



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 or cross-border insolvency law is the law that regulates insolvencies that transcend one State and require coordination and cooperation between estate representatives and courts in the affected States to achieve an effective outcome which is equitable to all interested parties.

2

Question 2.2 [maximum 5 marks]

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

The two concepts, universality and territoriality or territorialism, are diametrically opposed to each other.

Universalism advocates a unified or a single insolvency proceeding which covers all assets of the debtor and claims of all creditors and other interested parties such as employees, taxes etc. Thus, under universalism, even where multiple insolvency proceedings have been commenced by different creditors or claimants in different jurisdictions, attempts would be made to consolidate the different proceedings into a single insolvency proceeding. Such an approach is believed to ensure satisfaction of all legitimate claims and equitable distribution of available assets in the insolvency estate at a relatively lower cost.

Territorialism on the other hand, promotes separate or concurrent insolvency proceedings either involving the same debtor or an enterprise with connected subsidiaries operating in different States. The advocates of territorialism justify this approach as having the capacity to better protect local interests in cross-border insolvency proceedings since some local stakeholders such as creditors, employees etc. may lack the means to participate effectively in cross-border insolvency proceedings. Additionally, differences in domestic laws regarding matters such as the legal definition of insolvency, securities, priorities etc. could make a single insolvency proceeding more complex and potentially compromise or alter legal rights of local stakeholders such as creditors who had considered the domestic laws before lending.

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.

- 1. The Adoption of the UNCITRAL Model Law on Cross-Border Insolvency by Bahrain and the Dubai International Financial Centre in 2018 and 2019 respectively;**
- 2. Reform of domestic insolvency laws by the United Arab Emirates (2016 and 2019) and Saudi Arabia (2018).**
- 3. The launch of regional comparative survey on international insolvency instruments that regulate insolvency proceedings in the Middle East and North Africa in 2009.**

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

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.

Insolvency proceedings regarding an individual is aimed at rehabilitating the bankrupt to be able to start afresh. Thus, such procedures may involve discharge or forgiveness of part of the debt owed at the end of the bankruptcy or administration. Liquidation and dissolution, which are available in the case of corporate insolvency proceedings and which eventually lead to the dismantling and the “death” of an insolvent corporation, is not an option available in modern bankruptcy proceedings against individuals.

The objective for corporate insolvency on the other hand, would be determined by among others, the underlying cause or causes of the insolvency (for example, whether commercial /cash flow insolvency or balance sheet insolvency).

A rescue culture, which promotes among others, restructuring of debts, injection of fresh capital, the disposal of non-core assets and shutdown of loss-making lines of the business etc. with the view to changing the financial or commercial fortunes of the insolvent corporation and eventually preserving it as a going concern is considered more preferable.

However, where it becomes obvious that rescue would not be a viable option, liquidation and eventually dissolution would be another option to consider in a corporate insolvency.

Thus, unlike individual insolvencies, the overarching objective in corporate insolvencies is not necessarily, rehabilitation and discharge.

This answer displays a satisfactory understanding of the issues. 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 and there are relevant matters which are not addressed such as exempt property.

3.5

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.

Cross-border or international insolvency situations arise where an insolvent corporation has operations or assets or creditors etc. in different states. The situation

arises because there is no statute with universal application, or a court with a world-wide jurisdiction to handle such matters of transnational dimensions. Due to the fact that different countries may have different domestic insolvency laws (both substantive and procedural) that regulate matters such as securities, set-off, secured and unsecured creditors, priorities etc., cross-border insolvency proceedings pose formidable challenges to stakeholders, especially in determining the choice of forum, the choice of law and the recognition and effect or enforcement of foreign judicial orders or decisions arising from concurrent insolvency proceedings. Additionally, where concurrent insolvency proceedings are taking place in different jurisdictions in respect of the same corporation and underlying assets, it could become difficult for the courts involved in such proceedings to achieve co-operation and coordination to ensure that all the assets and claims arising under the estate are properly aligned. The development of multinational cross-border insolvency treaties such as the one signed in 1993 by the OHADA member countries in Africa, the adoption of the UNCITRAL Model Law on Cross-Border Insolvency, and the resort to coordination and co-operation agreement between parties, for example as promoted by the American Law Institute (ALI), are some of the options available for navigating a path around cross-border insolvency challenges.

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 Model Law in Cross-Border Insolvency (MLCBI) is one initiative to harmonise domestic insolvency laws around the world. The MLCBI promotes co-operation and coordination between both courts and insolvency representatives in different states. It further promotes recognition of foreign courts and foreign insolvency representatives. The adoption of the MLCBI by most countries around the world will ensure more efficient cross-border insolvency proceedings that maximise returns to creditors.

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.

1.5

Marks awarded 8.5 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.

The above information does not disclose whether any of the two countries, i.e Utopia and Erewhon had adopted the UNCITRAL Model Law on Cross-Border Insolvency. Again, the information does not indicate whether there is any cross-border insolvency treaty between Erewhon and Utopia. Additionally, it would have been helpful to know whether there was any agreement between the respective parties in the concurrent proceedings that seeks co-operation and coordination between the courts in the different states.

The provision of the additional information listed above is required because there are concurrent insolvency proceedings in two different states and a court order for liquidation of the same company has been obtained in one proceedings. Thus, the issue of recognition and enforcement of a foreign proceeding (i.e. the winding-up order obtained by one creditor in Erewhon) and foreign insolvency representative (i.e. the liquidator appointed by the Erewhon court) arises.

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 UNCITRAL Model Law on Cross-Border Insolvency (MLCBI) promotes co-operation and coordination between courts in different states that are handling insolvency

proceedings affecting the same debtor in cross-border insolvency situation. 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.) It also promotes the adoption of a singular proceedings to maximise benefits to all creditors and minimise costs associated to the insolvency proceedings. Usually, the domestic court of a country that has adopted the MLCBI would recognise and enforce a foreign order and a foreign representative provided such recognition and enforcement would not violate any public policy of the domestic country.

However, while the MLCBI “provides procedural mechanisms to facilitate more efficient disposition of cases in which an insolvent debtor has assets or debts in more than State, it does not purport to address substantive domestic insolvency law”¹.

From the facts of the case, although Nadir was originally incorporated in Erewhon, its centre of main interest is now in Utopia. Given that the Utopia is yet to enact or adapt its domestic laws to reflect the provisions of the MLCBI, Utopia’s current cross-border insolvency Act is the applicable law in Utopia.

There is no indication that the order of liquidation obtained in Erewhon considered the totality of the assets and liabilities of Nadir to determine whether liquidation or rescue would be the best approach to resolve Nadir’s insolvency.

My advice to the Erewhon liquidator regarding the relevance of the cross-border Insolvency Act of Utopia would be that it is the applicable substantive law on cross-border insolvency proceedings in Utopia. Its provisions will thus determine matters such as choice of forum, choice of law and whether the order of liquidation obtained would be recognised and enforced or otherwise.

[See the model answer.](#)

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.**

¹ UNCITRAL Model Law on Cross-Border Insolvency: The Judicial Perspective (Updated 2013) p.4.

(a) If Apex has also filed to wind-up Nadir but the matter is yet to be heard, then it is possible for the foreign representative to enter into an agreement for the co-operation and coordination of the two proceedings.

(b) My response will be the same as (a) above.

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 will select Australia which has adopted the UNCITRAL Model Law on Cross-Border Insolvency (MLCBI).

The four key international insolvency issues potentially facing the insolvency representative in the above-given facts would, among others include the forum of the main cross-border insolvency proceeding, the choice of law to be applied, the recognition and enforcement of foreign orders and co-operation and coordination between courts in different States with concurrent proceedings.

1. Choice of forum: I chose Australia mainly because of its adoption of the MLCBI and the adoption of the MLCBI which provides for a better co-operation and coordination between courts in concurrent proceedings and additionally promotes a unified proceeding that takes care of all assets and liabilities.

2. Choice of law: This relates to the potential of courts in different States applying different laws on matters such as securities, priorities, set-off, to the same set of parties. I will encourage the use of cross-border insolvency agreements between the different insolvency representatives to navigate this challenge.

3: Recognition and Enforcement of foreign order: Where there are no existing treaties or conventions and adoption of the MLCBI harmonising the laws of Australia and the laws of the other countries with concurrent proceedings, I will advise resort to the use of cross-border international agreements as indicated above.

4. Corporation and coordination: My approach will be the same as (2) and (3) above.

This is a satisfactory response. 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.

5

Marks awarded 9 out of 15

* End of Assessment *

TOTAL MARKS 33.5/50

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