



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: 9 out of 10

QUESTION 2 (direct questions) [10 marks]

Question 2.1 [maximum 2 marks]

Explain what the term "international insolvency law" means.

Wessels defines international insolvency law as that part of the law that:

"[i]s commonly described in international literature 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 consideration being given to the international aspect of a given case.

On the basis Wessels himself admits that the above definition is limited, I would add to this the most salient point within the definition as provided by Fletcher, that is that international insolvency law is the part of international law that deals with "insolvency occurring in circumstances which in some way transcend the confines of a single legal

system, so that a single set of domestic insolvency law provisions cannot be immediately and exclusively applied[...]".

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 concepts of universality and territoriality are competing concepts that set out different approaches to dealing with international insolvency (cross-border) proceedings.

Universality states that there should only be one insolvency proceeding covering all of the debtor's assets and debts worldwide and accordingly, once the proceedings are opened, no other insolvency proceedings ought to be possible nor any other forms of execution of the debtor's assets. As best as possible, only one forum should have jurisdiction over international insolvency proceedings. On the other hand, territoriality states that insolvency proceedings may be commenced in each jurisdiction where the debtor holds assets, but the proceedings should be territorially limited and restricted to property within the State where the proceedings are opened.

Consequences

Whilst universalism means that the law of the "main proceeding" will have worldwide effect, even outside the territorial jurisdiction of the State where the "main proceeding" has been opened, territorialism prescribes that the consequences of an insolvency proceeding will only apply to the State where the insolvency proceeding has been opened and can lead to a plurality of insolvency proceedings.

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.

- 1. Saudi Arabia has reformed its domestic insolvency laws in 2018.**
More detail would have improved the mark awarded for this sub-question.
- 2. Bahrain adopted the Model Law on Cross-Border Insolvency in 2018.**
- 3. Dubai International Financial Centre adopted the Model Law on Cross-Border Insolvency in 2018 and Dubai has reformed its domestic insolvency laws in 2019.**

More detail would have improved the mark awarded for this sub-question.

2

Marks awarded 7 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.

Drawing from the work of Sealy and Hooley in M A Clarke et al, Commercial Law, the main differences between individuals and corporations in respect of their respective objectives of insolvency are as follows:-

Whilst a goal in individual/personal insolvency is to protect the debtor from harassment by his creditors so as to enable the debtor to make a fresh start - especially in less blameworthy cases (where insolvency could have been said not to have been brought about by the actions or conduct of the debtor), in short, taking in account the personal circumstances of the debtor, such corresponding goal in corporate insolvency is to preserve the business, or viable parts thereof, not necessarily the debtor company/companies in question, and in cases where personal liability has been abused, to impose personal liability on responsible persons.

In short, whilst the objectives for individual insolvency could be summarized as being wholly rehabilitative and preservative in nature, whilst corporate insolvency has both rehabilitative and punitive elements. For example, it is only in relation to individuals that the notion of exempt or excluded assets will apply; the same principle of maintenance being applied to the debtor or their dependents do not apply 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.

Friman mentions that there is a lack of a common insolvency language. Accordingly, the reason for commencing proceedings, is normally quite clearly defined in a domestic context but at an international level, it may be quite difficult to define the term "insolvency". It appears so difficult that international conventions and other instruments do not even attempt to provide a proper definition and instead focus their attention on defining "insolvency proceedings". In this context, Friman also mentions that cross-border insolvency cases usually deal with collective proceedings which require sufficient definition and ascertainment.

Omar states that the general situation in the conflict of laws is compounded by differences in domestic norms - both of these lead to particular difficulties on the position of creditors and the priorities they assert in insolvency. These difficulties are even more complex by the presence of nuanced qualifications, including the presence of security, set-off and netting arrangements, retention of title clauses and other means of protecting title available to creditors in national laws.

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.

*The UNCITRAL promulgated its *Legislative Guide on Insolvency Law* in 2004. This was a small but significant initiative that has been taken in the 21st century to promote harmonisation of domestic insolvency laws. This was intended 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. Specifically, on international insolvency, Part One Recommendation 5 states "The insolvency law should include a modern, harmonized and fair framework to address effectively instances of cross-border insolvency [...]"*

*Beginning in the early 2000s, the World Bank also produced guidelines on the regulation insolvency, entitled *Principles for Effective Insolvency and Creditor/Debtor Regimes*. The Principles have been revised multiple times in the 21st century. These principles gain some significance in the context that the International Monetary Fund (IMF) and the World Bank sometimes require bankruptcy reform in developing countries as condition of loan support, referring countries to the *Legislative Guide* and promoting a convergence of insolvency law.*

In 2010, the European Parliament published a report on the Harmonization of Insolvency Law at EU Level, which in turn lead to the European Union's Action Plan on Building a Capital Markets Union (CMU) in 2015, in Europe's effort to harmonize domestic insolvency laws.

Opinion & Reasoning

These are likely to have a limited impact in addressing international insolvency issues. Given the multi-faceted and multi-dimensional nature of international insolvency issues, these international instruments have to been adopted and the relevant institutions and actors within each relevant country have to co-operate and co-ordinate in order to properly and comprehensively address international insolvency issues.

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

3.5

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.

On the basis that the Cross-border Insolvency act of Utopia is an adoption, without modification, of the UNCITRAL Model Law on Cross-border Insolvency, Chapter IV of the UNCITRAL Model Law on Cross-border Insolvency authorizes and mandates co-operation and direct communication between a local court and foreign courts or foreign representatives.

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.

Accordingly, the Erewhon liquidator is advised that as with what happened in the Maxwell Communications Corporation plc cross-border insolvency case in 1991, there

should be an insolvency agreement between the respective administrations in Erewhon and Utopia to resolve conflicts and facilitate the exchange of information, eg to maximize the value of Nadir's estate and harmonizing the two proceedings to minimize expenses, waste and jurisdictional conflict.

Further, if the liquidator would like to stop Apex's court action against Nadir in Utopia, the UNCITRAL Model Law on Cross-border Insolvency would easily manage answers to the questions relating to the choice of forum to exercise jurisdiction in a matter; the recognition and effect accorded to foreign proceedings in the same matter; and the choice of law to apply in the matter. Elaboration is warranted.

3.5

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.

All hinges upon the choice of forum to exercise jurisdiction in the matter, and the recognition and effect accorded foreign proceedings in the same matter; and the choice of law to apply in the matter. Assuming that Erewhon is England, and the application of English law:

(a) No difference. Elaboration is warranted

(b) ss 220-221 and s 436 of the Insolvency Act 1986 applies to accords the Erewhon court jurisdiction to wind-up Nadir, and will cause the Erewhon court to recognize those winding-up proceedings initiated by Apex in Utopia. Accordingly, the Erewhon court will neither grant the winding up order nor give any effect to those proceedings as initiated by Nadir's Erewhon creditors.

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 select England as the country for the company's incorporation base my answer on the insolvency laws of England.

The four key international insolvency issues facing the insolvency representative in this scenario are:-

- 1. Whether an English court would recognise winding up proceedings for the foreign companies within the group of this debtor company - *Insolvency Act 1986 s 426.**
- 2. Whether an English court would refuse to grant an English winding up order over the this debtor company and instead give effect to the foreign proceedings by recognising the potential authority of any appointed foreign liquidator to gain control over any local assets of the English debtor - *Insolvency Act 1986 s 426.**
- 3. What law applies to the English winding-up of the foreign companies within the group of this debtor company - English law applies to matters of procedure and substance, although a foreign law may be relevant to aspects of the administration of the winding-up eg if a claim is properly governed by foreign law.*
- 4. Where the English court is acting under the aid and assistance statutory provisions in *Insolvency Act 1986 s426* to recognize and cooperate within a foreign insolvency proceeding, then it may apply either the English law or the foreign law - *Insolvency Act 1986 s 426(5).**

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 8 out of 15

*** End of Assessment ***

TOTAL MARKS 36/50

A good paper that correctly identifies many of the issues raised and satisfactorily substantiates several answers.