused approach, allowing debtors to reorganise and rescue their businesses as a going concern.
- The United Arab Emirates adopted the Federal Decree Law No. 21 of 2020, amending the UAE Federal Bankruptcy Law No. 9 of 2016 ("**2016 Law**") to:
 - extend the moratorium on judicial proceedings where a commencement order is made against the debtor in either: (i) protective composition proceedings; or (ii) restructuring-in-bankruptcy proceedings, taking into account creditors' overriding right to apply to the Court to lift the stay;
 - clarify the position of preferential creditors where distributions are made under formal bankruptcy procedures; and
 - introduce a new procedure in circumstances where the debtor's obligation to file for bankruptcy under Part 4 of the 2016 Law (restructuring in bankruptcy or formal bankruptcy) is deferred by reason of an 'Emergency Financial Crisis', defined as "*A public situation that affects trade or investment in the state, such as the outbreak of epidemic, natural or environmental disaster, war, or other which case and duration shall be determined by a cabinet resolution, based on the Minister's proposal*".
- Bahrain adopted its new Reorganisation and Bankruptcy Law (Bahrain Law No. 22/2018) which includes:
 - provisions for cross class cram down;
 - the ability for insolvency practitioners to sell assets out of the bankrupt estate free of liens;
 - a moratorium/stay on enforcement proceedings;
 - the ability to obtain debtor in possession financing; and
 - the right of the debtor to continue to manage its business.

3

Marks awarded 10 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.

The differences between the objectives for insolvency processes for individuals or corporations relate largely to the treatment of the debtor.

There is a greater focus on the protection of debtors from creditors as at the commencement of individual insolvency processes, whether in bankruptcies or individual voluntary arrangements. The Court may take into account the degree of blameworthiness and personal circumstances of the debtor, enabling that individual to make a fresh start while still reducing overall indebtedness to creditors by contributing to the debtor's estate from present and future income.

Although the 2008 financial crisis introduced a similar focus on the preservation of corporations on the grounds of economic recovery and safeguarding employment, the focus remains the preservation of viable businesses or the most effective recovery and realisation of assets for creditors.

Where directors have acted in breach of their duties under the Companies Act 2006, corporate insolvency processes seek to impose personal liability on those responsible directors whether by operation of sections 212 or 214 of the Insolvency Act 1986 or otherwise. Such claims may assist in recovering assets for the benefit of the entities creditors.

In both corporate and personal insolvencies, the *pari passu* distribution principle applies (subject to the insolvency waterfall of prioritising categories of creditors).

This was well answered and almost addressed all of the issues.

4

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 difficulties that arise from dealing with insolvency law in a cross-border context relate to the treatment of insolvency process by each jurisdiction and the differing interests that such processes protect.

In analysing a common cross-border insolvency language, international instruments have yet to define the term "*insolvency*" and instead focus on insolvency proceedings despite a significant variety of procedures applied at national-level to deal with the non-payment of debts. A notable example concerns schemes of arrangement. Entering into such schemes is not conditional on the debtor's insolvency, meaning difficulties may arise in seeking recognition of the proceeding in jurisdictions where the debtor's insolvency is a conditional for all insolvency processes (until such time as a Court order is made).

As Omar states¹, conflicts of laws may arise where creditors assert their priorities in multiple jurisdictions. Any "*differences in domestic norms*" are felt more acutely in the varying treatment of "*security, set-off and netting arrangement, retention of title clauses and other means of protecting title available to creditors.*"

¹ The Landscape of International Insolvency (2002) 11 IIR 173

Further examples, as noted by Westbrook², include standing and recognition of a foreign representative, the application of moratoriums, creditor participation (noting also the dissemination of information to creditors), executory contracts, co-ordinated claims procedures, priorities and preferences, avoidance and discharge.

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.

Coordination agreements under the UNCITRAL Model Law on Cross-Border Insolvency (MLCBI) and further initiatives undertaken by multilateral organisations, including completed UNCITRAL texts, have each sought to facilitate insolvency proceedings in recent years.

While adoption of the MLCBI may harmonise various domestic insolvency laws in so far as they address international insolvency issues, the question addresses more broadly the harmonisation of domestic insolvency laws in general. See the 'model' answer on this sub-question.

On 1 July 2009, the Commission adopted the Practice Guide on Cross-Border Insolvency Cooperation, seeking to inform officeholders and legal practitioners on practical aspects of cooperation and communication and the use (and negotiation) of such coordination agreements to resolve conflicts. Further guidelines have also sought to facilitate the use of coordination agreements, including those published by the American Law Institute and the International Insolvency Institute in 2000, the American Law Institute again in 2012 and the Judicial Insolvency Network in 2016.

Although such agreements have had significant success in managing and coordinating insolvency proceedings, noting for example the Nortel Networks³ matter, one must nevertheless confine them to their context. The benefit of coordination agreements lies in the flexibility of their application, tackling a wide range of unique problems in proceedings between different jurisdictions but otherwise unhelpful beyond that context. The countries involved will often benefit from similar insolvency laws.

However, global harmonisation of insolvency laws continues to stall in favour of these practical and pragmatic approaches to specific issues at regional levels. Whilst the extent of differences between legal systems makes harmonisation an attractive concept, it is for this same reason that complete harmonisation remains unattainable beyond the examples cited.

3.5

Marks awarded 12.5 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

² Developments in Transnational Bankruptcy (1995), 39 St Louis University Law Journal 753

³ Ontario Superior Court of Justice, Toronto, Case No. 09-CL-7950 (14 January 2009) and the United States Bankruptcy Court for the District of Delaware, Case No. 09-10138 (15 January 2009)

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 relevance is that UNCITRAL Model Law discourages individual creditors from continuing with individual debt enforcement measures as from the commencement of an insolvency proceeding⁴ and gives representatives of foreign insolvency proceedings and creditors a right of access to the courts of an enacting State to seek assistance and authorize representatives of local proceedings being conducted in the enacting State to seek assistance elsewhere.

The Model Law provides a simplified procedure for recognition of qualifying foreign proceedings, i.e. provided the Erewhon liquidator could satisfy the Utopia Court of certain requirements, it could apply for recognition of the liquidation and to recognise it as the main proceedings. Albeit, given the recent relocation of Nadir, the liquidator needs to consider if Nadir's COMI has shifted (by considering where most of its trade takes place and where its bank accounts etc), accordingly whether the Erewhon liquidation ought to be main proceedings or non-main proceedings. The benefit of obtaining a recognition order under the Model Law would provide for Utopia to assist the foreign proceeding, in this instance the interim relief may include staying Apex's claim. The provisions focus on what would best achieve the objectives of both proceedings, whether local and foreign proceedings or multiple foreign proceedings.

It is not clear if Erewhon has also adopted the UNCITRAL Model Law, but given the local court in Erewhon determined that it would hear the matter and satisfied itself of its jurisdiction and ability to wind-up Nadir, the Erewhon local laws would remain important as the Model Laws do not seek to import the consequences of foreign law into the insolvency system of the enacting State nor applies to the foreign proceedings the relief that would be available under the law of the enacting State.

The Erewhon liquidator could allow Apex to submit a proof of debt in the Erewhon liquidation. **The MLCBI is significant for its provisions on recognition and relief in 4.1. The liquidator is primarily seeking advice about staying court proceedings in Utopia and that should be considered.**

3.5

Question 4.2 [maximum 2 marks]

⁴ UNCITRAL Legislative Guide on Insolvency Law, Part 1, cl 1.

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) There would be little point in there being two liquidations, the recognition of the Erewhon liquidation would only become more important in order that there would not be competing interests and potentially different laws in action as to the treatment of claims.

(b) If the Utopia liquidation order had already been granted, given the shifted head office and location of stock, the Utopia liquidation may be main proceedings and Erewhon creditors could instead submit proofs in that estate.

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

Using the laws of England and Wales, the main legislative instruments are the Insolvency Act 1986, the Insolvency Rules 2016 and the Corporate Insolvency and Governance Act 2020. England and Wales also adopted the UNCITRAL Model Law on Cross-Border Insolvency in 2006.

One of the issues would be to consider what the domestic laws are in each of the other States in which the Company operated were and whether the Model Laws or any other treaties had been incorporated/adopted. Private international law (and conflicts of law) would come into play. As Fletcher sets out⁵ the pertinent questions will be:

- the choice of forum to exercise jurisdiction in the matter;
- the recognition and effect accorded foreign proceedings in the same matter; and
- the choice of law to apply to the matter.

It is assumed that if the incorporation and head office are said to be in England (or Wales) that the insolvency proceedings in that jurisdiction would be the main proceedings, with the

⁵ F Fletcher, *Insolvency in Private International Law – National and International Approaches* (Oxford: Oxford University Press, 2nd edition, 2005)

anticipation of being able to have the proceedings recognised in other States, however, whichever foreign estate has the most recognisable Court/system, should be considered as a candidate for main proceedings for ease.

The English Court also has jurisdiction to wind up a foreign company⁶, to the extent that the corporate debtor had locally registered companies or subsidiaries in the other States in which it operated. Further, the English Court recognises winding-up proceedings for foreign companies and will give effect to foreign proceedings.⁷

- Conflicts of law could be a considerable issue, as the law of the State in which the assets are located will usually govern real assets⁸ and it is stated the debtor has assets in multiple States. Local policies towards insolvencies also differs considerably.
- Cooperation between Courts can be an issue, however, English judgments are generally well respected. However, if the State does not follow the approach of universality, you may end up with secondary procedures in those States.
- Priority issues and the treatment of creditors in each of the States. Many national laws exist to give or refuse priority to certain categories of creditors and/or have enhanced protections. It can be a difficult task to class creditors in order that they are treated fairly across the multiple States.
- The practicality of taking possession and realising assets in multiple jurisdictions is often complex, along with currency fluctuations effecting the achievable realisations, particularly in developing countries. Having assets in multiple States often makes the process slower and more costly too.

7
Marks awarded 11 out of 15
MARKS AWARDED 41.5/50

*** End of Assessment ***

⁶ section 220-221 of the Insolvency Act 1986

⁷ Section 426 of the Insolvency Act 1986

⁸ PJ Omar, "The Landscape of International Insolvency", (2002) 11, IIR 173