



FORMATIVE ASSESSMENT: MODULE 1

INTRODUCTION TO INTERNATIONAL INSOLVENCY LAW

This is a formative assessment relating to Module 1 and is designed to provide candidates on the Foundation Certificate course with some direction and guidance as to the form and content of assessments on the course as a whole. The submission of this assessment is not compulsory and the mark awarded will not count towards the final mark for Module 1 or the course as a whole. However, students are encouraged to submit this assessment as part of their orientation for the submission of the formal (summative) assessments for all the modules on the course.

The Marking Guide for this assessment will be made available on the web pages for Module 1 as well as the Course Administration page for this course after the submission date of 15 October 2023.

INSTRUCTIONS FOR COMPLETION AND SUBMISSION OF ASSESSMENT

Please read the following instructions very carefully before submitting / uploading your assessment on the Foundation Certificate web pages.

- 1. You must use this document for the answering of the assessment for this module. The answers to each question must be completed using this document with the answers populated under each question.**
- 2. All assessments must be submitted electronically in MS Word format, using a standard A4 size page and a 11-point Arial font. This document has been set up with these parameters - please do not change the document settings in any way. DO NOT submit your assessment in PDF format as it will be returned to you unmarked.**
- 3. No limit has been set for the length of your answers to the questions. However, please be guided by the mark allocation for each question. More often than not, one fact / statement will earn one mark (unless it is obvious from the question that this is not the case).**
- 4. You must save this document using the following format: [studentID.assessment1formative]. An example would be something along the following lines: 202223-336.assessment1formative. Please also include the filename as a footer to each page of the assessment (this has been pre-populated for you, merely replace the words "studentID" with the student number allocated to you). Do not include your name or any other identifying words in your file name. Assessments that do not comply with this instruction will be returned to candidates unmarked.**
- 5. Before you will be allowed to upload / submit your assessment via the portal on the Foundation Certificate web pages, you will be required to confirm / certify that you are the person who completed the assessment and that the work submitted is your own, original work. Please see the part of the Course Handbook that deals with plagiarism and dishonesty in the submission of assessments. Please note that copying and pasting from the Guidance Text into your answer is prohibited and constitutes plagiarism. You must write the answers to the questions in your own words.**
- 6. The final submission date for this assessment is 15 October 2023. The assessment submission portal will close at 23:00 (11 pm) BST (GMT +1) on 15 October 2023. No submissions can be made after the portal has closed and no further uploading of documents will be allowed, no matter the circumstances.**
- 7. Prior to being populated with your answers, this assessment consists of 10 pages.**

ANSWER ALL THE QUESTIONS

QUESTION 1 (multiple-choice questions) [10 marks in total]

Questions 1.1. - 1.10. are multiple-choice questions designed to assess your ability to think critically about the subject. Please read each question carefully before reading the answer options. Be aware that some questions may seem to have more than one right answer, but you are to look for the one that makes the most sense and is the most correct. When you have a clear idea of the question, find your answer and **mark your selection on the answer sheet by highlighting the relevant paragraph in yellow. Select only ONE answer. Candidates who select more than one answer will receive no mark for that specific question.**

Question 1.1

It should be relatively easy to develop a single system to deal with cross-border insolvency since all jurisdictions have more or less the same local insolvency law rules.

- (a) This statement is true since all countries have implemented the UNCITRAL Model Law on Cross-Border Insolvency.***
- (b) This statement is untrue since there are huge differences in both the approach and insolvency legislation of various jurisdictions.***
- (c) This statement is true since all systems have at least the same general insolvency concepts.***
- (d) The statement is true since the historical roots of all insolvency systems are the same.***

Question 1.2

The Statute of Ann, 1705 was a very important piece of legislation for the development of English insolvency law.

- (a) This statement is true since this Act introduced imprisonment of debt.***
- (b) This statement is untrue because it dealt with the distributions of the proceeds derived from the proceeds of selling the assets of the estate.***
- (c) This statement is true since it introduced the notion of discharge.***

(d) This statement is true since it introduced fraudulent conveyances into English law.

Question 1.3

The purpose of the UNCITRAL Legislative Guide (2004) has direct application in all the member States of the UN.

(a) This statement is true because UNCITRAL's model legislative guidelines apply automatically to all member States.

(b) This statement is true because all member States supported its automatic implementation in their respective jurisdictions.

(c) This statement is untrue because the Legislative Guide serves merely as soft law and contains best practice to be considered when countries revise their own insolvency legislation.

(d) This statement is untrue since the Legislative Guide is only available for use by developing countries when reforming their own insolvency laws.

Question 1.4

Modern rescue proceedings have replaced liquidation as an insolvency procedure in most systems.

(a) This statement is true since business rescue is important for socio-economic reasons.

(b) This statement is true because liquidation is viewed as a medieval and outdated process.

(c) This statement is untrue since there is still a need for both liquidation and rescue procedures in insolvency systems.

(d) This statement is untrue since some systems have no formal rescue procedure.

Question 1.5

The principles and requirements for avoidable dispositions and executory contracts are the same in all jurisdictions - hence these do not pose problems in a cross-border insolvency matter.

(a) The statement is untrue, the requirements and principles do differ and pose problems in a cross-border case.

(b) This statement is untrue because the insolvency laws of the State where the original insolvency order is issued will apply to all the other States involved in the matter.

(c) This statement is untrue since avoidable dispositions and executory contracts do not pose any problems in a cross-border case.

(d) The statement is untrue since avoidable dispositions and executory contracts may be disregarded in a cross-border case.

Question 1.6

The domestic corporate insolvency statute of a country makes no mention of the possibility of a foreign element in a liquidation commenced locally. The country has ratified a regional treaty on insolvency proceedings that contain provisions on concurrent insolvency proceedings over the same debtor in a neighbouring treaty state.

In a local liquidation commenced under the domestic corporate insolvency statute, to what law can the local court refer in order to resolve an international law issue that has arisen because of concurrent insolvency proceedings in the neighbouring state?

(a) Public International Law.

(b) UNCITRAL Legislative Guide on Insolvency Law.

(c) World Bank Principles for Effective Insolvency and Creditor Rights Systems.

(d) Private International Law.

Question 1.7

Which one of the following documents mandates co-operation or communication between courts in concurrent insolvency proceedings on the same debtor, which are being conducted in different nation states?

(a) ALI / III Global Guidelines Applicable to Court-to-Court Communication in Cross-Border Cases (2012).

(b) EU Cross-Border Insolvency Court-to-Court Communications Guidelines (2014).

(c) UNCITRAL Model Law on Cross-border Insolvency (1997).

(d) JIN Guidelines for Communication and Cooperation between Courts in Cross-Border Insolvency Matters (2016).

Question 1.8

Latin and Middle America states have ratified various multilateral conventions and treaties that address international insolvency issues. While they promote unity of proceedings in the treaty states where a debtor has a single commercial domicile, they acknowledge the possibility of concurrent proceedings.

Which of the following conventions and treaties does not provide for judicial co-operation where there are surplus funds remaining in a proceeding in one treaty state and there are concurrent insolvency proceedings over the same debtor in another treaty state?

(a) Montevideo Treaty on International Commercial Law (1889).

(b) Montevideo Treaty on International Commercial Terrestrial Law (1940).

(c) Montevideo Treaty on International Procedural Law (1940).

(d) Havana Convention on Private International Law (1928).

Question 1.9

The Council Regulation on Insolvency Proceedings (European Insolvency Regulation) (2000), which applies in all European Union member states except Denmark, was reviewed after a decade's operation. An amended European Insolvency Regulation (EIR) Recast (2015) was adopted in 2015 and took effect in June 2017.

Which of the following aspects of international insolvency is not addressed in the EIR Recast?

(a) Proceedings to restructure a debtor that is facing the likelihood of insolvency.

(b) Definition of "centre of the debtor's main interests".

(c) A centralised insolvency register of insolvency proceedings opened in member states.

(d) Co-operation and co-ordination provisions applicable to corporate groups.

Question 1.10

An unsecured Creditor is owed monies by the Debtor for services it supplied locally. It has issued proceedings to recover the debt in the local Court. The Debtor has moved its registration and head office to the local country from its original place of incorporation in a foreign country. The Creditor is incorporated and has its head office in that foreign country. The contract to supply, which was created by exchange of emails sent between the head offices, denominates the debt in the currency of the foreign country. The Debtor is being wound-up in the foreign country and the foreign liquidator seeks recognition and a stay in the local Court proceedings. What aspect is an international insolvency issue?

(a) The local Court's jurisdiction over the Debtor.

(b) The standing of the foreign Creditor to sue for its debt in the local Court.

(c) The foreign liquidator's standing to request a stay of the local proceedings.

(d) The fact that the debt owed to the Creditor is in a foreign currency.

Marks awarded: 7 out of 10

QUESTION 2 (direct questions) [10 marks]

Question 2.1 [maximum 2 marks]

Explain what the term "international insolvency law" means.

International insolvency law is a consequence of ever-increasing globalisation. It refers to the collective laws, rules, regulations, guidelines and the like, stemming from local, foreign and/or supra-national instruments, which may be relevant to an insolvency scenario with an international element (for example, the debtor has an economic presence, debts or assets in multiple jurisdictions or foreign creditors).

2

Question 2.2 [maximum 5 marks]

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

Universalists propose that, where an insolvency has an international element, there should only be one law and one 'main' proceeding, having extra-territorial effect, covering (i.e. having ultimate authority over) all of the debtor's assets and debts globally. The proper jurisdiction of such a proceeding may be based on where the centre of the debtor's interests is located (e.g. see the EIR / EIR Recast concept of the debtor's COMI). Critics of universality point to, among other things, the practical / political difficulties of establishing universality and the difficulty (and sometimes artificiality) of determining a debtor's 'home' jurisdiction in the case of truly global or multi-national debtors.

A modified form of universality proposes instead that the main proceeding is 'supported' by secondary or ancillary proceedings in the foreign jurisdiction(s) through cooperation with the main proceeding.

Diametrically opposed, territoriality (as the name implies) proposes that the consequences of an insolvency proceeding in one jurisdiction should be limited to assets, debts, creditors, etc. in that jurisdiction. If an insolvency has an international element, stand-alone proceedings may be commenced in every jurisdiction where the debtor holds assets. Such an approach is likely to lead to a plurality of concurrent insolvency proceedings and, ultimately, a more expensive process for administering the international insolvency estate.

Proponents of territoriality propose that issues with the territoriality approach (e.g. plurality of proceedings) can be dealt with through cooperation between the different jurisdictions / courts seized with the same matter.

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.

- 1. The New Saudi Insolvency Law (Royal Decree M 50 of 1439, Resolution No 264 on 1439), introduced in 2018, lay the foundation for specific rules on cross-border cooperation (among other reforms). On 16 December 2022, the rules issued by the Minister of Commerce came into effect and provided a framework for (a) the recognition and enforcement of foreign bankruptcy procedures in Saudi Arabia and (b) judicial assistance to foreign officeholders in those circumstances.*
- 2. The Dubai International Financial Centre's bankruptcy legislation, DIFC Law 1 of 2019, which came into effect on 28 August 2019, incorporated the UNCITRAL Model Law on cross border insolvency proceedings (with certain*

modifications) and, among other things, introduced new rules regarding debtor in possession bankruptcies.

3. *Bahrain introduced Law No. (22) of 2018 promulgating the Restructuring and Insolvency Law which came into effect on 30 November 2018. Among other reforms, the law provided a mechanism for cooperation between courts / authorities in foreign countries and Bahrain in cross-border insolvency situations. For example, the law provides for (a) procedure for foreign court or foreign representatives to submit 'assistance applications' and (b) the stay of judicial or enforcement proceedings if the foreign proceeding is deemed a 'foreign main proceeding'.*

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 objectives of insolvency or "bankruptcy" procedures for individuals include protecting the debtor from unlawful harassment from creditors and in certain circumstances to enable the debtor to eventually make a "fresh start".

On the other hand, for corporations, the objectives include preserving (to the extent possible) the business and where there has been fraud or misconduct, to impose personal liability (and recover from) responsible persons (often prior management).

There is scope to also discuss exempt property

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.

In a cross-border context, it is often difficult to reconcile the various differences (in substantive law and procedurally) to the national approaches to insolvency across the different jurisdictions involved.

For example, there may be differences in the rules with respect to:

- *the definition of insolvency or bankruptcy;*

- *certain types of contracts, such as leases, the purchase of real estate or contracts of employment;*
- *netting and set-offs (for example, certain transactions may need to be honoured even if a party is insolvent);*
- *real security (for example, a floating charge is generally common in jurisdictions based on English law but not in civil law jurisdictions); and*
- *corporate rescue, restructuring and debtor-in-possession regimes.*

These issues are brought to the fore where there are concurrent proceedings in more than one jurisdiction, with the effect and enforceability of local laws and judicial pronouncements extra-territorially often a critical issue.

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.

There have been various multilateral steps taken in the 21st century to promote the harmonisation of domestic insolvency laws. For example:

- *In 2004, UNICITRAL promulgated its *Legislative Guide on Insolvency Law*, a reference for national authorities and legislative bodies when reviewing insolvency laws and regulations;*
- *In 2005 (and as revised in 2011, 2015 and 2021), the World Bank produced guidelines on the regulation of insolvency (*Principles for Effective Insolvency and Credit / Debtor Regimes*);*
- *In 2010, at the EU level, the European Parliament published a report on the Harmonisation of Insolvency Law (note that the European Commission recently published a draft Directive on *harmonising certain aspects of insolvency law* on 7 December 2022).*

These, and many other, multilateral steps have had and continue to have significant impact on cross-border insolvencies. There will likely always be difficulties raised by cross-border insolvencies, but multilateral instruments are and will remain integral to the harmonisation, or at least compatibility, of domestic insolvency laws.

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

4.5

Marks awarded 12 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.

One option available to you to stop the Apex Court action against Nadir in Utopia is to make an application for recognition of the Erewhon winding up proceedings in the Utopia Court under article 15 of the Utopian Cross-border Insolvency Act. That will require producing a certified copy of the winding up order and a statement identifying all foreign proceedings in respect of Nadir that are known to you.

A potentially important aspect might be adducing proof (if it is available) that, despite Nadir being registered in Utopia, its centre of main interests (COMI) is in fact in Erewhon. There is a presumption in the Utopian Cross-border Insolvency Act that because Nadir is registered in Utopia, Utopia is its COMI.

If we can rebut the presumption that Utopia is its COMI (and that Nadir's COMI is in fact Erewhon), then you could seek the recognition of the Erewhon winding up proceedings as a foreign main proceeding. If that recognition is granted, continuation

of the Apex court action against Nadir will automatically be stayed under article 20(1)(a).

If recognition is granted but on the basis that the Erewhon proceedings are foreign non-main proceedings (because Nadir's COMI is Utopia), there is still provision for you to seek the stay of the Apex Court action upon demonstration to the Court that the stay is necessary to protect the assets Nadir or the interests of its creditors given the Erewhon proceedings.

Note is also possible to seek an urgent stay of the Apex Court action in Utopia effective from the time of filing of the application for recognition where it can be shown that relief is urgently needed to protect the assets of Nadir or the interests of its creditors. Such relief would be provisional pending the determination of the application.

There is scope to elaborate, for example with respect to the MLCBI as drafted by UNCITRAL not requiring 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.

Assuming Apex had filed proceedings to wind-up Nadir, but the matter had not yet been heard: Yes, that would make a difference. The Erewhon liquidators-to-be would need to wait for an order appointing them as the liquidators of Nadir in order to seek recognition in Utopia. They could write to Counsel for Apex (or have Nadir's Utopian Counsel do so) to let them know that winding up proceedings have been filed in Erewhon and that there is an intention to file for recognition and a stay in Utopia, so that there is a paper-trail that Apex was on notice.

Assuming Apex had obtained a court order to wind-up Nadir in Utopia prior to the Erewhon winding-up order: Although that would mean there are concurrent insolvency proceedings in respect of Nadir, the Erewhon liquidators could still seek recognition of the Erewhon proceedings in Utopia. In this case, it would be better for the Erewhon liquidators to have the Erewhon proceedings recognised as foreign main proceedings given the stay is automatic.

It would be beneficial to refer to article 29

1.5

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 corporate debtor (X Co) was incorporated and had its head office in the Cayman Islands.

Four international insolvency issues facing X Co's insolvency representative (the Liquidator) are as follows:

- 1. Appropriate forum: Even if X Co was incorporated and had its head office in Cayman Islands, that does not necessarily mean that it is the only or most appropriate forum for insolvency proceedings in respect of the company. One concept that might assist in addressing this issue is determining which jurisdiction constitutes X Co's centre of main interests (COMI; see EIR Recast guidance).*
- 2. Recognition: If, for example, X Co has a claim against another company based in the US or against directors in the US for mismanagement or fraud, the Liquidators will need to pursue those claims in the US. In many jurisdictions, the Liquidators can seek recognition of the liquidation of X Co in the Cayman Islands and their appointment and office. In the US specifically, the Liquidators can seek recognition through Chapter 15 of the US Bankruptcy Code (a product of the adoption of the Model Law promulgated by UNCITRAL).*
- 3. Concurrent proceedings: Say winding up proceedings were first commenced in Mexico (where X Co had a significant economic presence) by a large creditor of X Co. In this case, the Liquidators face two separate proceedings seeking to wind up the company. In some jurisdictions (like Mexico), proceedings can be recognised as foreign "main" or "non-main" proceedings. If the Cayman proceedings can be successfully recognised as the main proceedings, the Liquidators may be able to apply for certain relief.*
- 4. What if a cross-border transaction entered into by X Co is avoidable under Cayman Islands legislation but not the jurisdiction of the counterparty? This presents the fourth issue: conflict of laws. If "contradictory" proceedings are commenced (e.g.*

the Liquidators seek to avoid the transaction whereas the counterparty seeks to enforce it), there a various international instruments which provide guidelines in relation to cooperation between Courts, such as the JIN Guidelines and the ALI NAFTA principles.

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

5.5

Marks awarded 11.5 out of 15

*** End of Assessment ***

TOTAL MARKS 39.5/50

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