



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.

Wessels¹ describes international insolvency law as a body of rules concerning certain insolvency proceedings or measures which cannot be fully enforced because the applicable law cannot be executed immediately and exclusively without first considering the international aspect of a given case.

Fletcher² also describes international insolvency law as a situation that occurs where the circumstances transcend the confines of a single legal system. This means that a

¹ B Wessels, *International Insolvency Law*, (Kluwer Law International, 2006)

² I Fletcher, *Insolvency in Private International Law* (Oxford University Press, 2nd ed, 2005)

single set of domestic insolvency provisions cannot be immediately and exclusively applied without regard to the issues raised by the foreign elements of the matter.

These are authoritative sources. While you have combined their information into other words, it could perhaps better convey your personal understanding.

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 covering all of the debtor's assets and debts worldwide. This means that only one set of insolvency proceedings should be opened, for example in the State where the debtor has its centre of main interests (COMI).

This concept is based on the approach that all of the debtor's assets should be included in the single insolvency proceeding and all creditors around the world should have the opportunity to participate in the proceedings on an equal basis.

On the other hand, the concept of territoriality provides that insolvency proceedings can be opened in every State and jurisdiction where the debtor holds assets. This can therefore lead to multiple insolvency proceedings running concurrently with each other which is known as plurality of proceedings.

This approach benefits local creditors in the relevant State, however smaller creditors will face difficulties in participating in the other ongoing insolvency proceedings in other States.

This approach could result in the debtor being declared insolvent in one State (i.e. where the debts are located) but not in another State (where the debtor's assets are located).

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.

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.

A number of Middle East States have recently reformed their domestic insolvency laws.

The UAE has adopted the Federal Law by Decree No. (9) of 2016 on Bankruptcy and the Federal Decree Law No. (19) of 2019 on Insolvency.

Saudi Arabia has adopted the Saudi Arabian Bankruptcy Law in 2018.

Bahrain and the Dubai International Finance Centre also adopted the Model Law on Cross-Border Insolvency in 2018

what impact did this have on reforming domestic insolvency laws or addressing international insolvency Issues in the Middle East?

3

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.

Sealy and Hooley³ set out the differences between insolvency for individuals and corporations as follows.

The objectives of insolvency for individuals include:

- (1) protecting the individual from harassment by their creditors;*
- (2) allowing the individual to make a fresh start - particularly in cases where the insolvency has not been brought about by the conduct or actions of the individual; and*
- (3) reducing the indebtedness of the individual by making contributions to the estate (from both present and future income).*

The objectives of insolvency for corporations include:

- (1) preserving the business (or at least the viable parts of the business); and*
- (2) imposing personal liability on responsible persons (i.e. directors) where the concept of personal liability has been abused.*

Some principles apply to both individual insolvency and corporate insolvency:

- (1) ensuring pari passu distribution to creditors as far as possible, save where creditors have priority (i.e. secured creditors);*
- (2) ensuring secured creditors deal with the debtor (individual or company) and other creditors fairly;*
- (3) investigating the reasons for failure and the insolvency; and*
- (4) to reclaim assets where the debtor dealt with those assets improperly in the period prior to insolvency.*

Another example of a difference between corporate insolvency and individual insolvency is the concept of exempt or excluded assets. It is only in individual insolvency where some insolvency systems allow the insolvent individual to retain

³ *M A Clarke et al, Commercial Law (Oxford University Press, 2017), chap 28.*

some of their assets that are required by the individual or their dependents. The concept of dissolution also only applies in corporate insolvency.

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.

Friman⁴ notes that one of the first issues that arises when dealing with insolvency law in a cross-border context is finding a common language for insolvency.

For example, a short-term inability to service debts can be considered sufficient for the commencement of insolvency proceedings in some jurisdictions but not others. This means it can be difficult to define the term insolvency at an international level, as evidenced by the fact that some international conventions and instruments do not even attempt to include a definition of insolvency.

Omar⁵ also notes that differences in insolvency systems can have a specific impact on the position of creditors and their priorities in insolvency processes. There are also qualifications in different jurisdictions (i.e. security, retention of title clauses and other title protection measures available to creditors).

Westbrook⁶ has summarised key issues in cross-border cases, including: (i) standing and recognition of the foreign representative, (ii) moratorium on creditor actions, (iii) priorities and preferences, (iv) discharges and (v) conflict of law issues. There are 9 factors listed by Westbrook

Commentators argue that the fundamental differences between legal systems are both the root problem of cross border insolvencies and the major obstacle to their solution. As such, commentators argue that the goal of harmonisation must continue to be pursued.

One of the biggest differences between systems is that some systems are pro-creditor (i.e. follow a more conservative approach in relation to granting a discharge of debt to debtors) and some systems are pro-debtor (i.e. follow a more liberal approach towards the discharge of debt).

4.5

Question 3.3 [maximum 5 marks]

⁴ H. Friman

⁵ P J Omar "The Landscape of International Insolvency" (2002) 11, IIR 173

⁶ J L Westbrook, "Global Insolvency Proceedings for a Global market: The Universalist system and the Choice of a Central Court" (2018) 96 Texas Law Review

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 UNCITRAL Legislative Guide on Insolvency Law was introduced in 2004 and was proposed to be used as a reference by national authorities and legislative bodies when preparing new laws and regulations or reviewing the adequacy of existing laws and regulations. This guide addresses a wide range of aspects of insolvency law and has been expanded in recent years. The Guide recommends a modern, harmonised and fair frameworks to effectively address cross border of insolvency law.

Fletcher and Wessels have annexed recommendations on Global Rules on Conflict-of-Laws Matters in International Cases to the ALI-III Report on Transnational Insolvency: Global Principles for Co-operation in International Insolvency Cases (2012).

In 2010 the European Parliament issued a report on the harmonisation of insolvency law at EU level which outlined the differences between the domestic insolvency laws across the EU. The report identified a number of areas where harmonisation at EU level could be achievable, including: (i) a common test of insolvency as a requirement of a formal insolvency process, (ii) directors' responsibilities and (iii) the formal aspects of lodging and dealing with claims in a formal insolvency.

Furthermore the European Commission launched an action plan on building a capital markets union in 2015.

These steps show that great progress is being made in the attempts to harmonise international insolvency law in order to address the issues faced by all stakeholders in a cross border insolvency. However, these steps are mainly guidance or soft law which are not binding and serve as recommendations or suggestions only. As a result, the impact of these initiatives and multilateral steps may be limited unless different States take steps to incorporate these proposals into their own domestic laws.

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

4.5

Marks awarded 14 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 would be deemed a foreign representative for the purposes of the Cross-border Insolvency Act of Utopia (which incorporates the UNCITRAL Model Law on Cross-border Insolvency into the domestic law of Utopia) (the "Act").

Article 15 of the Act would allow the liquidator to apply to the court in Utopia for recognition of the foreign proceeding in Erewhon where the liquidator was appointed.

The court in Utopia can then decide whether to recognise the foreign proceedings in Erewhon in accordance with Article 17 of Act.

From the point at which the liquidator files an application for recognition, until the application is decided upon, the court in Utopia may grant relief of a provisional nature under Article 19 of the Act, including staying execution against Nadir's assets or suspending the right of Nadir to transfer, encumber or otherwise dispose of its assets.

Where the court in Utopia approves the recognition of the Erewhon proceedings, the liquidator can apply for the court to grant relief including staying the commencement of individual actions against Nadir's assets, staying execution against Nadir's assets, suspending the right of Nadir to transfer, encumber or otherwise dispose of any of its assets under Article 21 of the Act.

The court can also entrust the administration or realisation of all or part of Nadir's assets located in Utopia to the liquidator.

Under Article 18 of the Act, the liquidator is required to inform the court in Utopia of any substantial change in the status of the recognised foreign proceedings in Erewhon and any other foreign proceedings in relation to Nadir that become known to the liquidator.

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.

Under the Act (as defined in the answer to question 4.1), the recognition of the Erewhon proceedings would not prevent the commencement of proceedings in Utopia (and once commenced the Utopia proceedings would not terminate the recognition already provided to the Erewhon proceedings).

(b) Apex had obtained a court order to wind-up Nadir in Utopia prior to the Erewhon winding-up order.

If Apex had already obtained a court order to wind-up Nadir in Utopia prior to the Erewhon, this would mean there would be concurrent proceedings and the provisions of Article 29 of the Act (as defined in the answer to question 4.1) would apply.

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?

The company is incorporated in England.

The issues that arise are:

Forum - whether the court can and will hear the matter. The court will examine the connection of the company with the jurisdiction, i.e. the fact it is incorporated in the jurisdiction and has its head office in the jurisdiction.

Recognition of foreign proceedings in the same matter - in the event there is a foreign judgment in the same matter, i.e. a judgment in relation to the company's assets in a different jurisdiction, the court will need to decide whether to recognise the judgment.

Choice of law - once the court has decided that it will hear the matter, it may need to decide upon the choice of law to apply. As a common law system, England allows the parties to invoke choice of law where a foreign law might be to the advantage of one of the parties.

The insolvency practitioner may also face issues with standing and their recognition as a foreign representative in relation to proceedings commenced in other jurisdictions.

The relevant instruments for these issues are the Insolvency Act 1986 and the Cross-Border Insolvency Regulations 2006 which incorporates the UNCITRAL Model Law on Cross-Border Insolvency into English domestic law.

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. Then apply the current English laws on CBI to such issues.

4

Marks awarded 11 out of 15

*** End of Assessment ***

MARKS AWARDED 41/50

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