



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.

There are no single insolvency rules or law that apply globally. Each state that has a developed legal system will have some form of bankruptcy or insolvency system, with their own unique laws, rules and procedures. International insolvency law concerns the situation where an insolvency situation arises that cannot be dealt with exclusively by one nation's insolvency laws, and concerns those foreign aspects or interactions between different nation states.

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Question 2.2 [maximum 5 marks]

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

Universalism, or universality, denotes there being only one insolvency proceeding to cover all of a debtor's assets and debts worldwide. This encompasses there being only one legal proceeding commenced in a forum having exclusive jurisdiction over dealing with the debtor's assets and debts – such location could be the centre of the debtor's main interest. The aim is to have all of a debtor's assets the subject of the insolvency proceeding, with officeholders having the ability to control and obtain all the assets; equally, all worldwide creditors should be able to participate in the proceeding.

Conversely, territorialism, or territoriality, denotes there being insolvency proceedings being commenced in every state or jurisdiction in which a debtor has assets, and each such proceeding should be territorially restricted to property within the state in which proceedings are instituted. Equally, creditors must also be in the same jurisdiction to participate in the proceeding and make claims, and officeholders would have a nationally restricted mandate. Under the territoriality concept, it envisages multiple insolvency proceedings in different jurisdictions running at the same time in relation to the same debtor.

There is scope to elaborate with respect to recognition and effect

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.

In 2016 and 2019, the UAE reformed its domestic insolvency laws.

Saudi Arabia and Dubai reformed their domestic insolvency laws in 2018 and 2019, respectively.

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

The Dubai International Financial Centre also adopted the Model Law on Cross-Border Insolvency in 2019.

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

2

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.

Whilst there are objectives of insolvency common to individuals and corporations, the objectives of the two participants do differ. For example, the primary goal for corporations is to maintain the business as a going concern, or the viable parts of the business should the business itself fail. Where a person's authority has been exceeded or personal liability is abused, another objective is the imposition of liability on persons responsible. Contrast this with the objectives of individuals in insolvencies, which include to personally protect the debtor from harassment by creditors, to attain a clean slate or fresh start, and to reduce overall indebtedness. The objectives common to individuals and corporations include, to ensure proportionate distribution to the extent possible, save for preferred creditors, to understand reasons for the insolvency, to reclaim any voidable dispositions and ensure that secured creditors deal fairly with the debtor and other creditors.

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.

Various issues may be encountered when dealing with insolvency law in a cross-border context, including from a very fundamental issue like language. Some jurisdictions will refer to insolvency and some will refer to bankruptcy. Defining what is and is not an insolvency or an insolvency event or insolvent company or estate, is crucial to a functioning insolvency regime. It is, however, difficult to define these terms and concepts at an international level - this being because there is no single insolvency law having global effect. From an operational perspective, debtors may face creditor claims arising in more than one jurisdiction, inevitably giving rise to conflict of laws issues. Such conflict can be made all the more difficult due to the presence of qualifications in certain jurisdictions, including for set-off, netting off, retention of title or other means of preserving title for creditors in national laws. When faced with a potential insolvency situation that crosses national borders, one is faced with various questions including: in what jurisdiction may or should the insolvency be commenced, which countries laws shall apply in respect of differing aspects of the case, how will judgments or interests be enforced and/or recognised across jurisdictions.

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.

Various multilateral steps have been taken in the 21st century to promote harmonisation of domestic insolvency laws. Such efforts have had mixed success. One such step is where states have ratified or acceded to treaties or conventions importing into their domestic laws international principles to resolve insolvency issues that have a connection with another state. An example of an insolvency convention was the Convention on Certain International Aspects of Bankruptcy (the Istanbul Convention, Counsel of Europe Treaty Series No 136) - this convention was signed by 8 member states, but was not ratified by a sufficient number of members for it to come into force. Whilst seemingly unsuccessful in promoting harmonisation of domestic insolvency laws (at least so far as Europe is concerned), this convention had an important influence on the development of the European Union, and arguably, was instrumental in developing the European Union's response to international insolvency issues amongst member states. For example, the European Insolvency Regulation (2000), and subsequent amendments (effective for most member states), which are excellent examples of the harmonisation of international insolvencies across Europe, have their precursor in the European Union's earlier attempts to implement Treaty Series No 136 described above. On this basis, I would argue that international conventions have been effective at laying the groundwork to enable effective harmonisation of international insolvency issues.

Domestic law has also developed to accommodate aspects of insolvencies with international dimensions. Courts have increasingly dealt with international parts of insolvencies, developing precedents as international insolvencies have grown over time. Domestic legislation has also developed over time by amendment to specifically govern international issues, such as recognition and enforcement or the effects of foreign insolvency proceedings, for the purposes of offering assistance (by way of compulsory document production, examination of witnesses, collection of assets, etc.) to local representatives of official liquidators. Other developments include domestic legislation that permits cooperation and coordination amongst concurrent international insolvency proceedings. Such developments have been instrumental in the harmonisation of international insolvency issues, and have enabled strong international recognition of insolvency systems and processes amongst states.

Inter-governmental bodies such as UNCITRAL and other commercial/professional multilateral bodies (like INSOL International or the International Bar Association) have been active, and very effective, at promoting soft law responses to developing international insolvency issues in a way that harmonises domestic insolvency laws. Highly effective measures implemented by such bodies include UNCITRAL's Legislative Guide on Insolvency Law (2004) and the World Bank's Principles for Effective Insolvency and Creditor/Debtor Regimes (as amended).

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

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 Cross-Border Insolvency Act of Utopia will generally be a starting point of reference for the conflict of laws issues arising on these facts. The Cross-Border Insolvency Act of Utopia is of potential relevance to the Erewhon liquidator as it may include laws and procedures in respect of whether and how it may go about seeking recognition (as foreign representative) of the liquidation in Erewhon. The laws will prescribe the requirements for standing to bring such a recognition application. They ought also to identify any moratoriums that may be available on recognition of the foreign liquidation in Erewhon, which may or may not prevent the claims brought by Apex against Nadir in Utopia.

The laws may also include mechanisms for a co-ordination of claims amongst each jurisdiction (including entry into cooperation agreements), govern priorities and preferences and aid in determining which countries laws should apply to different parts of the case. As the law is adopted as drafted by UNCITRAL, cooperation and direct communication between a local Court and foreign courts, or foreign representatives, will

be permitted. This will enable a Protocol or Cross-Border insolvency agreement to be entered into.

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.

The laws will also presumably include the requirements for the liquidator to seek a stay of the litigation in Utopia, pending the winding up in Erewhon.

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

3.5

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.

It may not necessarily change my answer in respect of (a) – presumably, the legislation would operate to enable the respective liquidations to coordinate and enter agreements in respect of the same.

It would probably change my answer in relation to (b) because by the winding up order having been obtained against Nadir in Utopia before the Erewhon winding up order, it is possible that a global moratorium against claims being made against Nadir became effective, thereby preventing any claims (including a winding up application in Erewhon) being made against Nadir.

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 Country I select is the United Kingdom.

Four key international insolvency issues facing the insolvency representative in this factual scenario (and the relevant domestic or international instrument applicable) are as follows:

1. Ability of the insolvency representative to take into custody and under their control all the foreign tangible and intangible property to which the UK company is entitled and which it remains the legal owner (i.e. foreign subsidiaries and assets of the UK company).

The UK insolvency practitioner's ability to take into custody the UK company's foreign assets and subsidiaries will be governed by each relevant country's cross-border insolvency legislation (to the extent it has enacted it). Such legislation will include laws with respect to the recognition of the UK liquidation and ability for the UK insolvency practitioner to appoint foreign representatives in the respective overseas jurisdictions.

2. Ability of the insolvency representative to accept proofs of debt lodged by foreign creditors in respect of the UK Company's liabilities incurred overseas or governed by foreign law.

This will be governed by the UK's domestic insolvency legislation.

3. Choice of law to apply in the winding up in the UK as to procedure and substance

Domestic laws in relation to choice of law are applicable to winding up by a UK court where international elements (like these facts) are involved. Likely legislation will be the Insolvency Act 1986.

It is likely that UK domestic law governs the procedure for lodging a proof of debt in the UK liquidation, however, recourse to the foreign country's law may be required in order to establish the validity of the foreign claim in circumstances where that debt is governed by foreign (not UK) law.

4. Cooperation with foreign parties and foreign Courts in respect of claims against foreign subsidiaries of the UK company or insolvency proceedings in respect of the same

Local UK law should aid in this regard, by virtue of sections 426 of the Insolvency Act 1986 (UK).

There is some scope to elaborate.

7

Marks awarded 11.5 out of 15

*** End of Assessment ***

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

TOTAL MARKS AWARDED 41/50