



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: 7 out of 10

QUESTION 2 (direct questions) [10 marks]

Question 2.1 [maximum 2 marks]

Explain what the term "international insolvency law" means.

International Insolvency Law refers to laws/principles of law formulated to facilitate resolution of insolvency matters which have a foreign element to them (i.e., extend beyond a single state in the form of says debtors and creditors in foreign states), with a view to regulating the choice, and implementation, of the laws that will govern these insolvency proceedings. International Insolvency Law governs the interplay between two or more (potentially) competing sets of insolvency laws emanating from the respective states involved in the matter.

2

Question 2.2 [maximum 5 marks]

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

Universality is a principle of International Insolvency Law that is based on the view that all aspects of a debtor's insolvency, both local and foreign, should be governed by a single substantive legislation and under a single main proceeding under which the debtor's affairs are overseen by a single trustee and in which assets and liabilities are pooled across various states involved.

Territoriality is a principle of International Insolvency Law that is based on the view that application of any state's insolvency laws ought to be restricted to the borders of that state and that, similarly, the effect of insolvency proceedings should be restricted to the state of origin and should only involve debtors, creditors, and assets in that state of origin.

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

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.

- 1. In 2019, UAE enacted a new federal law to govern personal bankruptcy. Amongst other provisions, this laws introduced protection from legal prosecution. (<https://u.ae/en/information-and-services/business/protection-of-insolvent-natural-persons>, 14 October 2023, 14:10HRS) .*
- 2. In 2019, the Dubai International Financial Centre adopted changes to its insolvency law which introduced provisions such as a "Debtor-in-Possession" style Rehabilitation Plan and also adopted the Model Law on Cross-Border Insolvency (<https://bsabh.com/knowledge-hub/news/the-difc-insolvency-law-a-first-of-its-kind-procedure-for-insolvency-in-accordance-with-international-best-practice>, 14 October 2023, 14:18HRS)*
- 3. In 2018, Bahrain adopted a new Reorganization and Bankruptcy Law. Some key feature was the introduction of reorganization procedures for distressed businesses and mechanisms for cooperation between courts in foreign jurisdictions in cross-border insolvency matters (<https://www.tamimi.com/law-update-articles/bahrain-introduces-new-insolvency-regime>, 14 October 2023, 14:24HRS)*

3

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 primary objective of insolvency for individuals is to protect the debtors from harassment by their creditors and to accord them a fresh start. On the other hand, corporate insolvency has the primary objectives of preserving viable businesses or, in the alternative, realizing assets to facilitate repayment of debts owed to creditors, while also providing an avenue for attribution of personal liability where necessary (e.g., in the case of wrongful/fraudulent trading).

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.

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.

Some of the difficulties that may in the context of cross-border insolvency due to differenced in the systems of the involved states include: [Take care to proof read](#)

- 1. Differences in the overarching/underlying policies for the respective states. While some states take a pro-creditor approach to insolvency, other states take a pro-debtor approach. This conflict can result in counterproductive proceeding being pursued in different jurisdictions e.g., a pro-debtor system maybe trying to implement a reorganization which is undermined by a concurrent liquidation in the pro-creditor system.*
- 2. Differences in other Substantive Laws over and above the Insolvency-specific Laws pose an inherent challenge to cross-border insolvencies since these laws can have a great influence on insolvency laws and implementation thereof. For example, aspects such as Taking of Securities and means of Conveying Title, which are anchored in other Substantive Laws and which may vary across different states, are critical in the conduct of insolvency proceedings. Material differences in Substantive Laws may frustrate cross-border insolvencies due to inability to reconcile the two systems.*
- 3. Differences in other fiscal and socio-political policy considerations may also create difficulties in the context of cross-border insolvencies. For example, a government may choose to protect local creditors at the expense of foreign*

creditors/stakeholders for political capital. This is also true for differences in other socio-economic policies e.g., protectionist approach to labour rights etc.

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.

Some of the steps taken in the 21st Century to promote harmonization of domestic insolvency laws include:

- 1. The World Bank's Principles for Effective Insolvency and Creditor / Debtor Regimes - This sets out international best practice on development of creditor/debtor systems
<https://www.worldbank.org/en/topic/financialsector/brief/the-world-bank-principles-for-effective-insolvency-and-creditor-rights>, 14 October 2023, 16:42HRS).*
- 2. The UNCITRAL Legislative Guide on Insolvency - This sets out the key objectives and principles that should be reflected in a state's insolvency laws (https://uncitral.un.org/en/texts/insolvency/legislativeguides/insolvency_law, 14 October 2023, 16:39HRS).*

In my view, these steps will have a significant positive impact in addressing international insolvency issues because states are able to leverage these principles during the reform of their respective insolvency regimes which, in general, will result in more robust/comprehensive insolvency laws across the world which better reflect the realities of modern economies and trade, including cross-border insolvency. These principles in themselves try to balance the various competing interests in the context of insolvency proceedings and laws that are based off these principles are themselves likely to be more balanced. This will, potentially, reduce the divergence that arises due to state-specific policy priorities and which can pose difficulties in the context of cross-border insolvency matters.

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.

The Cross-Border Insolvency Act of Utopia is based on the UNCITRAL Model Law on Cross-border Insolvency. The Cross-Border Insolvency Act of Utopia will, therefore, provide for recognition of foreign proceedings (the Erewhon liquidation) following application by the foreign representative (Erewhon liquidator). I would advise the Erewhon liquidator to apply for recognition of the Erewhon liquidation in Utopia. Once recognition is obtained, the foreign representative can engage Apex to participate as a creditor in the Erewhon liquidation.

Additional information that would be useful is whether:

the suit filed by Apex is an application for commencement of insolvency proceedings or simply an application for recovery of debt. Note that the Apex has issued court proceedings against Nadir in Utopia for monies owing for the goods sold and delivered – not insolvency proceedings.

- a. *Utopia and Erewhon are signatories to any multilateral treaties governing cross-border insolvency*

3.5

Question 4.2 [maximum 2 marks]

Would it make any difference to your answer in question 4.1 in the following two alternative scenarios to Apex suing for its debt?

(a) Apex had filed proceedings to wind-up Nadir, but the matter had not yet been heard.

No, my advice would not change materially. I would, in addition, advise the Erewhon liquidator to include, in their application for recognition, an application that the Utopia winding-up proceedings be suspended considering there already a liquidation in place in respect of Nadir.

(b) Apex had obtained a court order to wind-up Nadir in Utopia prior to the Erewhon winding-up order.

In this case, I would advise the Erewhon liquidator to include, in their application for liquidation, an application that the Erewhon liquidation be recognized as the Main Proceedings in respect of Nadir and that the Utopia winding up proceedings become non-main proceedings. This application would be on the basis that the majority of Nadir's affairs and creditors are still in Erewhon considering the shift in headquarters is only a recent change.

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

1

Question 4.3 [maximum 8 marks]

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

A court has ordered the commencement of an insolvency proceeding against a corporate debtor in the State of its incorporation and head office. The company has operated business in a number of States and has assets (real property or interest in land, other tangible assets and intangible assets); creditors (including taxation / revenue authorities) and directors in several States.

Select a country for the company's incorporation and, based on the insolvency laws of the country you select and the brief facts provided, describe four key international insolvency issues facing the insolvency representative in this scenario. For each issue, what domestic laws or international instruments apply to assist the insolvency representative address these four issues?

I select the United Kingdom as the country of the Company's incorporation.

Four key issues that will face the Insolvency Practitioner in this case are:

- a. Recognition of the insolvency proceedings in the other states where the debtor has assets - The Insolvency Practitioner can apply for recognition of the UK*

Insolvency Proceedings as the Main Proceedings in respect of the debtor and for all the assets and liabilities of the debtor to be subjected to the Main Proceedings. This will be facilitated by the other UNCITRAL Model Law on Cross-border Insolvency where it has been adopted in the states where the debtor has assets.

- b. Differences in the policy position (i.e., underlying objectives) of insolvency proceedings in the respective jurisdictions where the debtor has assets (i.e., pro-creditor vs pro-debtor, rehabilitation vs liquidation) - The UK Insolvency Act contains provisions that prioritize both business rescue (administrations) and liquidation (liquidation proceedings) depending on the choice of proceedings. This can be used to give comfort that to courts/competent authorities in other states that the proceedings initiated are the most suitable in the context of the debtor, and considered the full breadth of options available (from reorganization to liquidation)*
- c. Differences in policies/approaches to critical elements of insolvency proceedings such as labour laws - The Insolvency Act of the UK provides for a portion of employee claims in redundancy to be paid in priority. The government also guarantees a portion of the balance employee claims out of the National Insurance Fund. This can be used to give comfort to other governments that employee welfare is well considered under the UK law which is proposed to be the applicable law in the insolvency proceedings.*
- d. Differences in ranking of claims, particularly, in relation to Crown taxes that are given priority over other concurrent/floating charge creditors - The Insolvency Practitioner can, where necessary, pursue court-sanctioned protocols with counterparts in the other states where the debtor has assets/liabilities to address any concerns about conflicting ranking of claims. A precedent was set for this under the Maxwell and Lehman Brother Protocols.*

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.

6

Marks awarded 10.5 out of 15

*** End of Assessment ***

TOTAL MARKS 37/50

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