



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**.

Commented [DB1]: You have not complied with the instructions. I will let it slide this time, but with future submissions I will not be so charitable and will return your assessment unmarked.

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.

As defined by Wessels, international insolvency law refers to the part of the law that is often described as a body of rules concerning certain insolvency proceedings or measures, which cannot be fully enforced. This is due to the fact that the law which would ordinarily be applicable cannot be executed immediately and exclusively without giving due consideration to the international aspect of that particular case.

There is scope to elaborate further in your own words

1.5

Question 2.2 [maximum 5 marks]

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

The first and biggest difference is that universality (or universalism) refers to the notion that there should only be one insolvency dealing with all of the debtor's assets and debts worldwide. Therefore, once insolvency proceedings have commenced in one jurisdiction, no other insolvency proceedings ought to be possible, nor should there be any other forms of execution of the debtor's assets. Ideally, there should only be one forum with jurisdiction over the insolvency proceedings. Conversely, territoriality (or territorialism) is premised on the notion that insolvency proceedings may be commenced in every state/jurisdiction where the debtor holds assets, but that such proceedings should be territorially limited and restricted to property within the state where the proceedings are commenced. Under territorialism, it would thus be possible to have multiple insolvency proceedings running concurrently in relation to the same debtor, but each of those proceedings would then be restricted in respect of which creditors may file their claims.

Secondly, under the concept of universality, there are various approaches to selecting the chosen state: for instance, the chosen state could be one where the debtor's centre of interests is located. Whichever approach is used, the premise is that the entirety of the debtor's assets should be included in the insolvency proceeding and the officeholder should be provided with the tools to control and obtain all such assets. Conversely, under territorialism, there is no such need to select a chosen state, but the officeholder's mandate would be limited to the national borders of the state where the insolvency proceedings are taking place and presumably where he is appointed.

Thirdly, for universality, creditors around the world should have the opportunity of participating in the proceedings with all claims being treated on an equal basis. Conversely, territorialism addresses local creditors who act within a domestic market, who may, however, suffer practical and economic challenges when participating in foreign insolvency proceedings, and it could happen that only the strongest creditors would receive any payment.

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.

4

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.

First, the first regional comparative survey of insolvency systems in the Middle East and North Africa (MENA) was launched in 2019 as a joint initiative of, among others, the World Bank and INSOL International. This was based on the World Bank's Principle for Effective Insolvency and Creditor Rights Systems (2005) as an indicator of best practice. **what impact did this have on reforming domestic insolvency laws or addressing international insolvency Issues in the Middle East?**

Second, the UAE reformed its domestic insolvency laws in 2016 and 2019. In particular, it passed the Federal Law by Decree No (9) of 2016 on Bankruptcy, which aims to regulate cases of bankruptcy and prescribes the necessary legal tools for restructuring a debtor's business and liquidation.

Third, Bahrain adopted the Model Law on Cross-Border Insolvency in 2018, and the Dubai International Financial Centre in 2019, to reform their domestic insolvency law to address international insolvency law issues.

2.5

Marks awarded 8 out of 10

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

Question 3.1 [maximum 5 marks]

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

The objectives of insolvency for individuals are to help them discharge their debts and to obtain a "fresh start" or rehabilitation, and to protect such individuals from harassment by creditors. To that end, insolvency helps such individuals to reduce indebtedness by making contributions from present and future income to the state whilst simultaneously taking the individuals' personal circumstances into consideration.

Conversely, in relation to corporations, the objective of insolvency is to preserve the business or viable parts of the business. Further, where personal liability has been abused, insolvency seeks to impose personal liability on those responsible persons. Further, while insolvency might exclude certain asset belonging to an individual which are necessary to maintain the individual, the same allowance is not made for corporations.

There is some scope to elaborate.

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.

There are several difficulties relating to pertinent differences in the relevant legal systems which might arise when dealing with insolvency law in a cross-border context.

The first is reconciling various national approaches to insolvency law. In this regard, a distinction is commonly drawn between pro-creditor and pro-debtor systems. Some systems might prioritise the interests of creditors in recovering their claims, whereas others may prioritise the interests of the debtor in continuing to do business. This results in various states competing with each other for the debtor's assets.

Second, insolvency proceedings may be complicated by the fact that they also relate to significant areas of substantive law, including both private and public law. For instance, the presence of local trust law might affect the order of priority of creditors, as would the law on charges and mortgages.

Third, there might also be differing definitions of insolvency across different states. While insolvency is traditionally understood as a debtor's liabilities exceeding its assets, some states might define insolvency as a short-term inability to service debts. Consequently, it is difficult to discern a international definition for a company to be deemed insolvent.

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.

Multilateral steps which have been taken to promote harmonisation include the release of instruments or guides which states can choose to adopt should they wish to. Examples include the UNCITRAL Legislative Guide on Insolvency Law in the 2004, as well as the guidelines produced by the World Bank, *ie*, Principles for Effective Insolvency and Creditor;/Debtor Regimes (which were revised in 2021). Should countries adopt the same standards promulgated in these guides, it would lead to harmonisation of domestic insolvency laws.

On a regional level as well, the European Union ("EU") moved towards greater uniformity in domestic insolvency laws of member states. In 2010, the EU published a report on the Harmonisation of Insolvency Law at EU Level, outlining differences between the domestic insolvency laws within the EU and identifying a number of areas of insolvency law where harmonisation at EU level was believed to be worthwhile and achievable. The EU later released an Action Plan on Building a Capital Markets Union in 2015, wherein it stated "Convergency of insolvency and restructuring proceedings would facilitate greater legal certainty for cross-border investors and encourage the timely restructuring of viable companies in financial distress".

In my view, these measures are likely to have a limited impact on promoting harmonisation in domestic insolvency laws. Firstly, states might face no consequences such as sanctions for not adhering to these standards (unless, for instance, tariffs are imposed in the EU for member states which deviate from the harmonised insolvency laws). Second, especially on an international level, these measures do not account for the differences in legal systems. For instance, it might be easier for a civil law jurisdiction to adopt these practices by interpreting a code in a certain manner, while it may be more difficult for a common law jurisdiction to adopt these practices where they are contrary to established precedent.

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

4.5
Marks awarded 11.5 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.

Given that Utopia has adopted the UNCITRAL Model Law on Cross-border Insolvency ("MCBI") without modification, the Cross-border Insolvency Act of Utopia ("CBIA") would facilitate cooperation and coordination of concurrent proceedings. Importantly, the MCBI does not require reciprocity and it is thus irrelevant whether Erewhon has adopted the MCBI as well. Chapter IV of the MCBI authorises and mandates cooperation and direct communication between a local court and foreign court (see, in particular, Articles 25 and 26 of the MCBI).

Accordingly, the Erewhon liquidator might be able to obtain a stay of proceedings of the Apex court action against Nadir in Utopia, so as not to further deplete the assets of Nadir in insolvency for distribution due to costly litigation. This is provided for by Art 20, which states that upon recognition of a foreign proceeding that is a foreign main proceeding, commencement or continuation of actions or proceedings concerning the debtor's assets, rights, obligations or liabilities is stayed. Alternatively, the Erewhon liquidator could seek a coordination of concurrent proceedings regarding Nadir in Utopia and Erewhon pursuant to Article 27(e) of the MCBI.

This is, however, subject to the Erewhon liquidator fulfilling the definition of a foreign representative. This is because Art 25 of the MCBI only provides that the court is obliged to cooperative with and is entitled to communicate directly with foreign courts or foreign representatives. Article 26 is to similar effect. Hence, I would need to know whether the Erewhon liquidator is considered to be a foreign representative within the meaning of the

MCBI, so as to be availed of assistance under Arts 25 and 26 of the MCBI. Moreover, this is also subject to Erewhon being the centre of main interests of Nadir. This is because Art 25 only applies if the foreign proceeding is a foreign main proceeding (*ie*, the proceeding in Erewhon), and in this regard, Art 2 defines a foreign main proceeding as one taking place in the state where the debtor has the centre of its main interests. Thus, more information is required to determine if Nadir's centre of main interests is Erewhon.

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) If Apex had filed proceedings to wind-up Nadir, but the matter had not yet been heard, there would be no change to my answer in question 4.1 because the Erewhon liquidator can still seek a stay of proceedings of the winding up proceedings.

(b) If Apex had already obtained a court order to wind up Nadir in Utopia prior to the Erewhon winding up order, my answer would differ. It would not be possible to seek a stay of winding up proceedings since the proceedings in Utopia since such proceedings have already concluded. Even if the Utopian court was willing to communicate or cooperate with the Erewhon liquidator, it is unlikely that the winding up order can be reversed. Consequently, the Erewhon liquidator might be advised instead to prove his debts in the insolvency proceedings in Utopia, assuming that Nadir has substantial assets in Utopia. In this regard, the liquidator could consider seeking cooperation by means of coordination of the administration and supervision of the debtor's assets and affairs pursuant to art 27(c) of the MCBI.

Refer to 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?

I select Singapore as the country for the company's incorporation. In this regard, Singapore has adopted the UNICTRAL Model Law on Cross Border Insolvency (the "Model Law") in the Insolvency, Restructuring and Dissolution Act 2018 (2020 Rev Ed).

The first issue is determining whether or not to grant a moratorium on local creditor actions pending the resolution of foreign insolvency proceedings against the same debtor, and the conditions to be satisfied for doing so. In this regard, it is also important to determine the centre of main interests ("COMI") of the corporate debtor. That is because Art 20 provides that upon recognition of a foreign proceeding that is a foreign main proceeding (*ie*, one that takes place in the corporate debtor's COMI), the court has no discretion but to stay the commencement or continuation of individual actions or individual proceedings concerning the debtor's property, rights, obligations or liabilities. Conversely, where the foreign proceedings are not foreign main proceedings (*ie*, they do not take place in the corporate debtor's COMI), the court has a discretion whether or not to extend relief to stay local proceedings (Art 21 of the Model Law).

The second issue is determining whether foreign representatives have the requisite standing to apply for assistance from the Singapore Court. This may be an issue as different jurisdictions may have different conditions to be satisfied before a foreign representative may seek assistance in the local courts. In this regard, it would be assistive if the domestic law incorporates international standards, such that there is a universal benchmark for obtaining standing as a foreign representative. For instance, Art 15 of the Model Law provides that only a foreign representative may apply to the Singapore Court for recognition of foreign proceedings in which the foreign representative has been appointed. In this regard, Art 2 defines a foreign representative as "a person or body, including one appointed on an interim basis, authorised in a foreign proceeding to administer the reorganisation or the liquidation of the debtor's property or affairs or to act as a representative of the foreign proceeding". Chapter 2 of the Model Law also governs the access of foreign representatives and creditors to the courts in Singapore, thus comprehensively setting out the scope of a foreign representative's standing.

The third issue is ensuring that all creditors around the world have a fair chance in participating in the insolvency proceedings. In this regard, Art 13(1) provides for access to such fair participation to prove debts in the local insolvency proceedings, as it provides that foreign creditors have the "same rights regarding the commencement of, and participation in, a proceeding under Singapore insolvency law as creditors in Singapore."

The fourth related issue is determining the priority and preferences of the creditors, in accordance with substantive law. This may be an issue as different jurisdictions may accord priority and preferences of creditors differently, which might prejudice foreign creditors who would have ranked higher in priority had the proceedings occurred in the foreign country. In this regard, Art 13(2) of the Model Law provides that Art 13(1), which allows foreign creditors the same rights to commence and participate in Singapore insolvency proceedings, "does not affect the ranking of claims in a proceeding under Singapore insolvency law, or the exclusion of foreign tax claims, social security claims or claims for employees' superannuation or provident funds or under any scheme of superannuation (collectively, "tax and social security obligations") from such a proceeding". Moreover, certain interests of foreign creditors are statutorily protected. For instance Art 13(2) also provides that the claims of foreign creditors other than those concerning tax and social security obligations are not to be given a lower priority than that of general unsecured claims solely because the holder of such a claim is a foreign creditor.

For another approach that is 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.

6.5

Marks awarded 12.5 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