



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: 9 out of 10

QUESTION 2 (direct questions) [10 marks]

Question 2.1 [maximum 2 marks]

Explain what the term "international insolvency law" means.

The term arises and relates to the fact that "there is not a single set of insolvency rules that applies globally". While all countries having developed legal systems have an insolvency system "there are differences in approach and policy as well as differences in substantive and procedural rules". (Cited from p3 of Module).

These many differences give rise to how international insolvency law issues are dealt with/ resolved.

The answer would be improved if it was in your own words to indicate your personal understanding of the explanation.

1.5

Question 2.2 [maximum 5 marks]

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

Universality suggests there should be a single insolvency proceeding covering “all of the debtors assets and debts worldwide”. It has been suggested the State that would have jurisdiction would be there the centre of the debtors’s main interests are. Some variations are considered, however all creditors should be able to participate, and all claims generally treated equally (subject to certain exceptions. (Module p37)

Territoriality is virtually the opposite, as it suggests that insolvency proceedings can be started in any country where the debtor has assets, where that country’s jurisdiction is limited. (Module p37)

There are modified terms of both, but it appears that it is most cost effective for Universality to prevail where possible, and there have been many international organizations that have tried to find the right balances so countries will update their insolvency laws so they are coordinated and differences are reduced.

These theories also involve recognition and effect (as well as jurisdiction) 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.

Recently, a # Please use clear English of Middle East states “reformed their domestic insolvency laws”, including:

UAE - 2016 & 2019

Saudia Arabia - 2018

Dubai - 2019

Regarding international insolvency, the UNCITRAL MLCI was adopted by Bahrain in 2018 and Dubai in 2019. (Module notes p 67)

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

1.5

Marks awarded 6.5 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.

Differences:

The objectives for companies should be to save any parts of the company that are viable, such as selling parts as a going concern, to maximize the return to creditors.

Companies that are liquidated are eventually dissolved based on the nature of their legal identity, they cannot be discharged from their debts.

It is often believed individuals may eventually be discharged from certain remaining debts that they cannot practically pay, which would often include a debt repayment plan, and the debtor would not have acted improperly. There is scope to elaborate regarding fresh start and protection from harassment.

Certain aspects of individuals assets are exempt from seizure and sale, for example basic household living items which the individual family may also need.

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.

One major example would be where the insolvency laws are based on the different systems generally, the main ones being Universality vs Territoriality, as has been described above, being basically the opposite in their objectives an approach, and also if a country has modelled their law on English/ Common Law vs Civil Law, and there are fundamental differences between them. The latter can create greater difficulties when a similar region, say Africa, had a variety of their original laws generally, usually related to their colonial history.

Countries that have not updated their insolvency laws to follow best practices (e.g., UNITRAL Legislative Guide) will have out of date or even non-existent cross border insolvency laws, creating difficulties between courts and IP's dealing with cross border issues.

If one or more countries involved has not adopted the UNCITRAL MLCI, there will generally be greater areas of differences/ conflicts.

Countries that have opted out of adopting treaties in their region, for example certain South American countries, and even with Brexit.

Further detail would be beneficial. For example, consideration of Westbrook's 9 key issues.

2.5

Question 3.3 [maximum 5 marks]

What multilateral steps have been taken in the 21st century to promote harmonisation of domestic insolvency laws? In your opinion, how much impact are these likely to have in addressing international insolvency issues? Include reasons for your opinion.

The EIR Recast (updated to address various issues as noted on p 65 of the Module notes) adopted in 2015 was significant for the large European region. This should increase the effectiveness of international insolvency issues within this region.

Principles of Cooperation were approved by the ALI Council and Members for the NAFTA countries in 2000 (module p 62)

More countries adopting the UNCITRAL MLCI improves coordination, for example, all 17 of the OHADA states adopted in 2015 “to add, renew and harmonize the domestic laws”. (Module p66)

Following a regional survey of insolvency systems in the MENA region in 2009, based on the World Bank’s Principles for best practice dated 2005.

Additional recent International efforts relate to Protocols and Cross Border Insolvency Agreements that should enhance coordination include:

- *ALI NAFTA Guidelines re court to court communications, by ALI/III in 2000*
- *ALI-III Global Guidelines re court to court communications in 2012*
- *JIN Guidelines re communication / cooperation between courts, 2016 (Module p71)*

Since it seems impossible to establish a global insolvency system, though improvements are being made to do so, including to address cross border issues, these international efforts to enhance general communication and cooperation should be very helpful to address issues as they arise.

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

4
Marks awarded 10 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 Act of Utopia "should" enforce/ recognize the stay of proceedings that would have been triggered when Nadir went into liquidation in Erewhon. So the Utopia Liquidator, with the assistance of the Utopia court, should apply for this recognition/ enforcement.

While the UNCITRAL MLCI should support enforcement and recognition of the stay, it is necessary to understand the implications of Utopia's modifications referred to (naming it's local laws relating to insolvency and it competent court under the Act), in relation to whether they recognize/ enforce, etc. If the Utopia court will not, then the Erewhon court and Liquidator may need to rely on the various communication and cooperation guidelines/ best practices to establish a protocol on how to deal with the situation.

It seems possible that Apex could institute parallel proceedings in Utopia, if it filed for a winding up order. Or, it seems possible Apex could enforce any resulting judgment if the Utopia court would not recognize/ enforce the stay of the Erewhon liquidation.

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

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.

(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 (presumably in Utopia), it would seem to depend if that were one before or after the Erewhon Liquidator was appointed. I assume it would have been done before the Erewhon court appointed a Liquidator, in which case the court in Erewhon should have ideally allowed those proceedings to be heard, including because Nadir's COMI appears to be in Utopia. It would be helpful to know if Erewhon has adopted the UNCITRAL MLCI, since that should support the courts in Nadir waiting for the Apex proceedings to be heard in Utopia. I don't believe Apex could have filed proceedings to wind-up Nadir in Erewhon, or the Erewhon court would have had to consider that before appointing a Liquidator.

If the court in Erewhon had already appointed a liquidator, then as note above, the UTOPIA court should be asked to recognize/ enforce the stay created by the Liquidator.

b) If Apex had obtained an order to wind up Nadir in Utopia, prior to the winding up order in Erewhon, the issue is then of concurrent proceedings, which may be determined the main proceeding vs secondary, etc. The above noted issues will similarly apply, that is, which court may defer to the other as the main proceeding, why they did not proceed under a single main proceeding, etc. While it is noted Utopia adopted the UNCITRAL MLCI, it is not stated that Erewhon has, which would presumably mean it has not. However, in any case, the Utopia court and liquidator will need to determine the recognition and enforcement issues between the parties, including a protocol to cooperate. It would be beneficial to refer to article 29

1.5

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?

The country I would select is Cayman.

The 4 issues:

- 1) If/ how the Cayman Liquidator can access the Debtor's assets in the other countries*

The domestic laws or international instruments that apply to assist the IP: While Cayman has not adopted the UNCITRAL MLCI, being English common law, it would still be looking to precedent/ protocols (particularly if an English Common law country), and also the various communication and cooperation guidance that has been issued to assist, many of which are note above.

Ideally Cayman is determined the COMI, and the courts in the other relevant countries would allow the Cayman Liquidator to conduct the main proceeding, including in the interest of efficiency. The Cayman court should be willing to treat all creditors equally (of a similar class, noting the preferred claims).

- 2) Recognition and enforcement of the stay of proceeding in Cayman in the other countries, to protect the assets for the benefit of the creditors.*

The domestic laws or international instruments that apply to assist the IP: Ideally the other countries would have adopted the UNCITRAL MLCI, and/ or are English/ Common law, which should enhance cooperation. Again, the various recent communication/ cooperation guidelines noted previously could be helpful.

- 3) Accessing/ examining the Directors living in other countries*

The domestic laws or international instruments that apply to assist the IP:

Ideally the courts of the other countries will recognize and enforce the Liquidators powers to examine the directors.

Again, the various recent communication/ cooperation guidelines noted previously could be helpful.

4) Assessing all creditors claims, including in other countries, and including because not all countries treat preferred claims the same.

The domestic laws or international instruments that apply to assist the IP:

The fact that Cayman recognizes that all creditors (if the same or similar class) should be treated equally may help the Cayman Liquidator coordinate this process and avoid the cost of duplicate proceedings in other countries.

Again, the various recent communication/ cooperation guidelines noted previously could be helpful.

For all of the above, Comity, as a general principle (i.e., cooperation, subject to public policy issues), could be helpful.

8

Marks awarded 13 out of 15

* End of Assessment *

TOTAL MARKS 38.5/50

A very good paper that generally addresses the questions asked and substantiates its answers.