



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.

There is no overarching framework regulating all international insolvency instances. Therefore, international insolvency law is an umbrella term that refers to the interplay between state-specific insolvency systems, international private and public law treaties and conventions as well as international organizations, that occurs when dealing with transnational insolvency issues.

2

Question 2.2 [maximum 5 marks]

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

Universality and territoriality refer to two opposing schools of thought in international jurisprudence. In the instance of insolvency proceedings, universality on one hand refers to the idea that only a single insolvency proceeding commenced in a single forum should have jurisdiction over the debtors' assets globally, whereby the insolvency practitioner should be equipped with the mechanisms to administrate the assets regardless of where they are located.

Territoriality on the other hand refer to the idea that separate and concurrent insolvency proceedings should be commenced in each jurisdiction that where the debtors' assets are located. In this instance the insolvency practitioners' exercise of his/her powers over assets would be limited to the national borders.

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.

In recent years the United Arab Emirates (UAE) overhauled their insolvency laws by promulgating the new Law No 9 of 2016 Law Concerning Bankruptcy and thereafter amended same in 2019 to provide for relief in Emergency Financial Crises.

Dubai recently adopted the UNCITRAL Model Law in their Dubai International Financial Centre and Abu Dhabi Global Market, which provided a stable framework for cross-border creditors.

The Kingdom on Bahrain also enacted a new bankruptcy law in 2018 which complies with the UNCITRAL Model Law.

3

Marks awarded 8.5 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 key objective of insolvency proceedings for individuals is the eventual financial rehabilitation from an insolvent debtor to enable the individual to make a fresh start free of historical debt. Insolvency proceedings for individuals are also more humane to a certain extent, as in most jurisdictions, the insolvent debtor might be able to retain

some of his/her possessions or a portion of their income to sustain himself/herself and their dependants.

Corporate insolvency proceedings are aimed at preserving viable enterprises or portions thereof; or failing which, to equitably wind up the corporation to the benefit of the creditors and shareholders and expose offences in order to impose the sanctions on offending persons.

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 a multitude of difficulties that may be encountered when dealing with cross-border insolvency proceedings. Aside from practical issues as language barriers, physical access to assets and ignorance of foreign statutes, harmonization questions relating to which jurisdiction should the insolvency proceedings be instituted; whether foreign states will recognize the foreign order or foreign insolvency practitioner; which state's law should be applied and how these statutes would be enforced internationally should all be considered and overcome.

Each instance should be considered on a case-by-case basis, with specific reference to the states involved. International instruments such as treaties, conventions and adoption of model law pursuant to the harmonization of cross-border insolvency proceedings provides a framework in terms of which the issued above are dealt with.

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.

Acknowledging that an effective insolvency system is of critical importance for a functioning global economy, especially following the advent of globalisation and the accompanying ease of international trade in the 21st century, states has attempted to pursue objectives regarding the harmonization of international insolvency laws- with varying degrees of success.

The Nordic Convention on Bankruptcy is an early 21st century example of success being achieved by Scandinavian states whereby a bankruptcy declared in one of the member states is also recognised by the other member states. The Americas also achieved moderate success in harmonizing cross-border insolvency proceedings in the 1940 Montevideo treaty and the 1928 Havana Convention on Private International Law, although in both instances considerable confusion regarding which of the treaties are applicable to which countries arise.

More recently, the UNCITRAL Model Law on Cross-Border Insolvency along with the accompanying Guide to Enactment, Interpretation and Practice Guide and Case Law (collectively referred to as "UNCITRAL Model Law") seem to have gained considerable traction in the international community. I believe that UNCITRAL Model Law will be critical in the future global economy as various states have already adopted and domesticated it, whilst others are in process of doing so. The Model Law provides the framework in terms of which key questions relating to (i) Access of Foreign Representatives and Creditors to Local Courts, (ii) Recognition of a Foreign Proceeding and Relief, (iii) Cooperation with Foreign Courts and Foreign Representatives, and (iv) Concurrent Proceedings may be harmoniously addressed. In addition, there is existing Case Law which a practitioner may be able to refer to. In essence, I believe that the UNCITRAL Model Law and accompanying literature provides the most-comprehensive framework for international insolvency law.

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

3.5

Marks awarded 12 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.

Considering that Utopia has adopted and domesticated the UNCITRAL Model Law on Cross-border Insolvency ("the Model Law"), Utopia's court shall decide whether to recognise the Erewhon proceedings in accordance with Article 17 of the Model Law.

***In casu* the Erewhon proceedings would be considered as a *Foreign Non-Main Proceeding* as per Article 2(c), read with 2(f) of the Model Law as Apex's centre of main interest is no longer located in Erewhon but has an *establishment* in Erewhon, in which instance the provisions of Article 17(2)(b) shall be satisfied and the Erewhon proceedings would be recognised in Utopia and the various forms of relief listed in Article 21 becomes available.**

However, whilst the application for recognition is pending, the Erewhon liquidators, being a *Foreign Representative* as defined by Article 2(d) of the Model Law may apply to the court from which Apex is suing Nadir for relief in terms of Article 19(1)(a) to urgently stay the execution against Apex's assets.

The Model Law provides the requisite authority for cooperation in cross-border proceedings but does not prescribe how such cooperation should be achieved. Instead, the Model Law leaves it up to each jurisdiction on to decide and apply their own rules.

A good understanding of the issues and the answer could be strengthened by additional detail.

4.5

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.**

Yes, in both the above instances, instead of applying for recognition of a foreign proceeding, the Model Law provisions relating to concurrent proceedings under Chapter 5 would be applicable.

With respect to (a) **the applicable law on the stay of proceedings is that of the local insolvency law, so more information is required on Utopia's insolvency laws on stays. It may be that the same principles would apply to a pending winding-up proceeding as to civil commercial litigation for debt recovery and so an order for a stay may be made.**

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?

Country - South Africa

Conflict of law.

South Africa is not a party to any international treaties or conventions relating to cross-border insolvency proceedings. South Africa has adopted the UNCITRAL Model Law in the Cross-Border Insolvency Act 24 of 2000, however, for all practical purposes this act is not yet in operation. Therefore South Africa shares no reciprocity with other states and South African Cross-Border insolvency law mainly based on common law with international private law and precedent.

Whether or not a foreign court will accept an order from a South African court would therefore be determined on a case-by-case basis. Some elaboration of the consequences of this would be beneficial.

Recognizing the local representative in the foreign jurisdiction.

Again, whether a foreign jurisdiction would recognize a South African insolvency practitioner with the powers to dispose of assets would be determined on a case-by-case basis. In accordance with South African law, the local insolvency practitioner should apply to the relevant South African High Court for an order, called a "process-

in-aid” or “letter of request”, requesting a foreign court to accord recognition to the insolvency practitioner.

Priorities and preferences.

South African Insolvency Law dictates in no uncertain terms a hierarchy of creditor preference. I.e., Secured Creditors being holders of real security over a particular asset; Preferent Creditors being employee claims, tax claims and other statutory obligations; and finally, the common concurrent creditors. Each of these creditors share a portion of the costs of administration.

In casu, where a Should a South African insolvency practitioner is faced with assets located in a foreign state, the laws of the latter state would in likelihood determine whether domestic creditors and costs receive a preference over the international body of creditors. Jurisprudence regarding territoriality versus universality will come into consideration.

Creditor participation

South African insolvency law does not draw a distinction between a local creditor or a foreign creditor. Should a foreign creditor satisfy the statutory provisions relating to claims and successfully proves a claim against an insolvent estate during proceedings, such a creditor will be entitled to participate in proceedings such as voting or giving directions to the insolvency practitioner.

This is a reasonable response. Some elaboration was warranted at times. 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.

6.5

Marks awarded 12.5 out of 15

* End of Assessment *

TOTAL MARKS 41 out of 50

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