



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: 7 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 a body of rules that addresses insolvency matters which have cross-border or transnational elements. These rules include domestic law (which includes a state's own private international law) which may have limited to no extraterritorial effect. It also includes treaties and convention which states have ratified and acceded to, thereby importing into and giving binding effect to certain international insolvency principles into domestic law; and soft laws with aims to influence regulation of international insolvency.

2

Question 2.2 [maximum 5 marks]

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

Universality and territoriality are two of the approaches to administering cross-border insolvency.

Universality is cross-border insolvency administration either under one proceeding or under a single global insolvency system whereby all the debtor's assets are under the control of a single insolvency officeholder. An advantage of this approach is that the debtor's creditors would have an opportunity to participate in the proceedings with all claim being treated equally. However, this approach has been criticized as being politically and practically difficult to achieve.

A modified approach to universality is where a main proceeding is opened in the state of the debtor's "centre of main interests". Such proceeding is then supported by ancillary or secondary proceedings in another state with the courts of each proceeding co-operating with each other.

Territoriality is the approach to cross-border insolvency administration whereby insolvency proceedings would be opened and run concurrently in each state where the debtor has assets. The insolvency officeholder's control of assets would be limited to the national borders of the state where proceedings are taking place. An advantage of this approach is that it addresses local creditors and local interests who may otherwise be prejudiced or disadvantaged in foreign insolvency proceedings. This approach however, has been criticized for being too costly and not recognizing extraterritorial elements of insolvency law.

A modified approach to territoriality is co-operative territorialism wherein each state has jurisdiction over assets in that jurisdiction; however courts under multi-lateral conventions courts would collaborate and communicate with each other.

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. Comparative survey of insolvency system of Middle East and North Africa was launched in 2009. The survey was based on the World Bank's principles for Effective Insolvency and Creditor Rights Systems (2005). It was a Joint initiative by World Bank, OECD, Hawkamah Institute for Corporate Governance, and Insol International of the launch of a comparative survey of insolvency systems of Middle East and North Africa. **what impact did this have on reforming domestic insolvency laws or addressing international insolvency Issues in the Middle East?**
2. Middle East state such as UAE, Saudi Arabia and Dubai have reformed their domestic insolvency laws. **More detail would have improved the mark awarded for this sub-question.**
3. Bahrain and the Dubai International financial Centre adopted the Model Law on Cross-Border Insolvency.

2

Marks awarded: 8 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.

Individuals engaged in economic activities do not enjoy limits on business liability, which consequently makes them personally liable for business debts. Corporations on the other hand, provide limited liability for the responsible individuals of the corporation and therefore widens the scope for abuse by those individuals. Although not mutually exclusive, insolvency objectives differ for either type of debtor; some topics do overlap.

Sealy and Hooley¹ point out the following differences in the objectives of insolvency proceedings against an individual debtor and a corporation debtor:

Individual

- Protection from creditor harassment
- Enable individual to make a fresh start, particularly in less blameworthy cases, where individual's actions or conduct did not cause the insolvency.
- Reduce indebtedness by making contributions from present and future income to the estate while considering the personal circumstance of the individual

Corporations

- Preserve business or viable parts, if possible
- Impose liability and discipline on responsible persons of the corporation where applicable

This answer displays a good understanding of the issues. There is some scope to elaborate at times.

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 lack of a unified insolvency system that applies transnationally together with each state applying their own insolvency rules (including its own choice of law rules), make it difficult to deal with insolvency in a cross-border context. These difficulties are alleviated for states which have acceded to or ratified treaties or conventions which determine cross-border insolvency issues.

¹ In M A Clarke *et al*, Commercial Law (Oxford University Press, 2017), chap 28

However, for states not governed by such treaties or conventions, those states own international private law will determine the following:

- The court's jurisdiction over a particular matter;
- What law should be applied; either special provisions of the law of the form or by operation of choice of law; and
- Whether foreign judgements are recognised and enforceable.

Still difficulties which may be encountered when dealing with insolvency law in a cross-border context include:

- Dealing with the differences of each states' other commercial laws and policy considerations:- for example the differences in property rights, labour rights, security rights, priority rules and other socioeconomic issues; these differences will results in conflicting claims between states especially with regards to the debtor's assets.
- Whether a state's insolvency system is pro-debtor;- which seeks to rehabilitate the debtor or whether it's a pro-creator system i.e. a wind-up regime which seeks to liquidate debtor's assets and distribute proceeds to creditors.
- Whether insolvency language is sufficiently aligned. Some insolvency language mean different things in different states, therefore from an international perspective this may present difficulties.
- Additional difficulties manifest in the manner and form in which insolvency proceedings take place within each state, i.e. differences in procedural law.

Further detail would be beneficial. For example, consideration of Westbrook's 9 key issues.
4

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 following are 21st century multilateral steps to promote harmonisation of domestic insolvency laws:

- UNCITRAL's Legislative Guide on Insolvency Law (2004) which is a reference for national authorities when preparing new insolvency rules or reviewing existing ones;

- The World Bank's Principles for Effective Insolvency and Creditor/Debtor Regimes (latest revision being 2021);

Both initiatives have gained significance in influencing domestic insolvency laws, and thereby promoting harmonisation of domestic insolvency laws.

According to Mevorach, together these guidelines form the international insolvency best practice standards for insolvency regimes.

- The Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on Insolvency Proceedings (Recast) (the "**EIR Recast**") is the current multilateral instrument on international insolvency within the European Union. The EIR Recast was influenced by the European Insolvency Regulation (EIR)(2000) and has direct applicability within the EU. It has been a good response to deal with issues of international insolvency among member states.

Additionally, the following are also 21st century multilateral steps aimed at encouraging parties in cross-border insolvency to put in place workable structures when co-ordinating complex international insolvency:

- UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation (2009);
- ALI-III Guidelines Applicable to Court-to-Court Communication in Cross-Border Cases (2000) which are guidelines for court-to-court communication in insolvency involving USA, Canada and Mexico;
- Ali-III Global Principles for Cooperation in International Insolvency Cases and Global Guidelines Applicable to Court-to-Court Communication in Cross-Border Cases (2012), which are guidelines for court-to-court communication applicable worldwide;
- European Guidelines on Communication and Cooperation (2007) which contain non-binding rules and a draft protocol;
- EU Cross-Border Insolvency Court-to-Court Cooperation Principles (2015); and
- Judicial Insolvency Network Guidelines for Communication and Cooperation between Courts in Cross-Border Insolvency Matters (2016)

In my opinion these will continue to grow in popularity because they are non-prescriptive means that has proven to foster fair and efficient resolutions in cross-border insolvency, where domestic systems differ, without interfering with the notion of a state's sovereignty. They are attractive because they allow flexibility in creating avenues for cooperation and coordination as they allow parties to tailor provisions to meet the specific needs of a given case and/or particular requirement of applicable laws.

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

4

Marks awarded 13 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.

The Erewhon liquidator would be seeking a stay on Apex's Utopian claim against Nadir. The wind-up order is in accordance with Erewhon's own domestic and private international law. Such order would have no extraterritorial effect and is therefore unenforceable in Utopia unless there is a treaty or convention between the two states which allows recognition and enforcement of the order.

Utopia has adopted the UNCITRAL Model Law on Cross-border Insolvency in its Cross-Border Insolvency Act of Utopia ("**Utopia Act**"), Article 21 of the Utopian Act states that relief may be granted upon recognition of a foreign main or non-main proceedings, such relief would include a stay of the Apex's Utopian claim.

The Utopian Act does not require reciprocity between states but will require Utopia to give assistance to insolvency officials of other states in relation to main proceedings and non-main proceedings.

In light of this the Erewhon liquid should anticipate a fair and efficient resolve of the matter.

A good understanding of the issues and the answer could be strengthened by more detail.

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.

It would not make a difference if Apex's action had been filed and not yet heard. Article 21 applies to commencement or continuation of individual action.

If Apex had obtained a court order to wind-up Nadir prior to Erewhon Article 29 provides that any relief granted under 21 must be consistent with the proceedings in the state.

There is scope to elaborate regarding article 29.

1.5

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?

Company incorporated in Australia. Four international insolvency issues the insolvency representatives may face are

1. Standing for recognition of as foreign insolvency representative
2. Moratorium on creditor actions
3. Conflict of laws issues
4. Priorities and preferences

Corporations Act 2001, section 580-581 permits cooperation and coordination between Australian and foreign courts as regards to external administration

Australia Cross-Border Insolvency Act 2008 is the domestic adoption of the UNCITRAL Model law which

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

4.5

Marks awarded 10 out of 15

*** End of Assessment ***

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

TOTAL MARKS AWARDED 38/50