



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]

Disclosure: All answers have relied extensively on INSOL International's Foundational Certificate in International Insolvency 2023/2024 Guidance Texts, as per honesty statement disclosure requirements.

Question 2.1 [maximum 2 marks]

Explain what the term "international insolvency law" means.

International Insolvency Law is a set of regulations that encompasses various jurisdictions, and thus, puts into consideration the necessary application of these laws across both the applicable local and foreign court proceedings. Simply put, it is a transnational basis of application of the law across all relevant jurisdictions.

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Question 2.2 [maximum 5 marks]

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

*Universality is premised on the approach that various insolvency proceedings which may be ongoing in or were filed in multiple jurisdictions can be addressed under the guidance of one primary insolvency law, such that it will cover the entirety of a debtor's assets and liabilities globally. In its ideal form, wherein a sole forum will have jurisdiction over all insolvency proceedings, the necessary means by which all of a debtor's assets may be obtained and directed will be made available, with all claims being given the opportunity to join the proceedings *pari passu*.*

Territoriality, on the other hand, takes an almost complete opposite view and highlights the importance (and relevance) of local court proceedings. In this case, there is a preference for local creditors to be given priority prior to assets being shared for distribution abroad. This creates a strong bias towards territorial limitation and, as such, considers that insolvency proceedings are largely independent of each other, may be commenced independently and are nearly entirely restricted to property that is located inside a State's borders.

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.

Three recent developments include:

The adoption of the UNCITRAL Model Law on Cross Border Insolvency by the Kingdom of Bahrain (2018) and the Dubai International Finance Center (2019), under its common law legal system.

A landmark survey through the cooperation of various multilateral organizations (The World Bank, INSOL, OECD, Hawkamah Institute for Corporate Governance)

which compared insolvency systems across countries in the Middle East (and included North Africa) against the World Bank's Principles for Effective Insolvency and Creditor Rights System as a best practice/s benchmark.

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

Developments in local insolvency laws during the past decade, in countries such as Saudi Arabia (New Saudi Bankruptcy Law, 2018), the UAE (Federal Decree Law No. 9, 2016 and Federal Decree Law No. 19, 2019) and even specifically for Dubai (DIFC Law 1, 2019)

2

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 a number of differences on objectives. One of the most straightforward is that an individual cannot be 'liquidated' as opposed to a corporation, hence there is a greater focus on rehabilitation for the former (on allowing for a 'fresh start'). Safeguarding against harassment is also of greater importance to an individual for quite apparent reasons.

Insolvency for corporations, on the other hand, highlights greater importance on retaining the portions of a business that can operate as a going concern. In addition, levying the necessary legal consequences for abuse of power, if any, on behalf of corporate officers / directors is also a key aspect of insolvency for corporations.

There is also scope to consider exempt property

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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 factors to consider, such as:

The decision as to which jurisdictions should see an insolvency proceeding commence, more so if there are no clear distinctions as to which area is the 'Centre of Main Interests (COMI)'.

The choice and application of law from another jurisdiction in a different (or various) jurisdiction/s.

Practical applications that intersect with international considerations, such as in the case of security enforcement for a certain location.

Further detail would be beneficial. For example, consideration of Westbrook's 9 key issues.
2.5

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.

Developments have largely been driven by insolvency professionals that work together in order to create frameworks that allow them to effectively perform their duties amidst the increasing complexity of cross-border insolvency cases. Specifically, the following organizations have seen reforms being formulated and openly communicated across various jurisdictions:

The UNCITRAL, American Law Institute / International Insolvency Institute, Judicial Insolvency Network, International Institute for the Unification of Private Law, International Lawyers Association, International Bar Association and, of course, INSOL International.

My views align with Fletcher's, specifically quoting McKenzie that "fundamental differences between the legal systems and the laws of countries are both the root problem of cross-border insolvencies and the major obstacle to their solution.."¹. My perspective is that there must be a continued push to allow for collaboration amongst States, as the reality of the alternative does not present a viable solution that allows for and combines trust, certainty of judgment or optimal recovery for all relevant parties.

¹INSOL Foundation Certificate in International insolvency Law 2023/2024, Module 1 Guidance Text p42 / D McKenzie, "International Solutions to International Insolvency: An Insoluble Problem?", (1997) 26(3), University of Baltimore Law Review 15, pp 15-29.

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

4

Marks awarded 10.5 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 key information in this case would still be aligned with the necessary consideration in a cross-border case, but allow me to expand further:

Important information in this case would primarily revolve around jurisdiction and application of the Model Law or relevant treaties - since a winding-up order has been filed in Erewhon, has the state applied any cross-border guidance, specifically the Model Law and aligned with completed texts (MLCBI, MLIJ, MLEGI, etc.) relative to its domestic laws? This will regulate the practical specifics relative to treatment of entities, enforcement, interpretation and others.

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.

It's been disclosed that the Cross-border Insolvency Act of Utopia has adopted the UNCITRAL Model Law, hence there are key considerations that must align with this application:

Acknowledging the Erewhon liquidator's standing relative to controlling Apex's assets is highly relevant as the Model Law provides guidance on the recognition of foreign representatives, per specifics in Chapter II, consisting of Articles 9 to 14. Specifically, in Article 12, it is stated that (given a foreign proceeding recognition), should an insolvency proceeding be commenced in Utopia, the Erewhon liquidator shall have standing to request, petition or submit to the Utopia court issues related to cooperation with the Erewhon court and the protection, realization and/or distribution of relevant assets.

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.

(a) Yes, depending on the judicial process, the other creditor which filed for Nadir's winding-up in Erewhon may end up preceding the Utopia filing which also affects the jurisdiction of primary proceeding.

(b) Yes, this presumes that Utopia will be the location of the main proceeding and will therefore manage regulation of the issue ('lex concursus').

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

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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?

Let us set the sample country as the United States, which adopted the UNCITRAL Model Law in 2005 as chapter 15 of its Bankruptcy Code via the Bankruptcy Abuse Prevention and Consumer Protection Act (BAPCPA).

There are four key issues that may be highlighted in which both domestic law and international instruments will be included in the discussion. These are sample issues are as follows: (1) recognition of a foreign representative, (2) non-discrimination of foreign creditors, (3) open communication amongst the court and representatives and (4) concurrent proceedings.

Recognition of a foreign representative to having standing in the courts - this is covered by 11 U.S.C. § 1504., which gives right of direct access to the United States courts. Application of Model Law Chapter II, Article 9-12.

Non-discrimination of foreign creditors - covered by 11 U.S.C. § 1513-1514, but also considered by the World Bank's Principle C15 (international instrument/s). Application of Model Law Chapter II, Article 13.

Open communication and cooperation amongst the court and representatives - specified by 11 U.S.C. §1525-1537. Application of Model Law Chapter IV.

Assistance may also be provided by the Guidelines Applicable to Court-to-Court Communications in Cross-border Cases appendix of the ALI NAFTA Transnational Insolvency Project: Cooperation among NAFTA Countries and the ALI-III Report, which followed, in that there are specified Global Principles for Cooperation (37 items), Global Guidelines (18 items) for court-to-court communications in international insolvency, expressions and terms accompanied by specific definitions (158 items), as well as Global Rules on Conflict-of-Law matters (23 items) which have been and continue to be used in the region's cross-border restructuring transactions.

Concurrent proceedings - this is covered by 11 U.S.C. §1528-1532. Application of Model Law Chapter V.

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 8.5 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.