



FORMATIVE ASSESSMENT: MODULE 1

INTRODUCTION TO INTERNATIONAL INSOLVENCY LAW

This is a **formative assessment** relating to **Module 1** and is designed to provide candidates on the Foundation Certificate course with some direction and guidance as to the form and content of assessments on the course as a whole. The submission of this assessment is **not compulsory** and the mark awarded will not count towards the final mark for Module 1 or the course as a whole. However, students are encouraged to submit this assessment as part of their orientation for the submission of the formal (summative) assessments for all the modules on the course.

The Marking Guide for this assessment will be made available on the web pages for Module 1 as well as the Course Administration page for this course after the submission date of 15 October 2022.

INSTRUCTIONS FOR COMPLETION AND SUBMISSION OF ASSESSMENT

Please read the following instructions very carefully before submitting / uploading your assessment on the Foundation Certificate web pages.

1. You must use this document for the answering of the assessment for this module. The answers to each question must be completed using this document with the answers populated under each question.
2. All assessments must be submitted electronically in MS Word format, using a standard A4 size page and a 11-point Arial font. This document has been set up with these parameters - **please do not change the document settings in any way. DO NOT** submit your assessment in PDF format as it will be returned to you unmarked.
3. No limit has been set for the length of your answers to the questions. However, please be guided by the mark allocation for each question. More often than not, one fact / statement will earn one mark (unless it is obvious from the question that this is not the case).
4. You must save this document using the following format: **[studentID.assessment1formative]**. An example would be something along the following lines: 202223-336.assessment1formative. **Please also include the filename as a footer to each page of the assessment** (this has been pre-populated for you, merely replace the words "studentID" with the student number allocated to you). Do not include your name or any other identifying words in your file name. **Assessments that do not comply with this instruction will be returned to candidates unmarked.**
5. Before you will be allowed to upload / submit your assessment via the portal on the Foundation Certificate web pages, you will be required to confirm / certify that you are the person who completed the assessment and that the work submitted is your own, original work. Please see the part of the Course Handbook that deals with plagiarism and dishonesty in the submission of assessments. **Please note that copying and pasting from the Guidance Text into your answer is prohibited and constitutes plagiarism. You must write the answers to the questions in your own words.**
6. The final submission date for this assessment is **15 October 2022**. The assessment submission portal will close at **23:00 (11 pm) BST (GMT +1) on 15 October 2022**. No submissions can be made after the portal has closed and no further uploading of documents will be allowed, no matter the circumstances.
7. Prior to being populated with your answers, this assessment consists of **10 pages**.

ANSWER ALL THE QUESTIONS

QUESTION 1 (multiple-choice questions) [10 marks in total]

Questions 1.1. – 1.10. are multiple-choice questions designed to assess your ability to think critically about the subject. Please read each question carefully before reading the answer options. Be aware that some questions may seem to have more than one right answer, but you are to look for the one that makes the most sense and is the most correct. When you have a clear idea of the question, find your answer and **mark your selection on the answer sheet by highlighting the relevant paragraph in yellow**. Select only **ONE** answer. Candidates who select more than one answer will receive no mark for that specific question.

Question 1.1

It should be relatively easy to develop a single system to deal with cross-border insolvency since all jurisdictions have more or less the same local insolvency law rules.

- (a) This statement is true since all countries have implemented the UNCITRAL Model Law on Cross-Border Insolvency.
- (b) This statement is untrue since there are huge differences in both the approach and insolvency legislation of various jurisdictions.**
- (c) This statement is true since all systems have at least the same general insolvency concepts.
- (d) The statement is true since the historical roots of all insolvency systems are the same.

Question 1.2

The Statute of Ann, 1705 was a very important piece of legislation for the development of English insolvency law.

- (a) This statement is true since this Act introduced imprisonment of debt.
- (b) This statement is untrue because it dealt with the distributions of the proceeds derived from the proceeds of selling the assets of the estate.
- (c) This statement is true since it introduced the notion of discharge.**
- (d) This statement is true since it introduced fraudulent conveyances into English law.

Question 1.3

The purpose of the UNCITRAL Legislative Guide (2004) has direct application in all the member States of the UN.

- (a) This statement is true because UNCITRAL's model legislative guidelines apply automatically to all member States.
- (b) This statement is true because all member States supported its automatic implementation in their respective jurisdictions.
- (c) This statement is untrue because the Legislative Guide serves merely as soft law and contains best practice to be considered when countries revise their own insolvency legislation.
- (d) This statement is untrue since the Legislative Guide is only available for use by developing countries when reforming their own insolvency laws.

Question 1.4

Modern rescue proceedings have replaced liquidation as an insolvency procedure in most systems.

- (a) This statement is true since business rescue is important for socio-economic reasons.
- (b) This statement is true because liquidation is viewed as a medieval and outdated process.
- (c) This statement is untrue since there is still a need for both liquidation and rescue procedures in insolvency systems.
- (d) This statement is untrue since some systems have no formal rescue procedure.

Question 1.5

The principles and requirements for avoidable dispositions and executory contracts are the same in all jurisdictions - hence these do not pose problems in a cross-border insolvency matter.

- (a) The statement is untrue, the requirements and principles do differ and pose problems in a cross-border case.
- (b) This statement is untrue because the insolvency laws of the State where the original insolvency order is issued will apply to all the other States involved in the matter.

- (c) This statement is untrue since avoidable dispositions and executory contracts do not pose any problems in a cross-border case.
- (d) The statement is untrue since avoidable dispositions and executory contracts may be disregarded in a cross-border case.

Question 1.6

The domestic corporate insolvency statute of a country makes no mention of the possibility of a foreign element in a liquidation commenced locally. The country has ratified a regional treaty on insolvency proceedings that contain provisions on concurrent insolvency proceedings over the same debtor in a neighbouring treaty state.

In a local liquidation commenced under the domestic corporate insolvency statute, to what law can the local court refer in order to resolve an international law issue that has arisen because of concurrent insolvency proceedings in the neighbouring state?

(a) Public International Law.

(b) UNCITRAL Legislative Guide on Insolvency Law.

(c) World Bank Principles for Effective Insolvency and Creditor Rights Systems.

(d) Private International Law.

Question 1.7

Which one of the following documents mandates co-operation or communication between courts in concurrent insolvency proceedings on the same debtor, which are being conducted in different nation states?

(a) ALI / III Global Guidelines Applicable to Court-to-Court Communication in Cross-Border Cases (2012).

(b) EU Cross-Border Insolvency Court-to-Court Communications Guidelines (2014).

(c) UNCITRAL Model Law on Cross-border Insolvency (1997).

(d) JIN Guidelines for Communication and Cooperation between Courts in Cross-Border Insolvency Matters (2016).

Question 1.8

Latin and Middle America states have ratified various multilateral conventions and treaties that address international insolvency issues. While they promote unity of proceedings in the treaty states where a debtor has a single commercial domicile, they acknowledge the possibility of concurrent proceedings.

Which of the following conventions and treaties does **not** provide for judicial co-operation where there are surplus funds remaining in a proceeding in one treaty state and there are concurrent insolvency proceedings over the same debtor in another treaty state?

- (a) Montevideo Treaty on International Commercial Law (1889).
- (b) Montevideo Treaty on International Commercial Terrestrial Law (1940).
- (c) Montevideo Treaty on International Procedural Law (1940).
- (d) Havana Convention on Private International Law (1928).

Question 1.9

The Council Regulation on Insolvency Proceedings (European Insolvency Regulation) (2000), which applies in all European Union member states except Denmark, was reviewed after a decade's operation. An amended European Insolvency Regulation (EIR) Recast (2015) was adopted in 2015 and took effect in June 2017.

Which of the following aspects of international insolvency is **not** addressed in the EIR Recast?

- (a) Proceedings to restructure a debtor that is facing the likelihood of insolvency.
- (b) Definition of "centre of the debtor's main interests".
- (c) A centralised insolvency register of insolvency proceedings opened in member states.
- (d) Co-operation and co-ordination provisions applicable to corporate groups.

Question 1.10

An unsecured Creditor is owed monies by the Debtor for services it supplied locally. It has issued proceedings to recover the debt in the local Court. The Debtor has moved its registration and head office to the local country from its original place of incorporation in a foreign country. The Creditor is incorporated and has its head office in that foreign country.

The contract to supply, which was created by exchange of emails sent between the head offices, denominates the debt in the currency of the foreign country. The Debtor is being wound-up in the foreign country and the foreign liquidator seeks recognition and a stay in the local Court proceedings. What aspect is an international insolvency issue?

- (a) The local Court's jurisdiction over the Debtor.
- (b) The standing of the foreign Creditor to sue for its debt in the local Court.
- (c) The foreign liquidator's standing to request a stay of the local proceedings.
- (d) The fact that the debt owed to the Creditor is in a foreign currency.

Marks awarded: 8 out of 10

QUESTION 2 (direct questions) [10 marks]

Question 2.1 [maximum 2 marks]

Explain what the term "international insolvency law" means.

It is described by Wessels¹ as a body of rules or situation as defined by Fletcher² where a debtor's assets exceed his liabilities, or he is unable to meet his financial obligations and the effect is felt across national borders and not confined to one legal system.

These are authoritative sources. While you have combined their information into other words, it could perhaps better convey your personal understanding.

1.5

Question 2.2 [maximum 5 marks]

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

Under the concept of Universality there is only one insolvency proceeding covering all the debtor's assets worldwide³, while the concept of territoriality on the other hand permits multiple insolvency proceedings running concurrently regarding the same debtor. Under universality one forum has jurisdiction while under territoriality, jurisdiction is limited to the property within the state where the proceedings are opened.

Under universality all creditors should have the same opportunity to participate in the proceedings with all claims treated on an equal basis and under territoriality national interests are protected before any assets are transmitted abroad. This can lead to a plurality of insolvency proceedings and creditors may suffer challenges in participating in foreign insolvency proceedings.

¹ B Wessels, *International Insolvency Law* (Kluwer, 2006), p 1.

² I F Fletcher, *The Law of Insolvency*, London (Sweet and Maxwell, 5th ed, 2017), Ch 1, p 6

³ J L Westbrook, "A Global Solution to Multinational Default", (2000) 98 *Michigan Law Review* 2276 pp 2276-2328

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

3.5

Question 2.3 [maximum 3 marks]

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

The UAE reformed its domestic insolvency law in 2016 and 2019⁴.

Bahrain adopted the Model Law on Cross-Border Insolvency in 2018.

Dubai's International Financial Centre adopted the Model Law on Cross-Border Insolvency in 2019⁵.

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

2.5

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.

The broad objectives of insolvency for corporations are to rescue businesses in financial difficulty, protecting employment, protecting the interests of creditors and, encouraging the development of an entrepreneurial class⁶. On the other hand, the objective of insolvency for individuals is to enable the individual a fresh start and negate the negative perceptions associated with sequestration.

The objective of individual insolvency is discharge and rehabilitation while under corporate insolvency a corporate is not discharged but wound-up at the conclusion of the liquidation or possible re-organisation through restructuring.

The concept of exclusion of assets from the estate is unique to individual insolvencies where some assets are exempt like household goods to ensure the primary survival of individuals. In

⁴ Federal Law by Decree No.(9) of 2016 on Bankruptcy (<https://www.mof.gov.ae/en/lawsAndPolitics/financial-banking-sector/Bankruptcy/pages/Laws.aspx>) and Federal Law by Decree No.(19) of 2016 on Insolvency <https://www.mof.gov.ae/en/lawsAndPolitics/financial-banking-sector/Bankruptcy/pages/Laws19insolvency.aspx>.

⁵ <https://www.difc.ae/newsroom/news/difc-announced-proposed-new-insolvency-law-regime-public-consultation/>.

⁶ UNCITRAL legislative Guide on Insolvency Law part C p 14.

corporate insolvencies all assets fall into the estate and there is the possibility of sanctions against directors for reckless trading.

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 choice of forum to commence insolvency proceedings of a cross-border nature may present difficulties in deciding which jurisdiction will determine the matter.

When the court has determined that it has the jurisdiction to hear the matter it then must decide on the law to apply. Deciding on the appropriate law to apply may result in a conflict of laws exasperated by the presence of qualifications like security, set-off and netting arrangements. Cross-border insolvencies tend to be expensive for foreign creditors and may result in their discrimination.

Judgements in insolvency cases of a cross-border nature may be difficult to enforce in foreign jurisdictions.⁷

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

3

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 UNCITRAL Legislative Guide on Insolvency Law of 2004 seeks to promote a harmonised insolvency system and is intended to be used as a reference by national and legislative authorities when preparing new laws and regulations⁸. The success of the UNCITRAL Model Law on cross-border Insolvency has been evidenced by its adoption, incorporation and application in local legislation. Examples include:

Its adoption by Bahrain in 2018 and in 2015 by all member states of the Organisation of the Harmonisation of Business law in Africa⁹ as have Canada and the United States of America.

Courts have adopted Protocols and Insolvency agreements in cases involving concurrent insolvencies to facilitate the speedy resolutions of cross-border insolvencies. This has

⁷ I F Fletcher, *Insolvency in Private International Law- National and International Approaches* (Oxford: Oxford University Press, 2nd ed, 2005) pp 3-5.

⁸ *Idem* note 6 p1

⁹ <http://www.unis.unvienna.org/unis/en/pressrels/2015/unisl222.html>.

developed international insolvency Jurisprudence. Examples include the cooperation between Canada and the United States of America in the Nortel Networks case¹⁰.

The Judicial Insolvency Network involves insolvency judges across the world and its main objective is to develop communication and cooperation amongst national courts in cross-border insolvency matters. The inaugural conference of 2016 resulted in the Guidelines for Communication and Cooperation between Courts in Cross-Border Insolvency Matters. (JIN Guidelines)¹¹

In the 2000s the World Bank produced guidelines on the regulation of insolvencies called the “Principles of Effective Insolvency and Creditor/Debtor Regimes”¹². The adoption of these principles has been used as a condition to funding by applicant states.

The recast European Insolvency Regulation (EIR) which was adopted in 2015¹³ has been successful. Among the provisions that promote cooperation and coordination are the allocation of jurisdictional competence among member states. The regulation extends to business rescues, recognising insolvencies outside the EU for purposes of coordinating proceedings.

The multilateral efforts discussed above have had a positive effect on cross-border insolvencies recognising the need for cooperation amongst states and the recognition of foreign insolvency proceedings.

What is your opinion on how much impact these are likely to have in addressing international insolvency issues?

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

4

Marks awarded 12 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.

¹⁰ https://www.uncitral.org/pdf/english/texts/general/Register_Texts_Vol2.pdf.

¹¹ <http://www.jin-global.org/jin-guidelines.html>.

¹² <https://www.worldbank.org/en/topic/financialsector/brief/the-world-bank-principles-for-effective-insolvency-and-creditor-rights>.

¹³ <https://eur-lex.europa.eu/eli/reg/2015/848/oj>.

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 of the adoption of the UNCITRAL Model Law on Cross-border Insolvency by Utopia mandates cooperation and direct communication between a local court and foreign courts or foreign representatives¹⁴.

The MLCBI is significant for its provisions on recognition and relief in 4.1. Its provisions on cooperation and coordination are secondarily important as the liquidator is primarily seeking advice about staying court proceedings in Utopia.

Based on the Maxwell Communication Corporation plc case¹⁵ the liquidator would be advised to consider entering into an insolvency agreement with local Attorneys in Utopia to be confirmed by the court in Utopia.

The liquidator in the agreement should consider maximising the value of the estate and harmonising the proceedings to reduce expenses, ensure fair representation of creditors including foreign creditors and resolve conflict of law issues.

The question requires candidates to apply the relevant MLCBI articles to the facts provided in more detail than that above.

2.5

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.

¹⁴ Article 27 (d).

¹⁵ Summarised in UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation 2009, pp.128-129

UNCITRAL Model Law on Cross-border Insolvency does not require reciprocity. It is applicable to matters heard in the Utopia courts as Utopia has incorporated it into its domestic law. The UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation¹⁶ encourages not just the Courts but insolvency practitioners to develop methods to address conflicts that arise when states attempt to apply different laws and enforce different requirements on the same set of parties. The advice given to the liquidator would therefore not be different in the above 2 different scenarios.

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

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?

The chosen country of the company's incorporation is the Republic of Botswana which has not adopted the UNCITRAL Model Law on Cross-border Insolvency. Issues of cross-border insolvency would then be governed by private international law. The key international insolvency issues include.

- The enforcement of court orders emanating from Botswana in the foreign jurisdictions where the assets lie. The enforcement of court orders obtained in the foreign countries for enforcement in Botswana. The relevant piece of legislation with respect to foreign orders a liquidator may obtain for enforcement in Botswana is the Judgements (International Enforcement)¹⁷. The procedure is to apply to the High Court for the recognition and enforcement of a foreign order.
- Commencement of proceedings in a foreign jurisdiction where the assets lie to realise them for the benefit of creditors. A liquidator would have to run concurrent proceedings in foreign jurisdictions where the assets lie, which is often expensive and does not speedily conclude insolvency proceedings. In order to commence proceedings in a

¹⁶ (2009) p 16

¹⁷ Chapter 11 :04

foreign jurisdiction the liquidator requires leave of the Court in Botswana. The is governed in the Companies Act¹⁸.

- The liability of directors in the foreign businesses for reckless trading is another international insolvency issue. The liquidator requires leave of the court to institute proceedings against directors in a foreign jurisdiction. The liquidator would still be subject to the conflict of laws rules in the foreign state in order to obtain recognition.
- The recognition of foreign creditors and the rank of their claims in Botswana. The Companies Act does not discriminate against foreign Creditors as long as they file their claims in Botswana. The Legal Practitioners' Act¹⁹ discriminates against foreign attorneys who do not enjoy automatic recognition in the Courts of Botswana.

This is answered well. There is some scope to elaborate.

7

Marks awarded 10.5 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

¹⁸ Chapter 42 :01

¹⁹ Chapter 61 :01