



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.

In my view the term "International Insolvency law" means a legal framework which applies to all consenting member states of the legal framework for resolution of international/cross border insolvency. It refers to the legal framework that governs the resolution of cross border insolvency issues when they involve Debtors/creditors and assets in multiple countries. It addresses issues of Jurisdiction, recognition of foreign proceedings, choice of law, coordination and co-operation of authorities. It aims to provide a structured and fair process for managing cross border insolvency.

2

Question 2.2 [maximum 5 marks]

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

The concept of Universality is based on the assumption that there should be only one insolvency proceeding for one particular debtor for all of his debts and assets all over the world, whereas Territoriality is based on the premise that insolvency proceedings may be started in all the states wherever the debtor is having assets and it should be limited to the assets situated in that particular state.

In the Universality concept once insolvency proceedings are started in one state there is no possibility of commencement of other insolvency proceedings against that debtor, whereas its opposite in the concept of territoriality, i.e concurrent insolvency proceedings are possible in multiple states.

In the Universality concept the cost of arguing is lower as compared in the territoriality concept.

The principles of universality related to globalisation whereas in territoriality addresses the local interests.

These theories also involve recognition and effect (as well as jurisdiction) 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.

Following are the 3 recent examples:

- 1) Bahrain adopted the Model Law on Cross Border Insolvency in 2018*
- 2) Dubai International Financial Centre adopted the Model Law on Cross Border Insolvency in 2019*
- 3) On 16th Dec 2022 Saudi Arabia issued Rules for Cross Border Insolvency proceedings based on MLCBI.*

3

Marks awarded 8.5 out of 10

QUESTION 3 (essay-type questions) [15 marks in total]

Question 3.1 [maximum 5 marks]

Write a brief note on the differences regarding the objectives of insolvency for individuals and corporations.

We can briefly discuss the differences regarding the objectives of insolvency for individuals and corporations are under:

1. *The objective of insolvency for individuals revolves around protecting the debtor from harassment by his creditors, enable him to make a fresh start specially when he was not a wilful defaulter, and reduce his current indebtedness by offering a resolution plan by which he may be allowed to contribute from his current as well future incomes to the estate while considering his personal needs.*
2. *Whereas the objective of the insolvency for corporations revolves around preserving the business may be in whole or in part as far as possible, transferring the business (with or without the corporation itself) in the able hands of the resolution applicant and wherever there has been abuse of powers by erstwhile management, make them responsible so that business is not suffered. Imposing liability on those responsible is also relevant*
3. *In the case of individual insolvency one of the objectives is also to exempt certain assets to become part of the distributable estate. The list of such exempted assets may differ from state to state but generally there are certainly some items which are kept exempted to make the debtor a fresh start. This concept is not applicable in the case of corporate insolvency.*

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.

It is a fact that there is no global enforcement agency/court/authority as of now to deal with cross border insolvency matters, so there are difficulties arising due to this non-existence of such an agency, there are other difficulties to deal with in cross border insolvency matters. We may discuss them as under:

- a) *Lack of common insolvency language. For example, the meaning of insolvency quite differs in various states. Traditionally insolvency was a situation where total assets of the debtors were less than the total liabilities (negative net worth). But now it is also sufficient to start an insolvency against a debtor (individual or corporate) where any given point in time the debtor's cash flows are not sufficient to service the repayment obligation (negative cash flow). As a result, at an international level, it is quite difficult to define the insolvency as such.*
- b) *The local laws are broadly dependent on the state policy where some of the states are pro creditor and other are pro debtor. Therefore, it is difficult in a cross-border insolvency scenario where one of the states is pro creditor whereas the other state supports debtors.*
- c) *There are different approaches worldwide, some of the state or group of states support universalism and some supports the concept of territorialism.*
- d) *The laws relating to discharge of insolvent and fresh start, definition of excepted assets, moratorium, composition of committee of creditors & their rights, disqualification of existing management, treatment of preferential/*

undervalued/fraudulent transactions, qualification of resolution professionals and recognition to foreign judgement are some of the areas that must be handled depending upon the local state policy.

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.

[If we talk about steps that have been taken in the 21st century to promote harmonisation of domestic insolvency laws, one can mention the following initiatives :

- 1. In 2004, United Nations Commission on International Trade Law (UNCITRAL) promulgated a Legislative Guide on Insolvency Law. This was intended to be used as a reference by member states when preparing new laws or modifying existing laws*
- 2. In early 2000, the World Bank prepared guidelines on the regulations on insolvency entitled "Principles for Effective Insolvency and Creditor/debtor Regime". These principles were revised in the year 2005, 2011, 2015 and in 2021.*
- 3. In the year 2010, the European Parliament published a report on the Harmonisation of Insolvency Law at EU level.*
- 4. In the year 2000, The American Law Institute (ALI) developed ALI NAFTA guidelines applicable to court to court communications in cross border cases. Subsequently in 2012, ALI-III Global Principles for cooperation in International Insolvency Cases and Global Guidelines Applicable to Court-to-Court Communication were published.*
- 5. In 2007, The European Guidelines on Communication and Cooperation were developed within the context of EIR, containing non-binding rules and draft protocol. Subsequent preparation of JudgeCO Guidelines, comprising 26 EU JudgeCo principles and 18 EU Cross-Border Insolvency Court-to-Court Communications Guidelines 2015.*

Lets let me discuss that in my opinion, how much impact are above steps do have in addressing international insolvency issues. My opinion goes with reasons as under:

- 1. Wherever these Model Laws and Guidelines have been adopted by the states, it has been taken a positive sign by international parties/suppliers/bankers and authorities. Now whenever a creditor sitting outside the state is taking a decision about extending loan/credit/supplies to a debtor in the country where their local insolvency laws have been modified considering Model law for*

Border Insolvency, such creditor is somehow feels more secure and confident before taking final call of doing trade/extending credit.

2. *The organisations like IMF and World Bank sometimes also make it compulsory for the borrowing state to implement the Model laws and modify their laws in line with model Laws. So, for a country which has already adopted such Model Laws enjoys higher credit rating.*
3. *A significant reduction has been noticed in the time, effort and cost of collecting outstanding debts from defaulting debtors sitting in a state where such Cross Border Insolvency Laws have been adopted.*

5

Marks awarded 12.5 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.

Since The UNICITRAL MLCBI has been adopted by Utopia, and this law mandates its member states to facilitate the coordination and cooperation of insolvency proceedings in cross border insolvency matters, provide a framework for cross border insolvency matters and tries to balance out the interests of all relevant parties. In this matter we can list out following important aspects:

1. *Nadir is now registered in Utopia and Apex has initiated court proceedings in Utopia.*
2. *Utopian courts will have the primary jurisdiction as Nadir has its registration and head office in Utopia.*
3. *Erewhon creditor has obtained winding up order against Nadir in Erewhon and also liquidator has been appointed there in Erewhon.*

Now, one can advise Erewhon liquidator considering above facts as under:

1. *UNICITRAL MLCBI recognises foreign insolvency proceedings and judicial orders therefore Erewhon liquidator should approach courts in Utopia where Nadir's matter is being handled by taking help of Utopian local insolvency professionals and request recognition of Erewhon liquidation order. High chances are that it may be recognised and an stay order may be obtained from Utopian courts.*
2. *Since the Model Law mandates cooperation and communication between the Courts, the Erewhon liquidator should engage with Utopian courts and insolvency professional and make sure that Erewhon liquidator is also given the right to be heard adequately and their interest are also considered.*
3. *Because of the Model Law implication, the Utopian courts may consider the impacts of local as well as foreign orders and balance out the interest of all parties including liquidation order and other proceedings in Erewhon while dealing with Utopian insolvency.*

Greater chances are that Erewhon party will also get appropriate relief because of the law framed in Utopia which is based on UNICITRAL MLCBI.

The MLCBI is significant for its provisions on recognition and relief in 4.1. (Its provisions on cooperation and coordination are secondarily important as the liquidator is primarily seeking advice about staying court proceedings in Utopia.) The question requires candidates to apply the relevant MLCBI articles to the facts provided.

2.5

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.**

Let's discuss these two scenarios:

- a) Where Apex had filed proceedings to wind-up Nadir, but the matter had not yet been heard.*

In this Situation also the Model Law is relevant as it allows foreign insolvency proceedings and mandates for coordination and communication. Erewhon

liquidator may still approach the Utopian Court and obtain a stay order to allow for coordination between courts of both countries. Model law expects that before hearing the winding up petition filed by Apex, the Utopian court shall coordinate and communicate with Erewhon liquidator too.

- b) Where Apex has obtained a court order to wind-up Nadir in Utopia prior to the Erewhon winding-up order. Since, Apex has already obtained court order in Utopia, so the Utopian court may not stay the proceedings as such, but Utopian court may consider coordination with Erewhon liquidator. Even in this case because of the mandates of Model law the Utopia court, Erewhon liquidator and Apex are required to work in such a coordinated way that the interests of both creditors are taken care simultaneously while doing the administration and distribution of Nadir's assets.*

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

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?

I would like to select the country India where this Company (Corporate Debtor) has been incorporated. Following four issues may be faced by insolvency representative in India to be addressed considering applicable local laws of India and international instruments:

- 1. Corporate Debtor is having Assets and creditors across multiple countries, so how to manage these assets and distribute them appropriately?*

India has its domestic law for insolvency entitled as "Insolvency and Bankruptcy Code, 2016" which has provisions and framework to deal with assets across all over India.

There is a provision under section 234 of the IBC which allows the government of India to enter into bilateral agreements with foreign countries. However, no

such bilateral agreement has been signed so far. But yes, the IBC code itself has been drafted considering the UNICITRAL MLCBI.

2. *Corporate Debtor is having foreign operations and creditors, so the question is how to coordinate with foreign insolvency proceedings?*

As explained above IBC and Regulations drafted thereunder allows recognition of foreign insolvency proceedings and for cooperation with foreign insolvency representatives.

Since India has adopted UNICITRAL MLCBI therefore this also provides for dealing with such matters.

3. *Taxation matters: how to deal with claims from taxation authorities of foreign land?*

IBC has provided for the treatment of taxation claims while dealing with insolvency or liquidation of a corporate debtor.

The Income Tax Act 1961 of India also have provided for the procedures to file the claims from the taxation authorities and consider the provisions of IBC superior to the Income Tax Act itself.

India also has signed various Double Taxation Avoidance Agreements (DTAA) with various countries which provides for treatment of bilateral taxation matters.

4. *How to deal with liability of Directors of the corporate debtors located in various countries?*

India has Companies Act, 2013 and IBC code which has provisions for liability of directors in India.

India has signed various Mutual Legal Assistance Treaties with various countries to deal with defaulting directors located in these countries, this can facilitate cooperation between signing states.

It is to be noted that the Insolvency representative in India may have to apply to National Company Law Tribunal (NCLT) which is the adjudicating authority in India for corporate debtors in Insolvency/liquidation and seek directions/orders to deal with international matters. In such matters wherever required, NCLT may direct the Govt of India to deal with foreign Govt also to ensure a proper resolution of the corporate debtor.

8

Marks awarded 11 out of 15

*** End of Assessment ***

TOTAL MARKS 40/50

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