



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 2023.

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 2023**. The assessment submission portal will close at **23:00 (11 pm) BST (GMT +1) on 15 October 2023**. 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: 8 out of 10

QUESTION 2 (direct questions) [10 marks]

Question 2.1 [maximum 2 marks]

Explain what the term "international insolvency law" means.

By International Insolvency law is meant those proceedings, formal or informal, which are set in motion to undertake the ultimate resolution of a debtors financial malaise which may span across national borders where the debtor may have assets or business interests. The said resolution may take shape in different ways or be called by different names depending on a particular system.

There is some scope to elaborate
1.5

Question 2.2 [maximum 5 marks]

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

Territoriality in cross border insolvency incorporates a notion where each nation/jurisdiction exercises it's own domestic laws regarding the debtor's property/assets located within the same jurisdiction. In so doing, that country or jurisdiction doesn't recognise another country's principles/laws on insolvency. That is to say that insolvency proceedings may be taken out in every jurisdiction or state where a debtor has assets/interests. This would give rise to a multiplicity of actions wherever said debtor houses his assets.

The territorial approaches rests on the premise that only those creditors within a particular confine may then rightly commence proceedings to lay claim to the debtors assets.

Whereas the universalist concept embraces the notion where cross border insolvencies are undertaken under the regime of a single global system and as such all the debtor's assets are

distributed by a single insolvency practitioner regardless of the state/country that the assets or claimants are located. Under the universalist concept, the place where the insolvency proceedings are commenced should be one where the debtor has the majority of interests situated and all creditors across the globe are given a chance to take part in the said proceedings and treated fairly. **There is scope to elaborate regarding effect and recognition 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.

In the years between 2016 and 2019, the United Arab Emirates undertook a reform of their domestic laws.

Whereas, Saudi Arabia and Dubai undertook the said changes in 2018 and 2019 respectively.

There is scope to elaborate as to this domestic reform.

Further, Bahrain and the Dubai International Financial Center adopted the Model Law on Cross Border insolvency in the years 2018 and 2019 respectively.

2

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.

The outcome of insolvency is different depending on whether the proceedings have been instituted against an individual debtor or a corporate debtor. Both proceedings are predicated by the inability to settle debts as and when they fall due or the prevalence of a situation where the liabilities of the debtor exceed the assets.

For the individual, one of the objectives that can be sought to be derived is to see that the conclusion of the proceedings gives rise to an opportunity for the debtor to make a fresh start, where the circumstances of the matter allow for the same. An arrangement could be made where the insolvency proceedings are managed in a manner where the debtor's personal life is not left in disarray. The insolvency proceedings can be a conduit through which the debtor's affairs can be managed in a proper and orderly manner so that all those that are owed have their matters addressed systematically and the debtor's life is reverted to a semblance of normalcy.

This can also be said to be true for the corporate debtor, should a possibility arise where the business, or components of it, can be maintained at the close of insolvency proceedings, such an angle can be taken. (business rescue)

This answer displays a satisfactory understanding of the issues. To improve your responses, ensure they are commensurate with the mark allocation – while Q 3.1 asks for a brief note, it is for 5 marks. There is scope to elaborate, for example with respect to imposing personal liability on the responsible persons in a corporate context.

3

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.

The first hurdle that comes to mind when dealing with insolvency law in a cross border context is the absence of a global insolvency court that administers a universal law should relevant matters come before it for determination.

All nations have their own laws whose applicability is within the confines of their boundaries. Further, the said laws tend to have specific definitions for key terminologies pertaining to many complex legal issue, insolvency included. Consequently this then affects the rights that a creditor from a foreign jurisdiction may have in accordance with the local laws. The way they may approach the court, eg through a representative or not, and what right of audience that representative may have (his or her qualifications) and ultimately the rights that may accrue to the creditor at the end of the proceedings.

Other hurdles that may arise when dealing with insolvency law in a cross border context is the apparent conflict that comes to the fore when dealing with matters concerning the choice of law, whether the creditors claim is a secured one or not, whether the local court system is pro debtor or pro creditor, whether the said system provides or offers a moratorium on creditor actions inter alia. Lastly another difficulty that would arise is the enforcement of the court order so issued to a successful creditor,

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.

All States/nations have in place legal systems that address different matters that may arise in their respective jurisdictions. The formulation of such laws is coloured by a varied number of factors one of which would be to address a particular nuisance or concern or indeed for some jurisdictions, the laws so formulated would be an inheritance of the same from a former colonial master. In view of this, it is therefore very clear that as a result the laws relating to specific matter from one country to another would differ in material ways.

The law relating to insolvency is not spared when it comes to the same being unique from country to country. However, due to the fact that the world is now a "global village", need has arisen for countries/regions to have a common understanding on how to deal with matters

where two or more nations or indeed nationals/corporations find themselves in conflict or indeed conducting business together.

The aforesaid common understanding is arrived at by way of use of multilateral agreements/treaties that spell out what should prevail at the occurrence of incidences indicated thereunder. The entering into multilateral agreements/treaties is in a bid to provide for some predictability and clarity. However, this cannot be said to be full proof as not all states domesticate the treaties nor do they ensure that their local laws conform or fall in line with internationally agreed standards and practices.

The said multilateral agreements/treaties form what is called 'soft law' that is to say that its mere persuasive and may not be considered compulsory.

The 21st century has seen the coming into being of a plethora of such multilateral agreements that have promoted the harmonisation of domestic insolvency laws. These developments have been mostly championed by the World Bank and the United Nations Commission on International Trade Law (UNCITRAL). Other regional bodies have been said to be instrumental as well.

The multilateral steps advanced in the 21st Century and that may be worthy of mention are the EIR 2000 (European Insolvency Regulation) under the auspices of the European Union. The regulations have been said to have influenced the multilateral development in international insolvency law. Further in the year 2010, the European Union parliament deliberated on the possibility of further harmonising insolvency laws at EU level.

In 2004 UNCITRAL developed a Legislative guide on Insolvency law whose objective was to set the standard by which member states would adhere when it came to legislative reform on insolvency law. It was expected that by following the guide, the outcome would be that the reforms so implemented would be coherent due to the adherence to the uniform standard so set under the legislative guide.

In 2011 the World Bank developed principles of insolvency and creditor rights which over time have been hailed to be one of the international best practices when it comes to insolvency legal reform. In fact the World Bank did not work in isolation in the development of the Insolvency and Creditors rights standard. This was done in collaboration with UNCITRAL and the International Monetary Fund. The principles were revised in 2015.

The aforesaid steps taken have had a positive impact in that prior to these steps, there had not been any guide or provision for how to deal with transnational insolvency matters. Each state was left to their own devices which resulted in uncertainty for creditors and ultimately had an effect on international trade. With the introduction of the multilateral initiatives international borders have been 'relaxed' in aid of transnational transactions.

This notwithstanding, the existence of the multilateral steps does not necessarily guarantee that the hurdles that hitherto existed have magically vanished. In fact, complete success cannot be guaranteed due to the fact that despite the fact that states party to these agreements/treaties have domesticated them or indeed absorbed them into their domestic laws, the said laws or regulations cannot and are not applied in isolation. In applying the insolvency laws, at times recourse is had to property laws, securities regulations inter alia which ultimately makes one country's implementation of the same that much different from another.

In conclusion, as long as there is no universal/global law on insolvency, adopted and/or domesticated by all states, there will always exist hurdles in the insolvency regime.

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.

From the outset, it is important to point out the fact that the UNCITRAL model law on cross border Insolvency is referred to as soft law (those instruments/treaties that are not legally binding but merely persuasive). In view of this, countries may exercise the option to adopt the model law, either in full or merely select parts of it into their domestic legislation.

The model law is said to be based on four key concepts, ranging from the provision of relief where necessary, to making provision of access for foreign representatives and those owed monies to 'local' courts. The model law is also premised on ensuring recognition of foreign proceedings and lastly to provide for cooperation with foreign courts and foreign representatives.

In view of the foregoing, the Erewhon liquidator will have access to the Utopia court and be able to ably represent the appointing client. The liquidator would be able to do this due to the fact that Utopia has adopted the model law, without modification, save for the parts that would need to be so modified to allow for domestication. The foregoing notwithstanding, as indicated above, the model law is merely a recommendation thus falling under soft law category.

Consequently, the liquidator would have to be bound by the Cross border Insolvency Act of Utopia and adhere to it. The model law will be relied upon where the above four key concepts arise.

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

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.

The answer in 4.1 would remain the same in both scenarios, that is (a) and (b). This is due to the fact that as stated in the answer provided under 4.1, the liquidator will be able to access the local courts and have the requisite recognition due to the fact that Utopia has domesticated the model law without modification, which model law is said to be based on four key concepts, ranging from the provision of relief where necessary, to making provision of access for foreign representatives and those owed monies to 'local' courts. The model law is also premised on ensuring recognition of foreign proceedings and lastly to provide for cooperation with foreign courts and foreign representatives.

Refer to Article 29 on concurrent insolvency proceedings, under which the local proceedings in Utopia maintain pre-eminence over the foreign proceedings in Erewhon.
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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?

For the purposes of responding to this question, we will assume that the company was incorporated and has its head office in Zambia. The Zambian government enacted the Corporate Insolvency Act No. 9 of 2017 and this is the piece of legislation applicable on all corporate insolvency matters and can thus be said to be 'law of choice' for insolvency representatives.

Zambia has not adopted the Model law on cross border insolvency however its provisions have been heavily 'borrowed' from the Model law with some of those provisions modified to suit the Zambian context so as to aid the facilitation of trade and investment as well as set the path that ought to be taken during the course of cross border insolvency proceedings.

During the insolvency proceedings the insolvency representative will face the underlisted four key issues;

- (a) Choice of law
- (b) Jurisdiction
- (c) Recognition
- (c) Enforcement

The Corporate Insolvency Act No. 9 of 2017 has provided for Cross Border Insolvency under Part X. section 147 of the said Act addresses the matter of choice of law or jurisdiction, (which provides that the High Court of Zambia is the court that would have jurisdiction over cross border insolvency matters), whilst sections 152 and 153 provide for recognition. The reliefs that may be sought under cross border insolvency proceedings (enforcement) are provided for under section 156 of the said Act.

Provide detail on the Zambia CBI laws to the issues you identify (for this 8 mark question).

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

3.5

Marks awarded out 7 of 15

*** End of Assessment ***

TOTAL MARKS AWARDED 34/50

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