



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.

"International insolvency law" concerns the group of laws and regulations that relate to insolvency proceedings or measures that span across countries. However, such "laws" or regulations can never be enforced without recognising or unpacking of national sovereignty, because of the international aspect of cross-border cases.

2

Question 2.2 [maximum 5 marks]

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

Universalism and territoriality are the two main approaches set forth to deal with cross-border insolvency.

Universalism refers to the integration of all insolvency proceedings into one, covering all the debtor's assets and liabilities. Under such a system, only one system has jurisdiction, and no other proceedings should be commenced. By contrast, territoriality advocates centres around the idea that debtors may commence proceedings in each jurisdiction where there are assets. The debtor's assets would be treated in each jurisdiction only in accordance with the local territory's laws and regulations.

Universalism protects greater substantive fairness for creditors, assessed globally - the use of a uniform system ensures that creditors internationally will be able to access assets in various jurisdictions to redeem their credit. On the other hand, territoriality may restrict creditors in local jurisdictions only to assets there, and thus may lead to a vast disparity of debt recovery across jurisdictions.

On the other hand, territoriality ensures a greater extent of procedural fairness - in that local custom and interests are protected. As each jurisdiction has control over the proceedings within its borders, it can ensure that local creditors are able to obtain due process in debt recovery. In contrast, universalism dictates that one jurisdiction, no matter where other assets may lie, controls all procedural and substantive elements of the insolvency process, thereby leaving open the possibility of local custom or regulation being omitted or ignored.

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.

The Gulf Cooperation Council has worked closely with the World Bank for several decades to regulate cross-border insolvencies.

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

There has also been a comparative survey by the Hawkamah Institute for Corporate Governance, the World Bank, OECD, and INSOL International.

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

Several countries have also began reforming domestic insolvency law, such as the UAE (in 2016 and 2019), Saudi Arabia (2018), and Dubai (2019). Internationally,

Bahrain has adopted the Model Law on Cross-Border Insolvency (2018) as well as Dubai (2019).

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

1.5

Marks awarded 7.5 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.

There are several differences between the objectives of insolvency for individuals and corporations.

Firstly, the objective of individual insolvency is targeted at protecting the individual. As Sealy and Hooley mention, this refers to protecting individuals from creditors. Individual insolvency thus promotes the possibility of debtors having a fresh start, such as by protection and also through creating payment plans to assist the debtor in recovering their financial position. In contrast, corporate insolvency is focused on salvaging only the viable elements of the business. This means that part of the business may be allowed to fail, depending on its financial viability.

Secondly, in recognition of the personal and relational element in individual insolvency, some assets may be exempt or excluded - this is again a form of protection, for the individual debtor or their family, where similar protections are not available for corporate insolvency.

Thirdly, corporate insolvency may also result in the entity being dissolved - this is not the same in individual insolvency where that is a legal impossibility. Corporations are often dissolved, whilst individuals may be "rehabilitated".

Fourthly, in some jurisdictions, there are no collective procedures for individual insolvencies.

Lastly, there may also be more "lasting" consequences for individual insolvencies. Whilst the consequences "end" for corporate insolvencies insofar as they are dissolved, individual insolvency may affect the individual's future ability to obtain new credit or certain positions within corporate governance or government.

There is scope to elaborate, for example with respect to imposing personal liability on the responsible persons in a corporate context.

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 several difficulties when dealing with insolvency law in a cross-border context because of the differences in the relevant systems. These are specifically - choice of words, the differences in the positions that creditors and debtors find themselves in in each jurisdiction, and various other technical differences between systems.

Firstly, in relation to the choice of "words" - "insolvency" deals with many wide-spanning situations, most commonly, the financial position where an entity's liabilities exceed its assets. However, specifically when this state triggers various insolvency regulations differs from jurisdiction to jurisdiction, as insolvency is measured for a wide variety of situations - such as long- or short-term debts. This issue is further compounded as many cross-border treaties and agreements do not attempt to define such a state of "insolvency", rather, leaving it to local jurisdictions to determine. Thus, ensuring that the financial state that the debtor is in is "counted" as insolvency across the various jurisdictions in which proceedings are desired to be opened in is a difficulty when dealing with cross-border insolvencies.

Secondly, the starting positions of creditors and debtors in each state vary. As a matter of default law-making and local custom, countries have put both parties in different starting positions, which mean a complicated matrix grid of decision making when acting for parties in cross-border matters. Parties would have to make trade-offs in terms of which priorities are asserted across the various matters, depending on the degree of universalism and territoriality that is being enforced in the local system of systems. Thus, managing such various interests is another difficulty.

Finally, Westbrook states several other technical differences that parties in cross-border insolvencies must resolve for successful insolvencies to complete. These include: standing for foreign representatives, moratoriums on creditor actions, creditor participation, executory contracts, co-ordinated claims procedures, priorities and preferences, avoidance provision powers, discharges, and conflict of law issues. Obviously, this entails a complex resolution of each issue in each jurisdiction to which the debtor and creditors are involved in, which result in lengthy discovery and negotiation processes.

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 initiatives in the 21st century promoting the harmonisation of domestic insolvency laws. For example, they include the UNCITRAL Model Law on Cross-Border Insolvency, and various regional initiatives such as by the American Law Institute, the International Insolvency Institute, the Judicial Insolvency Network, UNIDROIT, and INSOL International.

Insofar as there is yet a uniform skeleton of international insolvency law, the multiplicity of such efforts, to me, is also evidence of the absence of pure harmonisation. While it is important that these entities exist to resolve and work toward harmonisation, a balance with territoriality must be struck in order for sovereigns to protect local creditors. Largely, in the absence of significant evidence that there are issues with international insolvency law and formal dispute resolution, the current system largely appears to work because such entities resolve immediate matters of contention as they arise.

The existence of such fora to discuss and subsequently address international insolvency issues is key, with the explosion of international trade, in an interest rate environment where it is likely more debtors will not be able to service floating rate debt or raise new capital.

While adoption of the MLCBI may harmonise various domestic insolvency laws in so far as they address international insolvency issues, the question addresses more broadly the harmonisation of domestic insolvency laws in general. See the 'model' answer on this sub-question.

3

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.

The Cross-border Insolvency Act of Utopia, which has been adopted without modification, has several points of relevance.

Firstly, under the Model Law, the liquidator may apply for recognition of the Erewhon insolvency proceedings in Utopia. This would have the effect of according the Erewhon proceedings with certain automatic effects and discretionary relief in Utopia, as per Articles 15 and 17-21 in the Model Law.

Secondly, a specific immediate effect is that the recognition of foreign main proceedings would result in a stay of individual actions or proceedings, concerning the debtor's assets, rights, obligations, or liabilities under Article 20. Thus, if the liquidator is able to get Erewhon insolvency proceedings recognised as the foreign main proceedings in Utopia, the court action by Apex will be stayed.

Thirdly, there would be discretionary relief that could be sought by the Utopian court to protect assets of the debtor or interests of the creditors, per Article 21. This may include a stay in proceedings that are detrimental to the liquidator's efforts.

Fourthly, Article 16 provides guidance on the presumptions and evidence regarding the centre of its main business, which Apex may use to challenge the recognition of Erewhon proceedings or oppose the stay in their action.

Thus, the liquidator should pay attention to such Articles to achieve the result intended for its client.

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.**

- (a) **The automatic stay would still be applicable, and the liquidator may request additional discretionary relief under Article 21 to ensure that proceedings are coordinated, to protect the interests of all creditors and stakeholders.**
- (b) **The Utopian court may not recognise Erewhon proceedings, especially if doing so conflicts with or undermines the existing winding-up order. Articles 27 and 28 may be sought to be relied upon to emphasise the importance of coordinating both proceedings. Further discretionary relief under Article 21 may be sought. Article 29 should be referred to re concurrent proceedings.**

1

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?

Country - England, United Kingdom.

The first issue is the recognition of UK insolvency proceedings in foreign jurisdictions. The insolvency representative would want the proceedings to be recognised in jurisdictions where the company operates or owns assets. Such recognition is crucial because this ensures that dealing with the company's assets or addressing creditor claims can be subsequently managed smoothly. This may involve the EU Insolvency Regulation (Recast) 2015 (which would no longer be applicable post-Brexit) and the Cross-Border Insolvency Regulations 2006, which is the UK's adaptation of the UNCITRAL Model Law.

The second issue would be the realisation of assets located overseas. The representative would have to access assets, sell them, and realise their value in jurisdictions with different laws, with creditors local to that jurisdiction potentially raising challenges. The UNCITRAL Model Law, or insolvency bilateral treaties that exist between the host state and the UK may be applicable in such a scenario.

Thirdly, the insolvency representative would also have to deal with foreign creditor claims. Not only may these involve private parties, but there may also be government tax liens or other such claims. These will need to be understood how to be treated, especially if, for example, pay-out priority differed. The insolvency representative may have to refer to the UK's Insolvency Act 1986, and again the UNCITRAL Model Law.

Finally, potentially conflicting actions by foreign directors. Directors located overseas may take action, for which they are duly authorised, but which may conflict with processes initiated in the UK. The representative would have to refer to the Insolvency Act 1986, the Company Directors Disqualification Act 1986, and the UNCITRAL Model Law again.

8

Marks awarded 14 out of 15

*** End of Assessment ***

TOTAL MARKS 41.5/50

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