



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 segment of law that deals with bankruptcy and insolvency cases of companies operating in multiple jurisdictions whereby the insolvency case transcends the confines and limits of a single legal system and requires the consideration of issues related to the foreign feature of the case. One of the primary goals of international insolvency law is to ensure recognition of judgments across jurisdiction, coordination and cooperation among various courts, with the ultimate goal of ensuring fairness in treatment of the case and balancing of interests of the various stakeholders, including debtor, and local and foreign creditors.

2

Question 2.2 [maximum 5 marks]

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

Universality in cross-border insolvency favors the consolidation of all the debtor's assets and liabilities into one single unified case at the jurisdiction of the debtor's main center of interest and all proceedings, locally and internationally, would be aggregated under one single proceeding and creditors will be treated on an equal basis. However, territoriality, on the opposite, favors the treatment of the proceedings based on the location of the assets and therefore the assets on which creditors have claim against, which implies that the concept of national interest prevails. While universality should result in more efficient and fairer outcomes, territorialism entails the possibility of concurrent proceedings and unequal and conflicting outcomes based on the specifics of each territorial case.

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.

- *Saudi Arabia has adopted a new bankruptcy law to boost international investments and facilitate the process of unwinding bankrupt companies*
Elaboration is warranted
- *UAE has reformed its insolvency regime in 2016 and 2019 aiming as well to promote a healthier corporate and investment environment*
- *Bahrain adopted in 2018 the Model Law on Cross-Border Insolvency*

2.5

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.

The objectives of insolvency for individuals pertain to enabling a fresh start for the individual by reducing the level of indebtedness and protecting the individual from the actions of creditors and ensuring personal circumstances are taken care of, such as minimum living conditions and taking into account future income. However, for

corporations the primary objective is to maximize the chances of the business remaining a going-concern and to sanction personal liability of directors if it is proven to be behind the root causes of the insolvency.

To improve your responses, ensure they are commensurate with the mark allocation – while Q 3.1 asks for a brief note, it is for 5 marks.

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.

There are various difficulties that can be encountered when dealing with insolvency law in cross-border context, including the differences in the types of real security such as, for instance, the existence and applicability of floating and fixed charges per jurisdiction; the cash waterfall and distribution rules from State to State when it comes to priority of payment and restructuring of capital structure, such as, for instance, the payment of administrative costs; and the existence or non-existence of subordination of claims per applicable laws. There are also cultural barriers that make an insolvency regime either pro-debtor or pro-creditor that render insolvency law in cross-border situations difficult to deal with.

Further detail would be beneficial. For example, consideration of Westbrook's 9 key issues.

3

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 has been a number of multilateral steps taken in the 21st century to promote the harmonisation of domestic insolvency laws, including the first draft of an EC Convention on Bankruptcy and Related Matters in 1970 to enact a Uniform Law into domestic law, the IBA draft on Model Bankruptcy Code that later evolved into UNCITRAL project by the IBA that brought about the Legislative Guide. Later on, in 2004 UNCITRAL created the Legislative Guide on Insolvency Law to promote guiding principles based on a modern, harmonized, and fair framework to deal with cross-border insolvency cases in an effective manner. In the 2000s, the World Bank Principles emerged to promote convergence of insolvency law and in 2010 the European Parliament identified areas of harmonisation of insolvency law within EU.

These initiatives are likely to increase cross-border cooperation by offering tools and frameworks of reference to facilitate uniform approaches and concepts of

harmonisation, which will lead to more efficient use of court resources and faster and fairer outcomes. In my opinion, strategies based on uniform laws on the recognition of cross-border insolvency proceedings are more likely to achieve success, compared to laws that aim to address complex fundamental issues that are nationalistic and country-specific in nature.

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

4

Marks awarded 11 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 Cross-Border Insolvency Act of Utopia is relevant to the Erewhon liquidator because such act will facilitate cross-border cooperation tailored to meet the specific needs of each cross-border insolvency case and the particular requirements of applicable law. Since Utopia ratified this agreement, Utopia endorsed the principles of cooperation and communication to maximize the value of the insolvent estate and minimize expense, waste and jurisdictional conflict. Therefore, ignoring concurrent proceedings would go against the spirit of the Act and Utopia would be encourage to

use the Act framework to anticipate and resolve any conflicts that could arise with Erewhon liquidator and facilitate the exchange of information between both parties. The liquidator can invoke the Act to ask the court to use the principles of the Cross Border Insolvency Act to coordinate the process and lead the outcomes of the concurrent proceedings into a more coordinated process.

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.

3

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.**

For both a) and b) It would not make any difference because the liquidator could still appeal any hearing and invoke the Act that has been signed which involve the use of cooperation and communication among the different courts. As long as a more effective and efficient resolution of the insolvency case would be brought about by this cross-border coordination, the liquidator can still ask for a stay of proceeding from Apex and bring forward a recognition of the foreign Erewhon proceeding into the overall case resolution in the home Utopia jurisdiction. Indeed, the sharing of information and coordination of the joint administration of cross-border insolvency case are core principles of the Act and will be covered under both the a) and b) scenarios.

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

Refer to Article 29

0.5

Question 4.3 [maximum 8 marks]

NB: This question is not related to Questions 4.1 and 4.2

A court has ordered the commencement of an insolvency proceeding against a corporate debtor in the State of its incorporation and head office. The company has operated business in a number of States and has assets (real property or interest in land, other tangible assets and intangible assets); creditors (including taxation / revenue authorities) and directors in several States.

Select a country for the company's incorporation and, based on the insolvency laws of the country you select and the brief facts provided, describe four key international insolvency issues facing the insolvency representative in this scenario. For each issue, what domestic laws or international instruments apply to assist the insolvency representative address these four issues?

The company is incorporated in France. There are four issues that particularly relevant in this case:

- *Standing for recognition of foreign proceeding: according to French law, foreign judgement can only be recognized if it followed an interparty recognition procedure. The World Bank's Principle C15 enables a clear and speedy process for obtaining recognition of foreign insolvency proceedings, as well as the MIICA model on the basis of uniform recognition laws across the various States;*
- *Moratorium on creditor actions: the opening of the court-driven insolvency proceeding triggers a stay on creditor actions according to French law. However, in this case if the insolvency proceeding applies only to France homebase, creditors in other countries where the business operates will still continue to pursue their recovery and collection actions as they are not bound by any agreement. The UNCITRAL model law on cross-border insolvency can help address this issue if it has been adopted in the other countries where the business operates so that the French insolvency proceeding is recognised in those countries;*
- *Conflict-of-law issues: the conflict of law results from determining which court should have control on the case, and in this case it is not clear if France represents the majority of the business operations and holds the majority of assets. In addition, the choice of governing law in the creditor agreements and contracts will determine which law will prevail. The UNICITRAL Model Law and the European Union Insolvency Regulation (EIR) will act as soft laws to facilitate the cooperation and coordination among different States;*
- *Priorities and preferences: The French insolvency regime stipulates this order of payment when a company enters an insolvency proceeding: 1) secured creditors; 2) administrative costs; 3) employee claims; 4) claims to public authorities; 5) tax claims; 6) unsecured creditors; and finally 7) shareholders. The French priority rule could contradict the priority rules in other countries where, for instance, where "Crown preference" rights are given to the State or super priority above secured creditors for employees. In addition, the French rule will favor local creditors vs. foreign creditors. The UNICIRTAL model aims to harmonise priority rules among countries to facilitate the concept of equality (par conditio creditorum) among creditors and avoid conflicting outcomes across countries.*

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.

6

Marks awarded 9.5 out of 15

* End of Assessment *

TOTAL MARKS 35.5/50

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