



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 can be generally described as the laws governing insolvency proceedings which apply to foreign/international elements of the matter outside the ambit of a single legal system that needs to be taken into account when applying the relevant domestic law.*

There is some scope to elaborate. Perhaps consider the definitions given by Fletcher and Wessels.

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Question 2.2 [maximum 5 marks]

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

*According to the universality theory, all of a debtor's assets and debts internationally should be dealt with under a single insolvency proceeding having extraterritorial effect. Ideally only the courts in one chosen forum where the center of the debtor's interests is located should have jurisdiction. The rationale is that all creditors worldwide should be able to participate in that insolvency proceeding and claim on an equal basis. Such a universal approach would require a very high level of trust and cooperation between foreign legal systems and insolvency proceedings.*

*On the other hand, under the territorialism school of thought, it would be possible to have multiple concurrent insolvency proceeding in relation to the same debtor where the territorial effect of such proceedings would be limited to property, creditors and officeholders within the state where such insolvency proceeding has been opened.*

These theories involve two key aspects of private international law – recognition and effect as well as jurisdiction: For example, with universalism, the jurisdictional aspect requires all States to agree on the place for the one set of insolvency proceedings in respect of the debtor and, to be successful, (2) recognition and effect requires that other States recognise that one set insolvency proceedings 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.**

*The UAE reformed its bankruptcy law in 2016 and in 2019 which implement, amongst other things, measures to address and provide relief for debts during an Emergency Financial Crisis (which is a public event which affects trade or investments in the UAE).*

*Saudi Arabia also enacted its new bankruptcy law in 2018 which provides for various procedures for administering a debtor's assets and liabilities.*

*Dubai also introduced a new insolvency law in 2019 which provides for a new debtor in possession bankruptcy regime and administration process, and adopted a modified version of the UNCITRAL Model Law.*

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

2.5

Marks awarded 8 out of 10

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



Question 3.1 [maximum 5 marks]

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

*The objective for individual insolvencies is to protect the debtor from harassment by his creditors and allow the debtor to have the opportunity to a fresh start by discharging his pre-bankruptcy debts at the end of the bankruptcy process. On the other hand, the debtors will be repaid (to the extent possible, and in certain jurisdiction after reserving certain assets from the insolvent estate to maintain the debtor and his dependents) from contributions from the present and future incomes to the insolvency estate.*

*The objective for corporate insolvencies is to preserve the whole or viable parts of the company's business where possible. The insolvent company will be dissolved at the end of the insolvency process once its affairs have been wound up. Personal liability will only be imposed on responsible persons where there are factors of abuse (eg. fraud or dishonesty).*

There is scope to elaboration for example with respect to exempt assets.

4.5

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.**

*Due to the absence of a global insolvency law system and a global court to deal with insolvency proceedings, the underlying fundamental differences in the domestic law of the various jurisdictions posts various difficulties in cross-border insolvencies.*

*For instance, there is no universal definition of what constitutes "insolvency", and matters such as the position of creditors and their priorities, the validity of security and other rules in relation to setting off or protection of assets under various domestic laws also differ from jurisdiction to jurisdictions. Often, the domestic insolvency laws are also ill equipped in dealing with international or cross-border dimensions.*

*As such, cross-border insolvencies often raise private international laws on (i) the choice of forum to exercise jurisdiction, (ii) the recognition and effect of foreign proceedings and (iii) the applicable choice of law.*

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 21<sup>st</sup> 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.**

*Initiatives to promote harmonisation of domestic insolvency laws includes the introduction of the UNCITRAL Legislative Guide on Insolvency Law in 2004, the ALI - III Global Principles and EU Cross-border Insolvency JudgeCo Guidelines in 2012 and the JIN Guidelines for Communication and Cooperation between Courts in Cross-Border and Insolvency Matters, etc..*

*The effectiveness of these efforts in harmonising domestic insolvency laws will depend on the rate of adoption by the States and any reservations/modification in the adoption of these frameworks in the domestic legislations, and the courts' readiness in granting recognition to decisions of the other courts. Due to the underlying fundamental differences in the domestic insolvency and other substantive and procedural law of the various jurisdiction, flexibility given to the domestic legislations and domestic court will also be crucial for reaching compromises between jurisdictions and encouraging uptake.*

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

4.5

Marks awarded 12.5 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 Erewhon liquidator may apply to the Utopia courts for recognition of the Erewhon proceedings in which the foreign representative has been appointed. Applying the principles under the UNICTRAL Model Law on Cross-border Insolvency, the Erewhon proceedings shall be recognised as a foreign main-proceeding if it is taking place in the State where the debtor has its center of main interest, and as a non-main proceeding if the debtor has an establishment (ie a place of operations where the debtor carries out non-transitory economic activity).*

*As Nadir's registration and head office is in Utopia, Nadir's registered office is presumed to be the center of its main interests in the absence of proof to the contrary (Model Law Article 16(3)). However, since Nadir's registration and head office was only moved to Utopia a month ago, it may be possible to argue that the Erewhon is Nadir's center of its main interest. If the Erewhon proceedings is recognised by the Utopian court as a foreign main proceeding, then the commencement or continuation of the Apex action, being an individual proceeding concerning Nadir's assets, rights, obligations or liabilities, will be stayed. (Model Law Article 20) The Model Law does not expressly indicate the relevant date for determining the centre of main interests of the debtor, although the Guide to Enactment and Interpretation (para 30) provides that the date of commencement of the foreign proceedings is the relevant date to be considered in making the determination.*

*There is no requirement of reciprocity under Model Law, so whether Erewhon has adopted the Model Law is not relevant. However, the Cross-border Insolvency Act of Utopia may also set out provisions regarding how application for recognition will be processed and recognised (e.g. requirements for notice of application), and may leave the Utopian Courts with broad discretions for deciding whether to recognised and provide assistance to the Erewhon liquidator. The Model Law also does not included harmonized conflict of law rules for adoption, so the Cross-border Insolvency Act may be relevant in determining which law should be applicable in the Utopian proceedings.*

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.**

*As a general rule, relief granted to a recognized foreign proceeding should be consistent with the relief granted in the domestic proceedings, irrespective of whether such foreign proceeding was recognized before or after the commencement of the domestic proceeding. The foreign recognition order may be adjusted based on the outcome of the domestic proceeding.*

*However, the domestic court orders already granted prior to the recognition proceedings will not be affected.*

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

0.5

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?**

*Assuming that the company is incorporated in Hong Kong, which has not adopted the UNICTRAL Model Law, the following four key international insolvency issues will be addressed under domestic laws:*

- 1. Whether the court has jurisdiction to exercise jurisdiction over the insolvent proceedings: this would also depend on whether the relevant contracts are governed by any exclusive jurisdiction clause or arbitration clauses*
- 2. If there are concurrent foreign proceedings, whether such proceedings will be recognised and whether assistance will be granted to such foreign proceedings/insolvency representatives appointed by foreign courts. The court's power to grant recognition and assistance is based on its domestic common law.*
- 3. choice of law to apply to the matter: the courts will apply domestic law in relation to conflicts of law. For real property and other assets, the lex situs rule will typically*

*apply. Foreign creditors will not be preventing from taking part in domestic proceedings against the debtor.*

*4. whether the domestic proceeding and judgement will be recognised extraterritorially: a Hong Kong winding up order purports to have international effect but ultimately whether a Hong Kong judgement will be recognised in the foreign jurisdictions will be determined by the law of such foreign jurisdiction and whether there is any cooperation mechanism between Hong Kong and such jurisdictions.*

**For another approach that is closely applied to the facts, see the 'Model' Answer for four key international insolvency issues raised by the facts and facing the insolvency representative in this scenario.**

5.5

Marks awarded 11 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.**