



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.

International Insolvency law is defined by Fletcher¹ as a situation "... in which an insolvency occurs in circumstances which in some way transcend the confines of a single legal system, so that a single set of domestic insolvency law provisions cannot be immediately and exclusively applied without regard to the issues raised by the foreign elements of the case."

Fletcher goes on to state that "...an insolvency practitioner involved in a case with cross-border ramifications must come to terms with the fact that the world resembles a sort of patchwork quilt of jurisdictions whose provisions offer a wide variety of shades and patterns of collaborative potential."²

This is an authoritative quote. The answer would be improved if it also included information in your own words to indicate your personal understanding of the explanation also.

1.5

Question 2.2 [maximum 5 marks]

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

Universality and territoriality are different doctrinal perspectives deployed in the pursuit of a solution to the generally accepted issues posed by cross-border insolvency cases.

¹ I Fletcher, "International Insolvency: The Way Ahead" pg7
<https://onlinelibrary.wiley.com/doi/pdf/10.1002/iir.3940020104>

² Ibid, pg 13

Universality is, simply put, the idea that in cross-border insolvency matters one jurisdiction should be designated as the 'home state' under which all insolvency actions will take place. Universality does not allow for concurrent or ancillary proceedings and promotes an ideal scenario where an office-holder has access to all assets of a debtor globally and runs a process in which any and all creditors can participate.

Territoriality on the other hand is the concept that insolvency proceedings should be confined to the assets or issues based in that jurisdiction. The idea does not allow for the extra-territorial effect of insolvency proceedings and therefore paves the way for concurrent proceedings in as many states as the debtor operated or held assets in.

Neither concept is wholly without issue. Universality requires firstly, a mechanism to determine the 'home state' and secondly, a universal willingness to submit to that jurisdiction once selected. The idea does however appear to align with basic concepts of fairness if used successfully. Territoriality however, acknowledges the reality that many, if not all, jurisdictions will be protective in one way or another about assets or creditor classes they house. This doctrine, if allowed to run to its natural conclusion, paves a way for a scenario where creditors could end up being treated differently in different jurisdictions. The broadly accepted concept of *pari passu* is therefore more difficult to achieve.

As Mevorach³ states: "The opposing principles of unity/universality and plurality/territoriality in cross-border insolvency have created a historic struggle that has been unusually intense. In the process, territorialism evolved and challenged universalism, pointing to significant issues in the purist model. These problems include: reliance of pure universalism on full convergence of laws or the creation of supranational law, which may not be achievable; its inadequacy for business structures such as some forms of enterprise groups that comprise separate and independently controlled entities; and its disregard of the possible disadvantaged position of creditors where the process takes place in a foreign country. Yet territorialism... by adhering to a solution based on splitting the case between jurisdictions and disregarding foreign stakeholders, cannot provide a regime that promotes the goals of insolvency when insolvency happens across legal systems."

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.

1. Bahrain and the Dubai International Finance Centre adopted the Model Law on Cross-Border insolvency in 2018 and 2019 respectively. This furthers the goal of the Model Law to facilitate co-operation and co-ordination of cross-border insolvency cases globally;
2. The first regional parallel review of the insolvency regimes in the Middle East and North Africa was launched in 2009. This is a joint review by INSOL International, the World Bank, the OECD and the Hawkamah Institute for Corporate Governance; and

what impact did this have on reforming domestic insolvency laws or addressing international insolvency Issues in the Middle East?

³ I Mevorach, *The Future of Cross-Border Insolvency: Overcoming Biases and Closing Gaps* (Oxford University Press, 2018) pgs 5-6

3. The UAE introduced insolvency reforms in 2019 which, amongst other changes, introduce the concept of a moratorium or stay on criminal proceedings or enforcement action against a debtor.⁴

2.5

Marks awarded: 9 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 objectives, and therefore the likely outcomes, for the insolvency of individuals and corporations vary greatly. The point of difference emanates from the concept of rehabilitation or discharge which is only universally available in personal insolvency cases. The notion of discharge was first introduced into the English and Welsh legal system by the Statute of Ann in 1705. Discharge or rehabilitation became more commonly accepted as insolvency law developed and became more humane over time. For instance it is no longer the case that debtors in personal insolvency cases are criminally punished in France as they were under the 1807 Commercial Code. These developments progressed towards a system for personal insolvency cases that generally seeks to balance the creditors' rights against the debtor's needs. As such concepts such as 'excluded assets' have been developed to ensure that a debtor is still able to live and work whilst with his or her insolvency case progresses. In most jurisdictions there are also safeguards for their families and dependents protecting them from creditor action against the home or funds needed for basic survival.

In corporate cases rehabilitation is only usually achieved in limited circumstances where companies return to going concern status after successfully navigating through a rescue process. Whilst in recent times corporate rescue has become the focus of many jurisdictions' insolvency reforms it is not always possible. In such cases the creditors' rights as a whole will always trump those of the insolvent entity (and its shareholders). Insolvent entities will, once their insolvency process has run its course, be dissolved and cease to exist as a company. This 'death' of the insolvent entity is in stark contrast to the concept of discharge that applies to insolvent people.

There are however some similarities in the insolvency processes for individuals and corporate entities. These similarities relate to the pursuit of voidable transactions and investigations into the causes of the insolvency.

For further information see Sealy and Hooley.⁵

It would be beneficial for you to elaborate and explain the matters raised by Sealy and Hooley and to elaborate in your own words.

3.5

⁴ https://www.bakermckenzie.com/en/-/media/images/insight/publications/2020/02/the_new_insolvency_regime_in_the_uae.pdf

⁵ In M A Clarke et al, Commercial Law (Oxford University Press, 2017), chap 28

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.

Dealing with insolvency law in the cross-border context opens an Insolvency Practitioner or a stakeholder to a number of issues that arise from the differences in the systems at play.

For example, a cross-border insolvency case is likely to involve multiple forums which may or may not result in the instigation of concurrent proceedings. Concurrent proceedings can lead to increased costs and effort in administering the estate.

Another issue one might encounter relates to the jurisdictional differences at play. For example, local public policy will be particularly relevant when dealing with issues that directly impact the local economy such as redundancy or termination of employees. France, for example is known to be very strict on labour rights. Whereas in the UK there is a dedicated government body that assists those made redundant by an insolvent entity.

A further, more general issue that will become apparent is the difference between jurisdictions in their approach to stakeholders. Some jurisdictions are notably 'pro-debtor' and encourage the notion of discharge or forgiveness of debt (such as the USA). Other jurisdictions are more 'pro-creditor' where discharge is harder won or a debtor is subject to longer-lasting ramifications of their insolvency.

Another issue that will become apparent is that of each jurisdictions' ability or willingness to interact with another. Some jurisdictions are well-versed in cross-border insolvency issues and regularly interact with other States' Courts. The US and UK are a good example of jurisdictions that regularly interact, see Maxwell Communication Corporation plc⁶. Other States are less used to international cooperation such as those in the Middle East which do not currently interact regularly at a regional level. These states will in all likelihood be more challenging to deal with in a cross-border case due to a lack of infrastructure at the Court level to deal with such matters.

Finally, a very basic issue of definition will exist. At its core, the definition of insolvency and the applicable processes varies from state to state. An office holder's abilities will therefore vary greatly across the debtor's insolvent estate. This could create issues in achieving the concept of *pari passu* when dealing with foreign creditors or even when dealing with asset realisations.

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

Question 3.3 [maximum 5 marks]

What multilateral steps have been taken in the 21st century to promote harmonisation of domestic insolvency laws? In your opinion, how much impact are these likely to have in addressing international insolvency issues? Include reasons for your opinion.

⁶ See the summary in UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation 2009, pgs. 128-129

The 21st century has seen many steps taken to promote the harmonisation of domestic insolvency laws at the multilateral level.

Arguably, the most important and most likely to succeed is the UNCITRAL Model Law on Cross-Border Insolvency. The Model Law focuses on facilitating cooperation and co-ordination of concurrent proceedings but also acts as a guide or 'standard' to states developing or amending their insolvency legislation. The ultimate aim will be to achieve a 'levelling-up' globally that will not only improve insolvency proceedings at the domestic level but also make cross-border insolvencies easier, more streamlined and less open to exploitation or critique. I believe the Model Law is likely to be the most successful in addressing international insolvency issues because it has seen the greatest uptake globally. States from every region have now adopted the Model Law. In addition, the Model Law has the added benefit of being truly global in its approach, other attempts at the multilateral level have been regional or limited in nature and as such still retain idiosyncrasies specific to that region or group of states such as the Union of South American Nations.

Another 21st century multilateral development has been initiated is the Judicial Insolvency Network (JIN). The JIN is "a network of insolvency judges from across the world with the aim of providing judicial thought leadership, developing best practices and facilitating communication and cooperation amongst national courts in cross-border insolvency and restructuring matters."⁷ The JIN focuses on cooperation at the court level which, whilst very valuable, will be limited in its reach owing to the relevant public policy considerations at the state level that judges cannot necessarily disregard. This initiative will however work towards bettering the flow of information between courts and will therefore contribute to simplifying cross-border insolvency cases and making them more efficient.

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

4

Marks awarded 11 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.

⁷ <https://www.supremecourt.gov.sg/news/media-releases/judges-of-the-worldwide-judicial-insolvency-network-to-meet-in-new-york-city-this-september>

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.

[Type your answer here]

Take care to provide an answer to all sub-questions.

0

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.

[Type your answer here]

Take care to provide an answer to all sub-questions.

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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?

[Type your answer here]

Take care to provide an answer to all sub-questions.

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*** End of Assessment ***

A good paper on the questions answered. It identifies the issues raised, generally substantiating its answers satisfactorily.

TOTAL MARKS 28/50