



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).
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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 9 out of 10

QUESTION 2 (direct questions) [10 marks]

Question 2.1 [maximum 2 marks]

Explain what the term "international insolvency law" means.

The term "international insolvency law has been defined by Wessels as:

"...a body of rules concerning certain insolvency proceedings or measures, which cannot be fully enforced, because the applicable law cannot be executed immediately and exclusively without consideration being given to the international aspect of a given case."¹

It has also been defined by Fletcher 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."²

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.

Universality is the concept of one insolvency proceeding encompassing all the debtor's debts and assets globally. This means that once the proceeding has commenced, no other proceedings with respect to that debtor's debts and assets are possible. A single forum would have jurisdiction and all creditors' claims would be treated equal.³ Supporters of

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

² *Idem*, p 1 *et seq.*

³ Professor André Boraine and Professor Rosalind Mason, *Module 1 Guidance Text – Introduction to International Insolvency Law*, September 2022, p 37.

universality believe this is the best approach as it has the ability to satisfy the interests of creditors while being low cost. However, universality requires a high level of trust in legal systems and proceedings given the single proceeding would be applied globally. The difficulty with universality is establishing which state the exclusive proceeding will be commenced in, thereby creating uncertainty.⁴

Territoriality, however, is the concept of insolvency proceedings in every state and/or jurisdiction in which the debtor holds assets. Each proceeding would be territorially limited to the assets within each jurisdiction in which the proceeding was commenced. It would therefore be possible to have concurrent proceedings for a debtor. National interest would be protected as only local creditors may file their claims. One issue with this concept is that a debtor may be adjudicated insolvent in one jurisdiction but not in another. This may result in a situation where a debtor is insolvent in a country where he/she has debts but is solvent in the country in which he/she has assets. A solution to this issue may be the concept of co-operation between jurisdictions.⁵

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 2018, Bahrain adopted the Model Law on Cross-Border Insolvency. The Dubai International Financial Centre followed suit in 2019.⁶

In 2018, Saudi Arabia approved a new bankruptcy law that included general regulations, preventive actions, measures for financial restructuring and settlement procedures.⁷

In 2019, the Dubai International financial Centre also enacted a new insolvency law, which aimed to balance the needs of all stakeholders as well as facilitate a more efficient and effective bankruptcy restructuring regime.⁸

3

Marks awarded 9.5 out of 10

⁴ *Idem*, p 38.

⁵ *Idem*, p 38.

⁶ *Idem* p 67.

⁷ Saadi, Dania, "Saudi Arabia approves landmark bankruptcy law", at <<<https://www.thenationalnews.com/business/economy/saudi-arabia-approves-landmark-bankruptcy-law-1.707236>>>, accessed 14 October 2022.

⁸ "Dubai International Financial Centre Enacts New Insolvency Law", <<<https://www.difc.ae/newsroom/news/dubai-international-financial-centre-enacts-new-insolvency-law/>>>, accessed 14 October 2022.

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 objective of insolvency for individuals is to provide the debtor with the opportunity to start afresh as well as avoid harassment from creditors. The concept of the debtor having a fresh start is especially desirable in situations in which the insolvency is not due to the debtor's actions or conduct. A further objective of individual insolvency is to reduce the debt owing from present and anticipated income whilst taking into account the debtor's personal circumstances.⁹

The objective of insolvency for corporations is to preserve as many parts of the business as possible or the business itself. Furthermore, if appropriate in the circumstances, personal liability may also be sought to be imposed.¹⁰

However, there are also principles that apply to both situations, such as the concept of *pari passu* distribution (with the exception of creditors who have priority), fair treatment of the debtor by creditors and the reclamation of voidable dispositions.¹¹

There is some scope to elaborate

4.5

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.

Given there is not a single set of insolvency rules that applies globally, many difficulties may arise in the above context. As such, one will have to grapple with states' different laws, approaches and policies as well as differences in substantive and procedural rules.¹²

One issue in particular is having to reconcile the various approaches to insolvency - most commonly, states either have a pro-creditor or a pro-debtor system.¹³ Some systems may also take into account other interests vital in the domestic context (such as labour rights in France).¹⁴ Some states may also be reluctant to recognize foreign public claims for policy reasons or due to a desire to protect the interests of local creditors.¹⁵

⁹ Sealy and Hooley, as cited in M A Clarke et al, *Commercial Law* (Oxford University Press, 2017), chap 28.

¹⁰ *Ibid.*

¹¹ *Ibid.*

¹² Boraine and Mason, *supra* note 3, p 33.

¹³ *Idem*, p 36.

¹⁴ *Idem*, p 37.

¹⁵ *Ibid.*

This may also result in states competing with each other for a debtor's assets.¹⁶

In particular, Westbrook has noted the following nine key issues in cross-border insolvencies:¹⁷

- standing for (recognition of) the foreign representative
- moratorium on creditor actions
- creditor participation
- executory contracts
- coordinated claims procedures
- priorities and preferences
- avoidance provision powers
- discharges
- conflict-of-law issues.

There is some scope to elaborate for example regarding differing terminology

4.5

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.

The following steps have been taken in the 21st century towards harmonization of domestic insolvency laws:

- In 2004, UNCITRAL created a Legislative Guide on Insolvency Law.¹⁸ Its intention is to be used by national authorities and legislative bodies when reviewing existing insolvency law or preparing new regulations.¹⁹
- In the early 2000s, the World Bank produced guidelines on insolvency regulation called 'Principles for Effective Insolvency and Creditor/Debtor Regimes.'²⁰ Some commentators have noted that together with the UNCITRAL Legislative Guide, these

¹⁶ *Ibid.*

¹⁷ J L Westbrook, "Developments in Transnational Bankruptcy", (1995) 39, *St Louis University Law Journal* 753, pp 753-757, *supra* note 3, p 42.

¹⁸ <<https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/05-80722_ebook.pdf>>, accessed 15 October 2022.

¹⁹ Boraine and Mason, *supra* note 3, p 53.

²⁰ <<<https://www.worldbank.org/en/topic/financialsector/brief/the-world-bank-principles-for-effective-insolvency-and-creditor-rights>>>, accessed 15 October 2022.

two guides provide international best practice for insolvency regulations.²¹

- In 2010, the European Parliament published a report with respect to the Harmonization of Insolvency Law at EU level.²² This report identifies areas where further harmonization at EU level is possible and desirable.²³

The above steps have the potential to have significant impact on the global insolvency community in that harmonization can reduce the need for resolution of cross border issues,²⁴ and thereby allow for cheaper and more efficient resolution of international insolvency proceedings. Ultimately, the significance of the above however depends greatly on states adopting and implementing the available guidelines and reports.

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

4.5

Marks awarded 13.5 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

²¹ I Mevorach, "The Future of Cross-Border Insolvency: Overcoming Biases and Closing Gaps", (Oxford University Press, 2018), p 40.

²² <<https://www.eesc.europa.eu/sites/default/files/resources/docs/ipol-juri_nt2010419633_en.pdf>>, accessed 15 October 2022.

²³ Boraine and Mason, *supra* note 3, p 54.

²⁴ *Ibid.*

the Erewhon liquidator on the potential relevance of the Cross-border Insolvency Act of Utopia.

The relevance of the Cross-border Insolvency Act of Utopia would here likely be affected by the adoption of the UNCITRAL Model Law on Cross-border insolvency (MLCBI). While the Cross-border Insolvency Act of Utopia would still apply, the extent of its application may be affected by the provisions of the MLCBI, which facilitate co-operation and co-ordination of concurrent proceedings without requiring reciprocity,²⁵ to the extent those provisions differ from the Cross-border Insolvency Act of Utopia provisions with respect to co-operation and co-ordination.

Chapter IV of the MLCBI in this instance would "mandate co-operation and direct communication between a local court and foreign courts or foreign representatives."²⁶ The MLCBI also provides for the approval or implementation of co-ordination agreements.²⁷ In order to fully understand the relevancy of the Cross-border Insolvency Act of Utopia in light of the MLCBI, further information is required to determine how the Cross-border Insolvency Act of Utopia deals with cross-border insolvency issues (if at all), if any common law or rules of practice apply or whether Utopia offers assistance in cross-border insolvency matters.

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 question requires candidates to apply the relevant MLCBI articles to the facts provided.

3

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.
 - a) No, given the MLCBI facilitates co-operation and co-ordination of concurrent proceedings.
 - b) No, for the same reasons as my answer to 4.2 a).

Apply the MLCBI provisions on concurrent insolvency proceedings (see Article 29)

1

Question 4.3 [maximum 8 marks]

NB: This question is not related to Questions 4.1 and 4.2

²⁵ *Idem*, p 68.

²⁶ *Idem*, p 68.

²⁷ *Idem*, p 69, citing Article 27(d) of the MLCBI.

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 for the company's incorporation is Greece.

Four key international insolvency issues facing the insolvency representative are:

- 1) The issue of jurisdiction in other states where the debtor company has assets;
- 2) Creditors in the others states where the debtor has assets may try to compete for those assets with the Greek insolvency practitioner;
- 3) Foreign creditors may have registered interests in the assets of the company in Greece; and
- 4) Some assets may be subject to contractual obligations that fall under a foreign state's jurisdiction and therefore be governed by foreign law.

Given Greece is a EU member, the European Insolvency regulation Recast 2015 (EIR Recast) will apply. Greece has also adopted the UNCITRAL Model Law on Cross-border insolvency (MLCBI).

With respect to the first issue, the EIR Recast will allow the insolvency practitioner to bring subsidiary territorial proceedings in other member states given the debtor has an 'establishment' there by carrying out economic activity.²⁸

The EIR Recast also recognizes the existence of insolvency proceedings outside of the EU for the purpose of coordinating proceedings both inside and outside of the EU.²⁹ This will assist with the second issue.

With respect to the third and fourth issue, the MLCBI will assist given it facilitates co-operation and co-ordination between local and foreign representatives.³⁰ Under the MLCBI, the insolvency representative may be able to enter into an agreement with a practitioner of a foreign jurisdiction to coordinate proceedings.

This is a satisfactory response. For an approach more closely applied to the facts, see the 'Model' Answer for four key international insolvency issues raised by the facts and facing the insolvency representative in this scenario.

5

Marks awarded 9 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

²⁸ Boraine and Mason, *supra* note 3, p 65.

²⁹ Ibid.

³⁰ Boraine and Mason, *supra* note 3, p 68.