



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: 6 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 rules and regulations governing insolvencies of companies operating across borders (i.e., multiple jurisdictions). There is no universal international insolvency law that applies across the globe, which creates substantial challenges both from debtor's side (e.g., extending moratorium granted in one jurisdiction to other parts of the globe) as well as creditor's (e.g., getting their local claim recognized in a foreign jurisdiction where the debtor's assets are).

2

Question 2.2 [maximum 5 marks]

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

Universality refers to the concept that once a debtor's COMI has been established, and based on the debtor's COMI primary insolvency proceedings have been opened, the laws and regulations of the COMI State would apply in dealing with insolvency related matters in other part of the debtor's group (assuming the debtor has global operations). Furthermore, insolvency proceedings initiated in the COMI State would be recognized in other parts of the world in order to enable a single collective creditor recovery procedure (as opposed to having individual creditors going after assets).

Territoriality is a more insular approach to insolvency, in that every State would apply its own laws and regulations to insolvency for a particular debtor, especially where the

debtor has global operations. This creates substantial problems as it does not encourage cooperation across borders and makes creditor recovery much more challenging. At the same time, it is understandable from the perspective of some Emerging Markets, as they would want to protect their national interests, and not have to import foreign laws (e.g., English Law) into their 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.

Most recently various Gulf Cooperation Countries have reformed their insolvency laws specifically UAE, KSA and Bahrain, by introducing the concept of business rescue and rehabilitation. In addition, Bahrain and the DIFC have recently incorporated provisions of the Model Law on Cross Border Insolvency. Issue remains how to coordinate various jurisdictions, not just within the GCC, but also within the countries themselves (e.g., NMC case being transported to ADGM to accommodate UK style administration even though all the NMC hospitals are on-shore in the UAE).

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

2.5

Marks awarded 9.5 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.

Main purpose of insolvency proceedings for an individual is to get that person rehabilitated (i.e., in good standing once the procedure is completed), whereas in the case of corporate insolvency liquidation is always an option (i.e., closing down the corporate entity and potentially the business as well if it is not economically viable).

Other two main differences between personal and corporate insolvency are the concepts of dissolution (i.e., cannot dissolve an individual but definitely can a corporation) and exclusion of assets (i.e., a residential home can be excluded from the insolvency estate of an individual if they have nowhere else to live).

This answer displays a satisfactory understanding of the issues. To improve your responses, ensure they are commensurate with the mark allocation – while Q 3.1 asks for a brief note, it is for 5 marks.

3.5

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.

In a cross-border context main issues relate to the choice of forum (i.e., which jurisdiction will be used to initiate the insolvency proceedings as well as dictate application of laws post insolvency), recognition (i.e., will proceedings initiated in one state be recognized in other states that the debtor operates in) and the choice of law (i.e., if contracts are subject to a particular law will these be recognized in local insolvency proceedings). Most companies opt to initiate their insolvency proceedings in Common Law jurisdictions (due to inherent predictability of outcomes) but then have to cascade the office-holders authority throughout other parts of the group (if it is a global enterprise they have been appointed over) which poses substantial challenges and generally leads to value destruction as local creditors take action against locally available assets.

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.

In general there has been a concerted effort by the World Bank to harmonize and enhance insolvency laws across the globe, which is absolutely needed to promote trade and make sure the rights of all the stakeholders are protected.

Beyond the World Bank a number of other entities have either been established or have taken steps toward improving global insolvency framework.

UNCITRAL Model Law on Cross-Border Insolvency has probably had the most impact as it has been adopted by a number of States into their respective legal framework.

American Laws Institute / International Insolvency Institute (ALI / III) Global Guidelines for Court-to-Court Communications in International Insolvency Cases has played a prominent role in the restructurings of a number of airlines (e.g. LATAM) which inevitably operate across the globe.

Judicial Insolvency Network (JIN) has established guidelines for efficient communication between courts in cross-border insolvency cases. These guidelines have been adopted by the courts in the Americas, Asia and the United Kingdom.

INSOL plays an important role in this process because practitioner input is needed to put theory into practice effectively, and INSOL does just that by facilitating discussions and providing expertise to a number of governments and NGOs.

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.

3.5

Marks awarded 10.5 out of 15

QUESTION 4 (fact-based application-type question) [15 marks in total]

Nadir Pty Ltd (Nadir) is a company registered in Utopia. Originally it was incorporated in the neighbouring country of Erewhon before moving its registration and head office to Utopia one month ago. Apex Pty Ltd (Apex) is incorporated and has its head office in Erewhon. Apex and Nadir enter into a contract by exchange of emails between their head offices for Apex to supply goods to Nadir in Utopia. Nadir has failed to pay for the goods which have been delivered in accordance with the contract. Apex issues court proceedings against Nadir in Utopia for monies owing for the goods sold and delivered.

Meanwhile, Nadir also owes monies to creditors in Erewhon. One Erewhon creditor obtains a court winding-up order against Nadir in Erewhon and a liquidator is also appointed by that court.

If you require additional information to answer the questions that follow, briefly state what information it is you require and why it is relevant.

Question 4.1 [maximum 5 marks]

Assume the UNCITRAL Model Law on Cross-border Insolvency has been adopted by Utopia without modification, except as required to domesticate it. For example, the Cross-border Insolvency Act of Utopia names its local laws relating to insolvency and its competent court under the Act. The Erewhon liquidator's investigations detect that Apex is suing Nadir in Utopia. The liquidator would like to stop Apex court action against Nadir in Utopia. Advise the Erewhon liquidator on the potential relevance of the Cross-border Insolvency Act of Utopia.

The fact that Utopia has adopted UNCITRAL Model Law on Cross-border insolvency, would indicate that the Erewhon liquidator would be recognized in Utopian courts. Therefore, the Erewhon liquidator should apply for recognition in Utopia, and once that has been achieved, a stay of Apex proceedings against Nadir. Subsequently the liquidator can use their powers (assuming these are granted by laws of Utopia) to examine the transaction between Apex and Nadir and determine whether or not Apex is potentially a legitimate creditor of Nadir.

There is scope to elaborate. The question requires candidates to apply the relevant MLCBI articles to the facts provided in more detail.

4.5

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.

In case of a) it would not make a difference because the first liquidation proceeding was initiated in Erewhon, so a stay of proceedings would still be required.

In case of b) it would seem that the liquidators (to the extent one had been appointed by the court in Utopia) would have to cooperate in order to maximize creditor recoveries and minimize administrative costs.

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?

Let's assume that the corporate debtor is incorporated in the Utopia. **Please see the instructions noting that this sub-question is not related to 4.1 or 4.2. You were to select a country and apply the laws of that country, not consider the made up facts from 4.1 or 4.2.**

First issue will be the recognition of the office holder in other jurisdictions. For example, does a Utopia office holder have standing in Erehwon? If not, they may find themselves unable to take actions that would protect the estate in other countries, including Erehwon.

Second issue will be the moratorium, which is unlikely to be achieved given that assets may be dispersed across various jurisdictions. So for example, a stay issued by the courts in Utopia, will not be recognized by Erehwon creditors looking to seize assets in Erehwon. This would likely apply across the globe as well, due to lack of cross-border recognition.

Third issue will relate to directors of subsidiaries (assuming that the office holder was appointed over the TopCo in Utopia, with a number of foreign subsidiaries). It is likely that the local directors in various jurisdictions will (successfully) challenge the recognition of the office holder (who is now effectively the representative of the shareholder). As a result, assets in those subsidiaries will be depleted and moved out of the reach of Utopia based creditors.

Finally, tax authorities may refuse to acknowledge the appointment of an office holder, or may view themselves as a preference creditor relative to all other Utopia creditors, in which case net recoveries to the estate are likely going to be minimal (if at all).

To the extent that assets are located in States that have adopted the UNCITRAL Model Law on Cross-border insolvency, getting to a favourable outcome in each of these scenarios is going to be more likely. However, as a fall-back strategy (to the extent there are common creditors across the group), a number of related office holders may be appointed across

the group so that the liquidation efforts are focused on maximizing creditor recoveries rather than incurring legal/administrative costs unnecessarily battling other estates.

PS I am not sure I fully understood the last part of the question - i.e. what domestic laws or international instruments apply to assist the insolvency representative? The only one that may help is UNCITRAL Model Law (to the extent it has been adopted). Anything else forms part of "soft-law" and is thus entirely optional. **Please see the instructions noting that this sub-question is not related to 4.1 or 4.2. You were to select a country and apply the laws of that country, not consider the made up facts from 4.1 or 4.2.**

1.5

Marks awarded 7 out of 15

*** End of Assessment ***

A good paper that correctly identifies many of the issues raised and satisfactorily substantiates several answers.

TOTAL MARKS AWARDED 33/50