



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.

It refers to the law or laws applicable to a situation where insolvency occurs in such a way that transcends the confines of a single set of legal system, so that a single set of domestic legal system cannot be immediately and exclusively applied without regard to foreign legal system [I Fletcher, 2005]

This is an authoritative quote. The answer would be improved if it also included information in your own words to indicate your personal understanding of the explanation also.

1.5

Question 2.2 [maximum 5 marks]

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

The concept of universality provides that there should only be one insolvency proceeding for all of the debtor's assets and debts regardless of where they are located or based at, and once proceedings are opened, there should be no other concurrent insolvency proceedings relating to the same debtor and its assets. The officeholder of that insolvency proceeding should then be provided with the tools to control the debtor's assets. All creditors of that debtor should then have the opportunity to participate in that insolvency proceeding.

It is the opposite of territoriality, which is a concept that separate insolvency proceedings may be commenced in every state / jurisdiction where the debtor holds assets and the proceedings are limited to a specific territory, i.e. within the state / jurisdiction. In this respect, there can be multiple insolvency proceedings concerning the same debtor that are running concurrently. It is restricted in the sense that it addresses local interests within the domestic market, and it carries on independently from any foreign insolvency proceedings.

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.

4

Question 2.3 [maximum 3 marks]

Describe three recent examples of developments in the Middle East region to reform domestic insolvency laws or to address international insolvency issues.

First example is United Arab Emirates' ("UAE") Federal Decree-Law No. 19 of 2019 on Insolvency which regulates insolvency matters of natural persons. This came into force in January 2020.

Second example is Saudi Arabia's enactment of the Rules of Cross-Border Bankruptcy Proceedings on 16 Dec 2022 which adopts / implements the UNCITRAL Model Law on Cross-Border Insolvency.

Third example is Bahrain's Legislative Decree No. 22 of 2018 Promulgating the Reorganization and Bankruptcy Law that came into force in November 2018.

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 differences in objectives between the two have been described by Sealy and Hooley as follows:

In so far as insolvency for individuals, the objectives are:

- a. To protect the debtor from harassment by his creditors.
- b. To enable the debtor to make a fresh start.
- c. To reduce the indebtedness by making contributions from present and future incomes to the estate while at the same time taking his personal circumstances into consideration.

In so far as insolvency for corporations, the objectives are:

- a. To preserve the business.
- b. To impose personal liability on the persons responsible that led to the corporations' insolvency.

There is scope to elaborate, including with respect to exempt property.

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.

There are various difficulties such as the following:

1. The difficulty in finding a common insolvency language, as an insolvency phrase / term may differ in different states / jurisdictions. It is so difficult that international conventions and instruments do not attempt to provide a proper or standard definition.
2. Conflicts of law, where insolvency proceedings of different states / jurisdictions may be in conflict with one another, and there is no clear answer as to which may prevail.
3. The uncertainty in whether a particular state / jurisdiction may recognise the insolvency proceedings of another state, especially when the former does not have any domestic laws that adopt / recognise foreign insolvency proceedings.
4. The absence of a universal approach to insolvency where some states may be pro-debtors while others may be pro-creditors, and the difficulty in reconciling between these two approaches.

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.

The following are some examples of multilateral steps to promote harmonisation of domestic insolvency laws:

1. UNCITRAL Legislative Guide on Insolvency Law (2004)
2. UNCITRAL Model Law on Cross-Border Insolvency (1997)
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. UNCITRAL Model Law on Recognition and Enforcement of Insolvency-Related Judgments with Guide to Enactment (2018)
4. European Insolvency Regulation (Recast) 2015

In my opinion, the impact of the above are significant in addressing international insolvency issues as they set an international standard for countries across the globe to follow. As the world progress further in the 4th industrial revolution where businesses are transacted in the borderless world, an international standard of law or guideline is much needed to give businesses and markets a sense of certainty and confidence.

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

3.5

Marks awarded 10.5 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 consider filing proceedings in Utopia for recognition of the winding-up order made by the Erewhon court pursuant to Article 15 of UNCITRAL Model Law on Cross-border Insolvency ("Model Law") which has been adopted by Utopia.

Where the Erewhon liquidator believes that Apex's court action against Nadir in Utopia poses a risk to Nadir's assets in Utopia, the Erewhon liquidator has the option pursuant to Article 19 of the Model Law of seeking reliefs upon the filing of the recognition application to preserve Nadir's assets pending determination of the recognition application. This includes seeking a stay of execution of Nadir's assets or entrusting the administration or realisation of Nadir's assets in Utopia to Erewhon liquidator.

Where the Erewhon liquidator is successful in the recognition application, Apex's court action against Nadir should be automatically stayed pursuant to Article 20(1) of the Model Law. In any event, the Erewhon liquidator may apply, pursuant to Article 24 of the Model Law, to intervene in Apex's court action and to stay the court action in light of the recognition of the winding-up order.

There is some scope to elaborate re no need for reciprocity.

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.**

(a) No, but the fact that Apex had filed winding-up proceedings against Nadir in Utopia would allow the Erewhon liquidator further options, where the Erewhon liquidator may cooperate with the Utopia court hearing the winding-up proceedings pursuant to Article 25 of the Model Law. In such case, the Erewhon liquidator may assist and/or provide information to the Utopia court hearing the winding-up proceedings.

(b) In such circumstances, the Erewhon liquidator should still apply to recognise the Erewhon winding-up order pursuant to Article 15 of the Model Law. However, any interim reliefs that may be made under Article 19 of the Model Law (before recognition) and Article 21 of the Model Law (post-recognition) would have to be

consistent with the winding-up order obtained by Apex under the Utopia court. (Article 29 of the Model Law).

2

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?

Singapore

Where the corporate debtor is incorporated in Singapore and has its head office in Singapore, and the Singapore High Court has ordered the corporate debtor to be wound up, the applicable law is the Insolvency, Restructuring and Dissolution Act 2018 ("IRDA") which adopted the Model Law pursuant to Section 252 of IRDA.

The 4 key international insolvency issues facing the Singapore liquidator are as follows:

- 1. Whether other states contain domestic law that applies the Model Law or that consist of provisions that may recognise a foreign insolvency proceeding (i.e. the Singapore winding-up order).***

In respect of this issue, it may be necessary to determine whether the foreign state applies the Model Law or has legal provision that recognises foreign insolvency proceedings.

- 2. The existence of domestic laws that may assist foreign insolvency proceeding such as arrest or examination of directors who are residing in that state / jurisdiction.***

In respect of this issue, it may be necessary to determine whether the foreign state applies the Model Law or has legal provision that recognises foreign insolvency proceedings.

3. *The differing laws concerning the rights and interests of creditors from various jurisdictions (i.e. issues of priorities and preferences).*

In respect of this issue, private international law may be relevant to determine the rights and interests of those creditors.

4. *The conflicting interests of various State creditors such as the State itself, or the tax authorities of that State.*

In this respect, public international law may be relevant to determine the rights of differing states.

This is a reasonable response. 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.

5.5

Marks awarded 12 out of 15

* End of Assessment *

TOTAL MARKS 39/50

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