



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 is not a set of globally adopted laws. International insolvency law is a collection of uniform model laws, rules, guidelines, and protocols designed for review, and hopefully adoption, by sovereign States to address the rights of debtors, creditors, guarantors, employees, taxing authorities, equity holders, and all other stakeholders when a debtor is insolvent and its assets and/or creditors are located in more than one State. The goal of international insolvency law is to protect and encourage international trade and investment by bringing clarity and predictability regarding a debtor's insolvency and creditors' rights where complex jurisdictional and choice-of-law issues arise.

2

Question 2.2 [maximum 5 marks]

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

Universality and territoriality are theories that are, in their pure form, on opposite ends of the spectrum regarding which courts have (or do not have) insolvency jurisdiction, choice of law, authority of the estate representative, creditors' rights, and extra-territorial enforcement of court orders and judgments. Neither theory has been adopted in its pure form. However, modified universality and cooperative territorialism provide pragmatic approaches in certain systems, depending on local general law, culture, and related matters.

Universality proposes jurisdiction for only one insolvency proceeding, which is the forum where the center of the debtor's interests is located. Proceedings in another forum are unnecessary and unauthorized. The home forum provides the general insolvency law for the proceeding. All creditors, wherever located, may participate in this single proceeding. Judgments and orders of the home court are enforceable in foreign States. The advantage of universality is, with only one formal proceeding, the costs are lower than proceedings in multiple jurisdictions. Universality is difficult to achieve because it requires States to agree to defer to a foreign home court for application of foreign laws regarding the rights of local creditors.

Territoriality, on the other hand, promotes insolvency proceedings in multiple jurisdictions, running concurrently, with each forum determining the rights of stakeholders according to its local laws, and enforcement of such judgments and orders is restricted to the local jurisdiction. The estate representative's authority does not extend beyond the boundaries of the local jurisdiction's borders. The advantage of territoriality is protection of local creditors (who may have more difficulty protecting their interests in a foreign jurisdiction). However, this approach is more expensive than universality, especially for a financially distressed debtor involved in multiple proceedings. In addition, creditors located in the State in which debtor's most valuable assets are located may obtain an unfair advantage over creditors located in another State in which debtor holds assets of lower value.

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.

In 2009 a joint initiative of the Hawkamah Institute for Corporate Governance, the World Bank, the OECD and INSOL International launched the first, regional,

comparative survey of insolvency systems in the Middle East. This survey also included the North Africa (MENA) region.

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

In 2016 and 2019, the United Arab Emirates reformed its domestic insolvency laws, followed by reforms by Saudi Arabia in 2018 and Dubai in 2019.

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

In 2018 Bahrain adopted the Model Law on Cross-Border Insolvency. The Model Law was later adopted in 2019 by the Dubai International Financial Center.

1.5

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.

From the debtor's perspective, the objectives of an insolvency proceeding of an individual debtor are to stop creditor harassment and to discharge debts. Not all debts are subject to discharge, depending on the laws of the specific jurisdiction. For example, some debts, such as taxes, domestic support obligations, and student loans, may not be discharged. Moreover, not all jurisdictions allow broad discharge of debts.

In insolvency proceedings of a corporate debtor, the objective is to preserve the business or the viable parts of the business while paying down or restructuring debt. In the event that reorganization/restructuring is not feasible, the objective becomes liquidation of the assets and payment to creditors followed by dissolution of the debtor entity.

From a creditor's perspective, the objectives of an insolvency proceeding of a debtor (individual or corporate) are generally the same: investigation of debtor's previous transactions, avoidance of fraudulent conveyances and preferential payments, liquidation of all non-exempt assets, and payment to creditors that treat similarly situated creditors the same (i.e., administrative claimants, secured creditors, priority creditors, and general unsecured creditors). In a corporate insolvency, creditors also want directors and officers held liable for any misconduct that led to insolvency.

You raise some issues relevant to the question. It would be better to frame those issues to directly correspond to the matter at hand. There is also some scope to elaborate, for example with respect to exempt property.

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.

In a cross-border context, there will be at least two separate States with sufficient jurisdiction over the debtor, the assets, and/or the creditors to assert that its own law should govern determination of insolvency disputes. Each State may have some level of domestic insolvency law, but the root of their respective systems (civil law or common law) may be substantially different, leading to a tendency toward pro-debtor or pro-creditor dynamics that are incompatible with the other State's laws. In addition, one or more of the competing States may have little or no insolvency law with respect to cross-border cases. There is no global insolvency court and no international insolvency language.

Specific difficulties presented in a cross-border context include the likelihood that the two States have different substantive and procedural law regarding commencement of formal insolvency proceedings and uncertainty whether a local court will recognize foreign concurrent insolvency proceedings, foreign estate representatives, and orders and judgments of a foreign court.

A concise list of specific cross-border issues identified by J.L. Westbrook are the following.

- (1) standing for (recognition of) the foreign representative;*
- (2) moratorium on creditor actions;*
- (3) creditor participation;*
- (4) executory contracts;*
- (5) co-ordinated claims procedures;*
- (6) priorities and preferences;*
- (7) avoidance provision powers;*
- (8) discharges; and*
- (9) conflict-of-law issues.*

J.L. Westbrook, "Developments in Transnational Bankruptcy", (1995) 39, St Louis University Law Journal 753, Pp. 753 - 757.

You raise numerous relevant matters. There is some scope to elaborate, for example with respect to the meaning of 'insolvency' and difficulties with language.

4

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.

In the absence of a unified, global set of insolvency laws, several organizations have promoted multilateral approaches to harmonizing diverse domestic insolvency laws. While not all these approaches achieved widespread adoption, they each contributed to the analysis and future development toward harmonization of disparate domestic insolvency laws.

For example, in 1970 the initial draft of an EC Convention on Bankruptcy and Related Matters offered a mechanism to require contracting States to enact a “Uniform Law” regarding insolvency issues. This convention was not adopted, but it did lead to subsequent draft conventions.

In 1997 the International Bar Association (IBA) drafted a Model Bankruptcy Code. This project may have been too ambitious for adoption by other States. The IBA then focused its efforts in working with the United Nations Commission for International Trade Law (UNCITRAL) as it drafted its Legislative Guide on Insolvency Law in 2004.

The UNCITRAL Legislative Guide offers uniform standards and approaches to various insolvency issues as a guide for U.N. member states when evaluating and reforming their domestic insolvency laws. This Legislative Guide has been more successful in promoting harmonization of domestic law. For example, the Legislative Guide recommends enactment of the UNCITRAL Model Law on Cross-Border Insolvency, drafted in 1997. The Model Law has been enacted, sometimes with modification, by many countries around the world.

In the early 2000s, the World Bank published its Principles for Effective Insolvency and Creditor/Debtor Regimes, which has been subsequently revised several times. Given that the World Bank and the International Monetary Fund may require reform of a borrower State’s domestic insolvency laws before funds may be loaned, these Principles have been widely considered. Indeed, the UNCITRAL Legislative Guide and the World Bank Principles form the best practice guide for reform of domestic insolvency laws. Such reform based on uniform standards and principles leads to harmonization of international insolvency laws.

In 2010, the European Parliament addressed the differing domestic insolvency laws within the EU and identified areas of improvement in its report on Harmonisation of Insolvency Law at the EU Level.

In 2015, the European Commission published its Action Plan on Building a Capital Markets Union that promotes harmonization of domestic insolvency laws as a means to provide clarity and certainty for foreign investment.

5

Marks awarded 13 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 court proceedings initiated in Utopia by Apex involves breach of contract, not an insolvency proceeding against Nadir. Apex seeks only money damages from Nadir for nonpayment under the contract for goods delivered by Apex.

The winding-up proceeding against Nadir in Erewhon is an insolvency proceeding. Creditors in Erewhon have commenced a proceeding against Nadir to gather and liquidate Nadir's assets, including those located in Utopia, to pay Nadir's creditors in Erewhon and presumably elsewhere.

Under Utopia's Cross-border Insolvency Act, the Utopia court must cooperate with the Erewhon insolvency court and estate representative in Erewhon, either directly or through representatives.

I would advise the Erewhon liquidator to become familiar with the relevant provisions of the Utopia Cross-border Insolvency Act as it relates to the mandate to Utopia courts to cooperate with foreign courts and estate representatives in foreign insolvency proceedings. Next, I would advise preparation of a coordination agreement between

the two sovereign jurisdictions, known as Protocols or Cross-Border Insolvency Agreements, to clarify the rights of each jurisdiction and coordination of proceedings. Such agreement is subject to approval by the Utopia general court and the Erewhon insolvency court.

It would be interesting to know whether Erewhon, too, adopted the UNCITRAL Model Law on Cross-Border Insolvency, but that information is not necessary to the analysis. The Model Law does not require reciprocity, and Utopia is bound by the mandate to cooperate regardless of whether Erewhon has similar laws.

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.***

Yes, to some extent the fact that Apex had filed insolvency proceedings—not breach of contract proceedings—in Utopia before the insolvency proceedings were commenced in Erewhon makes a difference to the analysis. Under these circumstances, there are now two concurrent insolvency proceedings rather than one insolvency and one money-damages proceeding.

Specifically, the Utopia proceeding is now concerned with winding up Nadir, which involves sale of all Nadir's assets of value, rather than a proceeding for a judgment against Nadir and enforcement against some, but perhaps not all, Nadir's assets.

However, with respect to the UNCITRAL Model Law, Utopia must still cooperate and communicate with the court and estate representative in Erewhon. In advising the Erewhon liquidator, I would need to know whether Erewhon had adopted the UNCITRAL Model Law or similar domestic insolvency law that would require Erewhon to cooperate and communicate with the Utopia court and estate representative and/or honor and enforce a winding up order entered in the Utopia court.

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

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?

ABC Company is an American corporation with his head office in San Diego, California. As the estate representative in ABC Company's insolvency proceedings in the USA, below are four key international insolvency issues to be resolved, followed by the domestic laws or international instruments that may be applied to address such issues.

- 1. Issue: Obtaining recognition as the estate representative in foreign States. Once the estate representative has identified assets in foreign countries and/or claims against foreign directors or transferees, the estate representative must obtain recognition in the applicable foreign States. This recognition is mandated in all States that have adopted, without modification, the UNCITRAL Model Law on Cross-Border Insolvency. If the applicable foreign State is Canada or Mexico, the American Law Institute's Transnational Insolvency Project may be helpful in obtaining cooperation from the foreign State.***
- 2. Issue: Liquidating assets located in foreign States. The estate representative may require the assistance of the foreign court to take control and sell real property or other tangible and intangible assets located in the foreign State. The estate representative may look to Protocols or Cross-Border Insolvency Agreements between the home court and foreign court to assist in the cooperation and coordination of such sales.***
- 3. Issue: Investigating foreign directors and holding them accountable for any financial misconduct that led to the Company's insolvency. Here, the estate representative may have causes of action against the Company's directors living in a foreign State or transferees of fraudulent transfers or preferences living in a foreign State. The estate representative would look to the foreign State's domestic laws to determine whether the home State (USA) may have jurisdiction over the subject person and whether the foreign State is legally***

obligated to cooperate and coordinate with the USA Court under, for example, the UNCITRAL Model Law.

- 4. Issue: Determining and applying the correct choice-of-law with respect to security interests asserted by secured creditors in Company property as well as priority claims asserted by taxation/revenue authorities. Security interests in foreign property and priority claims asserted by foreign taxing/revenue authorities are determined by the domestic law of the foreign State.**

There is scope to elaborate on relevant issues. **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.**

7

Marks awarded 11 out of 15

*** End of Assessment ***

TOTAL MARKS 39/50

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