



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: 5 out of 10

QUESTION 2 (direct questions) [10 marks]

Question 2.1 [maximum 2 marks]

Explain what the term "international insolvency law" means.

Based on our analysis, we can define international insolvency law as a set of rules and principles aimed at resolving economic issues that arise in one country but have consequences in one or more other countries. The financial difficulties that a trader or a company engaged in cross-border economic exchanges may experience have prompted the international community to regulate, in an orderly manner, how a debtor can preserve their business and prevent widespread non-compliance with payment obligations from jeopardizing the viability of the business and its relationships with other parties, or how an orderly liquidation of their assets can take place with the proceeds being used to settle debts owed to creditors. International

insolvency law addresses issues related to jurisdiction, international cooperation, recognition of foreign procedures, and the enforcement of judgments.

2

Question 2.2 [maximum 5 marks]

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

The difference between these concepts is quite clear. In the universality approach, a single insolvency procedure is discussed, under the jurisdiction of the location where the debtor has its principal place of business, encompassing the debtor, their debts, and assets, without the possibility of another procedure being enforced against the debtor's assets. It is a procedure in which all of the debtor's creditors, regardless of their country of residence, will have the opportunity to participate on an equal footing to claim their debts.

This procedure aims to reduce costs; however, the parties must have absolute confidence in the legal system of the country where the insolvency procedure is conducted.

Conversely, the territorialism principle promotes the opening of insolvency proceedings in each state or jurisdiction where the debtor has assets. This results in the debtor having to undergo two or more insolvency procedures simultaneously, under different laws. Similarly, this causes creditors to invest greater financial resources if the assets within their jurisdiction are insufficient to obtain payment of their debts. Consequently, they may need to pursue their claims in other jurisdictions to recover the full amount of their credits. These proceedings may encounter complications such as incompatible legislation or lack of cooperation between states.

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.

- *United Arab Emirates (UAE) - Business Bankruptcy Law: In 2019, the United Arab Emirates introduced a new Business Bankruptcy Law aimed at modernizing and enhancing the insolvency process for businesses within the country. This law establishes a legal framework for the restructuring and bankruptcy of companies, enabling financially troubled enterprises to seek*

protection and reorganization. It also introduced provisions for debt mediation and conciliation before declaring bankruptcy.

- *Saudi Arabia - Commercial Insolvency Law: In 2018, Saudi Arabia enacted a new Commercial Insolvency Law with the objective of improving the business environment and safeguarding the rights of creditors and debtors in cases of insolvency. The law outlines procedures for the restructuring and liquidation of insolvent companies, along with provisions allowing for the continuation of commercial operations during the insolvency process.*
- *Cross-Border Recognition in Qatar: In 2020, Qatar implemented measures to address international insolvency issues and the recognition of foreign insolvency proceedings. These measures included the enactment of regulations facilitating the recognition of foreign insolvency and cooperation with foreign courts. This streamlines the resolution of insolvency cases involving assets and parties in different international jurisdictions.*

3

Marks awarded 9 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 insolvency procedure for natural persons aims to rectify their financial situation through the settlement of debts with each of their creditors, thereby achieving a fresh start. For the majority of natural persons, their primary concern is the safeguarding of assets necessary for their subsistence, such as the residential property and real or personal property required for the continuation of their profession, which constitutes a central concern.

Through an insolvency procedure, the objective is to minimize or even eliminate the pressure exerted by creditors who solely seek the collection of outstanding amounts. In this process, these creditors, often through a supervised payment plan, will receive the highest percentage of their credits, enabling the debtor to embark on a new financial beginning. This not only benefits debtors by affording them a "fresh start" but also provides creditors with a structured avenue to recover at least a portion of what is owed to them. Prevention of harassment and exempt property are also relevant

On the other hand, one of the primary objectives of a company is to ensure the continuity of its business and prevent mismanagement or wrong decisions from leading to the company's liquidation. The insolvency procedure entails the protection of jobs and the maximization of the company's value for the benefit of the creditors.

The act of liquidating a company has significant repercussions on the economy of the country where its principal administration is located, due to the loss of jobs and the impact on the businesses with which it had ongoing dealings. Therefore, the primary aim should always be to maintain the business's viability in order to preserve employment opportunities and the local economy.

It is also relevant to consider [imposition of personal liability on the responsible persons](#) 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.

After having analysed the introduction of international insolvency law, I find that the main difficulties are as follows:

*1.- **Applicable Legislation:** Each country has its own legal framework for insolvency cases, and its structure. Only through International Treaties or Conventions is it possible to establish cooperation among nations, allowing for greater harmonization and coordination in cases of cross-border insolvency.*

2.- As we have seen throughout this chapter, there are systems that lean towards creditor protection, while others aim to preserve the economic source by reorganizing the company.

3.- On the other hand, a difficulty arises when the legislation of the country where the debtor has its principal place of business is not compatible with the legislation of the country where the debtor's assets are located. This situation can disadvantage creditors, as it allows the debtor to evade their debts without any penalty, preventing creditors from using asset sales for debt collection.

4.- Finally, the issue of language and the cultural differences of each country hinder communication and the involvement of various stakeholders who could support the insolvency process, whether for restructuring or orderly liquidation.

[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.

Currently, there are significant organizations, such as UNCITRAL, which work and establish working groups focused on addressing specific circumstances, such as improving communication between nations and eliminating formalities that may hinder the insolvency process, thereby enhancing its efficiency and expediency.

INSOL is an academic institute dedicated to the education and training of experts worldwide, contributing to the strengthening of the international insolvency framework. This can assist countries in obtaining guidance to streamline the adoption of insolvency legislation and specific financial structures.

International cooperation among nations is a valuable tool. Recognizing the need to allow the enforcement and recognition of foreign insolvency proceedings due to the rapid growth of international trade is a significant multilateral step. This encourages a safer and more stable exchange of goods, benefiting both exporting and importing countries, as it reflects a clear path to economic strengthening for all parties involved.

Please see the model answer. Elaboration regarding steps and impacts is warranted.

3

Marks awarded 10 out of 15

QUESTION 4 (fact-based application-type question) [15 marks in total]

Nadir Pty Ltd (Nadir) is a company registered in Utopia. Originally it was incorporated in the neighbouring country of Erewhon before moving its registration and head office to Utopia one month ago. Apex Pty Ltd (Apex) is incorporated and has its head office in Erewhon. Apex and Nadir enter into a contract by exchange of emails between their head offices for Apex to supply goods to Nadir in Utopia. Nadir has failed to pay for the goods which have been delivered in accordance with the contract. Apex issues court proceedings against Nadir in Utopia for monies owing for the goods sold and delivered.

Meanwhile, Nadir also owes monies to creditors in Erewhon. One Erewhon creditor obtains a court winding-up order against Nadir in Erewhon and a liquidator is also appointed by that court.

If you require additional information to answer the questions that follow, briefly state what information it is you require and why it is relevant.

Does Nadir have branches in Erewhon? Does Nadir possess assets in Erewhon? It is crucial to determine the jurisdiction of the Erewhon court.

Are there any cross-border insolvency agreements between Utopia and Nadir? It is essential to ascertain the existence of a collaboration framework for enforcing a potential judgment.

Does Utopia have specific legislation concerning insolvency systems? Does Erewhon have specific legislation concerning insolvency systems? It is imperative to establish whether cross-border cases are recognized by law and whether it will be possible to homologate the insolvency procedure.

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.

Requesting the approval of the insolvency procedure is advised in order to preserve the insolvency estate, wherein the debtor's assets are not executed upon until a decision is made regarding the viability of the company, either through a repayment plan or by means of financing (DIP financing).

Detailed application of the articles relevant for the recognition and relief, including on COMI/establishment and on foreign main / non-main proceedings) was required for this fact-based application-type question. The MLCBI is significant for its provisions on recognition and relief in 4.1.

1

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.**

If there is a difference... if there is already a court order, the appropriate course of action is to seek recognition of the legal force of that judgment.

If the matter has not yet been resolved, there is no final resolution ordering the liquidation, so one can only appear for the recognition of the debt and, if necessary, seek the homologation of the procedure. Likewise, it is possible for the creditor to appoint a person to assist in seeking reorganization to facilitate the collection of the debts.

The MLCBI is significant for its provisions on concurrent insolvency proceedings in 4.2.

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?

The country of incorporation of the company is Mexico, and the four key issues it may face are as follows:

1.- Obtaining the necessary financial resources to integrate the insolvency estate: The representative must secure the financial resources required to assemble the insolvency estate. This entails gathering and managing the debtor's assets to pay creditors, in accordance with the regulations set forth in the Mexican Commercial Insolvency Law.

2.- Homologation procedure for foreign insolvency proceedings seeking to execute assets in Mexico: The Mexican Commercial Insolvency Law establishes a homologation procedure for foreign insolvency proceedings that intend to execute assets in Mexico. This process necessitates prior analysis and judgment before recognition is granted.

3.- Language barriers as a potential obstacle in other jurisdictions: Language may present a significant hurdle when attending other legal forums and defending the

insolvency proceedings under their responsibility. Overcoming this challenge may require legal assistance and translation services to ensure effective representation abroad.

4.- Coordination across multiple jurisdictions: If necessary, the representative must navigate the coordination of insolvency proceedings across multiple jurisdictions. In such cases, the representative must interact with each jurisdiction, informing them of the insolvency proceeding initiated in Mexico to consolidate the insolvency estate and prevent inequitable executions.

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.

4

Marks awarded 5.5 out of 15

* End of Assessment *

MARKS AWARDED 29.5/50

A satisfactory paper that identifies some of the issues raised, generally substantiating its answers satisfactorily. More detail would have strengthened a number of answers.