



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.

International Insolvency law means a collection of laws regulating individuals, businesses, or even government entities, who are financially distressed and unable to pay their debts who have connections to more than one country and thus are subject to more than one set of laws. International Insolvency law is the way in which those various foreign laws are applied and enforced in cases where one set of laws cannot be applied due to there being more than one jurisdiction involved.

2

Question 2.2 [maximum 5 marks]

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

The difference between the concept of universality and territoriality in cross-border insolvency is that in universality, there is one insolvency law that governs all insolvency proceedings in any territorial jurisdiction outside where the main proceeding may have been brought. In universality, any law has a universal effect on all territories so realistically, there is no issue of cross-border insolvency because the outcome applies anywhere. However, territoriality is different because it's based on the idea that each territory is isolated, whereas the outcome of a proceeding in one territory will not impact a different territory. In a cross-border insolvency proceeding, territoriality would lead to the necessity for multiple proceedings in every jurisdiction that may have assets or an interest because the outcome from another jurisdiction would not apply where the assets may be located.

Also, note, these theories involve two key aspects of private international law - recognition and effect as well as jurisdiction:

For example, with universalism, (1) 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.

Three examples of developments in the Middle East region to reform domestic insolvency laws or to address international insolvency issues are: (1) the launch of the first regional comparative survey of insolvency systems in 2009; what impact did this have on reforming domestic insolvency laws or addressing international insolvency issues in the Middle East?

(2) the adoption of the model Law on Cross-Border Insolvency by Bahrain in 2018; and the adoption of the Model Law on Cross-Border Insolvency in 2019 by the Dubai International Financial Centre.

2

Marks awarded 7.5 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 objective for insolvency for individuals centres around the rights of the Debtor and allowing them a new start. The insolvency is to help protect the debtor and reduce the indebtedness of the debtor in a way that is proportional to the personal circumstances of the case - by either having the Debtor make payments from present and future

income or allowing assets to be liquidated to satisfy the debts. In contrast, Corporations are not afforded the same rights and considerations as individuals in insolvency proceedings. The main objective for a business is to preserve the business if possible and not necessarily protect any of the individuals who may have contributed to the company. Businesses are not afforded the same ability to exempt property to retain assets and the in some cases the individual members or owners are even pursued for the recovery of business assets.

There is scope to elaborate, for example with respect to personal liability for corporate wrongdoing.

4

Question 3.2 [maximum 5 marks]

Write a brief note on the difficulties that may be encountered when dealing with insolvency law in a cross-border context relating to pertinent differences in the relevant systems.

Some difficulties that may arise when dealing with a cross-border context include: (1) making sure that terminology means the same thing between countries, such as what defines an asset; (2) making sure no special rules exist in one of the involved country, such as no collective procedures for individuals; (3) figuring out what approach to take and that the countries may be pro-debtor or pro-creditor and not align easily; and (4) differences in domestic laws such as securities laws which can change outcome.

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

3

Question 3.3 [maximum 5 marks]

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

Some recent multilateral steps that have been taken in the 21st century to promote harmonisation of domestic insolvency laws include the adoption of the UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation adopted in 2009, the creation of the Guidelines Applicable to Court-to-Court Communications in Cross Border Cases that was finalized by the ALI in 2001 and valuable in airline restructurings in 2021, the beginning of the Judicial Insolvency Network and their Guidelines for Communication and Cooperation between Courts in Cross-Border Insolvency Matters, creation of the International Institute for the Unification of Private Law texts on various issues, and further work from groups like INSOL, III, and IBA.

I think that these steps and projects are valuable in moving forward towards the goal of harmonisation of domestic insolvency laws. However, I don't think that overall the

goal is achievable in the current culture. These texts are important and are applicable to most nations who have formal, structured legal systems and I think they are instructive to helping create uniform approaches to laws. In reality though, there will always be countries and nations that do not have the same formal structured legal system and the same values in order to allow for a uniformed system. Even when there are laws to make things uniform, I also think that just doesn't happen. You can see it in the American Bankruptcy System. Here in America, the Statutes created by the government are the binding law for bankruptcy courts, every state must follow them. One of those laws was the creation of a US Trustee System to oversee bankruptcy cases. Even with the creation of this system, two US states have different system of the Bankruptcy Administrator and do not have the US Trustee. I think this is an example of how even if the laws are uniform, the application and reality is it will never be uniform. 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.

Under Chapter III, Article 15, the foreign representative (likely the liquidator) would need to apply to the court for recognition of the foreign proceeding in which the foreign representative has been appointed. If the qualifications are met for Article 17, the foreign proceeding shall be recognized in the other jurisdiction. Once recognized, the court may grant a stay of execution of the Debtors assets which would stop the proceedings in this case or could allow concurrent cases to move forward. Once there has been recognition, under Chapter V, Article 28 of the Model Law on Cross-border Insolvency, the proceeding can continue even with the foreign main proceeding so long as the debtor has assets in the state in which the proceeding is commenced (for this analysis, we would need to know whether or not there are assets in Utopia). The two suits could run concurrently and the suit in Utopia could not be stopped by the liquidator, however, there would need to be coordination and communication to ensure the outcome of the two suits are consistent. Upon the recognition of the judgment the foreign representative is also given standing to initiate any proceeding that ensures that actions are not taken that are detrimental to creditors.

There is scope to elaborate regarding 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) The additional facts in subpart a do not have an impact on the answer to the question above. The above analysis assumes that no judgment had been issued in regard to the Apex proceedings and therefore, it would still fall under Chapter III, Article 15 and 17.

(b) In this case the analysis would in fact change. Here, the court order in Utopia would be the "main proceeding" and therefore could not be stopped by a later filing or order. However, what would need to happen in that case is that the Apex liquidator (assuming one was assigned) would need to file for the recognition of the judgment in Erewhon so that the any further winding up order issued shall be consistent with what was already ordered.

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

1

Question 4.3 [maximum 8 marks]

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

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

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

Country Picked: Denmark

Four key international insolvency issues would be:

- 1. The first issue would be determining the location of the other assets. Denmark follows the Nordic Convention which gives recognition and enforcement of a proceeding in other member states. Therefore, if the property was in other states who are members (Finland, Iceland, Norway, and Sweden) then the order applies to property in any of the states without the need for further formalities.*
- 2. If the assets are not in a state which is part of the Nordic Convention then the second issue is what the laws are for each other state in which assets are located. The representative would likely have to file for recognition of the proceeding in any other state where the Debtor has known assets and try to bring those assets into he estate. Denmark is also a member of the EU and therefore, the EU Rules on cross-border insolvency would likely apply to what the process would be for those assets.*
- 3. Ancillary to the second issue, would be whether or not foreign jurisdictions recognize the authority of a judgment or order entered in Denmark. If a winding up order was entered then it would matter whether or not another jurisdiction would recognize that. And the opposite is also an issue, whether or not any order from another state was previously entered prior to the current proceeding and what affect the Denmark court would afford those orders. To determine this, one would need to look at the Nordic Convention, the EU Rules, and the rules of any additional jurisdiction.*
- 4. The fourth issue would be if any of the other creditors bring actions against the creditor and what affect that may have. We know that there are creditors in the other states. The Nordic Convention, gives an immediate general stay of creditor action which under Danish law is considered extraterritorial and bars enforcement actions and legal proceedings in foreign jurisdictions.*

This is a satisfactory 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.

6

Marks awarded 11.5 out of 15

*** End of Assessment ***

TOTAL MARKS 37.5/50

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