



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.

[B. Wessels (2006) defines international insolvency law as the "body of rules" which prescribe and define various insolvency proceedings or measures. The proceedings or measures cannot be fully enforced due to the fact that "international insolvency law" cannot be implemented and executed without taking into account the specifics of a particular matter.]

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.

[The concept of universality in cross-border insolvency is based on the premise that one insolvency proceeding should cover all of a debtor's assets and debts worldwide. As such, only one insolvency proceeding needs to be opened against a debtor and no other insolvency proceedings or other forms of execution should be necessary or be possible over the debtor's assets - i.e. "only one forum should have jurisdiction". The concept of territoriality in cross-border insolvency, is essentially opposed to the concept of universality. Territoriality is based on the premise that insolvency proceedings against a debtor ought to be commenced in every State or jurisdiction where the debtor holds assets and/or has liabilities.]

Further, any such proceedings should be limited to property in the State or jurisdiction in which the proceedings are commenced.

Whereas one proceeding is deemed to be sufficient under the concept of universality, territoriality required multiple proceedings in with regard to the same debtor where the debtor has assets and establishment In multiple jurisdictions.]

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

3.5

Question 2.3 [maximum 3 marks]

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

[One of the recent development in the Middle Ease region to reform domestic insolvency laws is steps taken by States such as the United Arab Emirates in 2016 and 2019 and Saudi Arabia in 2018 to reform their domestic insolvency laws. **More detail would have improved the mark awarded for this sub-question.**

Another development is Bahrain’s adoption of the Model Law on Cross-Border Insolvency in 2019 and the Dubai International Financial Centre in 2019.

Another steps taken by countries in the Middle East Region in an effort to address international insolvency issues is working closely with the World Bank, the Organization for Economic Co-operation and Development (OECD) and participating in a regional comparative survey on insolvency systems in the region. A recent report from the survey is available on the OECD’s website.]

2.5

Marks awarded 7.5 out of 10

QUESTION 3 (essay-type questions) [15 marks in total]

Question 3.1 [maximum 5 marks]

Write a brief note on the differences regarding the objectives of insolvency for individuals and corporations.

[According to Sealy and Hooney (2017) there are some differences between the objectives of insolvency for individuals and corporations.

For individuals, one of the key objectives is to protect the individual/debtor from any harassment from their creditors. Additionally, upon discharge an individual should be allowed to have a clean start especially in cases where the debtor's conduct did not lead to their insolvency.

Additionally, for individuals, insolvency proceedings assist to reduce their indebtedness by making contributions to repay their debt from their current and future income but at the same time taking the individual debtor's circumstances into considerations.

In some instances of individual insolvency, certain assets may be excluded from the insolvency proceedings in order to allow the individuals to maintain a decent standard of living for the debtor and their dependants.

For corporations, one of the key objectives is to preserve the business, or the viable parts of the business and where this is not possible to preserve the assets of the business. In some jurisdictions, such as the Insolvency Act 2015 of Kenya, certain insolvency proceedings, such as administration are used to preserve the assets of the company and provide the creditors a more favourable return than would be the case if the corporation was liquidated.

Unlike insolvency proceedings for corporations, where the main objective is to preserve the business or assets of the corporation, for individuals, the main objective is to allow the individuals to have a chance at having a fresh start upon the completion of the proceedings. Additionally, for corporations, if the business and assets cannot be preserved, the corporation may be liquidated. However, for individuals, liquidation is not an option.]

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 dealing with cross-border insolvency matters there are different matters which must be taken into account. For example, in some instances, there are laws and procedures on how to deal with assets relating to insolvency matters where proceedings have not been commenced in the jurisdiction where the assets are located.

While some jurisdictions have statutory provisions on how to deal with such situations some jurisdictions do not have any statutory provisions on how to deal with such situations. In some instances, "local courts" may be approached on a case by case basis to provide guidance.

In some instances, there is a treaty or convention on how to deal with insolvency matters in two jurisdictions, however, in some instances where States have not signed any treaties or are not party to any conventions it may be difficult to assess the most effective way to proceed in the State where insolvency proceedings have not yet been commenced.

Another major difficulty in dealing with cross-border insolvency is that most States are independent and sovereign in nature and have their own legislation which applies in their jurisdictions. It is therefore difficult for States to simply adopt different laws and apply them.

Additionally, in some States, the insolvency laws are relatively outdated and/or the standards of the laws might be low and at times have not been updated to suit modern day trade and investment.

Finally, three key challenges that relate to cross-border insolvencies are the questions of Forum - which court can and will hear and determine the matter at hand. This must be considered by the parties involved in the dispute.

Recognition and effect of foreign proceedings in the matter - where there are judgements that have been made in other jurisdictions in relation to a matter, how will the judgement be recognized in the current jurisdiction.

Choice of law to apply to the matter - the difficulty/hurdle to pass is determining which court will hear and determine a matter. This differs in different jurisdictions and the parties must decide which law to apply.]

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.

[Adoption of the UNCITRAL Model Law on Cross-Border Insolvency

Some jurisdictions have adopted the UNCITRAL Model Laws on Cross-Border insolvency in an effort to harmonize their State laws with those of other entities. Such adoption promotes and facilitates co-operation and co-ordination where there are significant concurrent proceedings.

While adoption of the MLCBI may harmonise various domestic insolvency laws in so far as they address international insolvency issues, the question addresses more broadly the harmonisation of domestic insolvency laws in general. See the 'model' answer on this sub-question.

Conferences and meetings to discuss insolvency laws

Various conferences and meetings have been held to discuss insolvency laws. This constant dialogue often resulted in working papers being presented on current topics and stakeholders discussing the matters in a great detail.

Formation and involvement of various bodies to promote dialogue and participate in various projects

Various bodies such as INSOL International and the International Insolvency Institute have continued to contribute by way of various projects with a view to improving the regulatory approaches and the outcomes that may arise from cross border insolvency matters.

In my view, these meetings, projects and working papers are likely to have an impact in creating some level of harmony, cooperation and reciprocity among nations which will improve the effectiveness of cross border insolvency. However, in my opinion, it is unlikely that there will ever be one insolvency law governing "all States" or a public law on insolvency, these steps which produce working papers and legislative guidelines are a great milestone and show institutions what to take into account when drafting and updating their insolvency laws.]

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

4.5

Marks awarded 13 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 adoption of the UNCITRAL Model Law on Cross-border insolvency will make it easier for the appointment of the liquidator in Erewhon to be recognized in Utopia. The adoption of the laws makes it easier to follow a universalism approach.

We would need to date the relevant commencement date of the liquidation in order to determine the impact of the Apex law suit in Utopia. If the commencement date was before the commencement of the lawsuit and the liquidation proceeding is recognized in Utopia, then that may place a stay on all other proceedings and likely will result in a moratorium for Nadir. However, in order to determine whether the stay is applicable, would need to know the date when the liquidation proceeding commenced and the day that the Apex Law suit commenced.

The adoption of the model laws will also mandate and facilitate the communication and cooperation of the Utopia and Erewhon Courts. This will have an impact on the liquidator's steps as again the date of commencement will depend.

Additionally, we will also need to know whether Nadir is still incorporated in Erewhon or whether only the registration and head office moved.

If the proceedings in Erewhon are recognized in Utopia, then the liquidator will not need to commence separate proceedings in Utopia. This will assist the liquidator in managing the costs that arise from the process that may be required to seek recognition in the foreign jurisdiction.]

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.

[a - Yes, it would make a difference depending on the jurisdiction where Apex filed the proceedings and depending on the date of the proceedings. If the proceedings were before the appointment of the liquidator in Erewhon, the question would then be, will the proceedings in Utopia be recognized in Erewhon. The model laws do not require reciprocity and as such, if Erewhon has not yet adopted the model laws, it may be the case

that the proceedings may not be recognized immediately and that the creditor in Erewhon can still commence a separate proceeding

b- Yes - as noted above, we would need to know whether Erewhon has adopted the Model Laws. If they have not adopted the model laws, then it would depend on whether their laws follow a more territorial approach or a universality approach. If the laws of Erewhon are more territorial, then the creditor in Erewhon could possibly still commence proceedings even after the winding up order in Utopia. However, if the laws in Erewhon allowed a universality approach or a modified universality or contractual approach, then it is likely that the Erewhon winding-up order would not have been granted. As such it all depends on the nature of the laws in Erewhon and how willing the courts are to consider proceedings from other jurisdictions.

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

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?

[Assuming a company has its incorporation and head office in Bermuda - the following considerations will need to be taken into account.

Which law applies - In Bermuda, insolvency law is governed by the Companies Act 1981 and the applicable winding up rules.

Issue 1: Who can make the appointment - in Bermuda depending on the proceeding that the entity would like to pursue, the stakeholders may need to consider whether they will petition the Court for the appointment of provisional liquidators with limited powers (similar to a soft touch provisional liquidation) or appoint provisional liquidators with full powers. Where an appointment is made by a creditor, they will need to confirm whether the security they hold entitles them to appoint a insolvency professional in Bermuda.

Issue 2: Will the insolvency proceedings in Bermuda be recognized in other jurisdictions. Depending on the jurisdictions where the Company's assets are located, the insolvency practitioner in Bermuda will need to consider whether any insolvency proceedings initiated in Bermuda will need to be recognized in the foreign jurisdictions. For example, if the assets are located in a jurisdiction such as Canada, the Order appointing the insolvency professional will need to go through a recognition process.

Issue 3: Are there any proceedings in any of the other jurisdictions:

The insolvency practitioner in Bermuda will need to confirm whether any other insolvency proceedings have been commenced against the Company in any of the other jurisdictions where the Company operates. If proceedings have been commenced, the stakeholders will need to consider how to proceed under the provisions of the Act in Bermuda

Issue 4: Forum - The stakeholders in Bermuda will need to determine whether the court in Bermuda is authorised to appoint an insolvency professional over the entity. According to the laws in Bermuda, where an entity is registered in Bermuda, then an insolvency professional may be appointed over the Company. However, the stakeholders must consider whether the Court has forum and has the powers to appoint an insolvency professional and the powers that the individual will have]

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.

4.5

Marks awarded 10.5 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 38/50