



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 refers to the legal principles which apply in circumstances where an insolvency in one jurisdiction involves foreign legal elements which must be addressed in order to determine all issues arising in that insolvency. It will address which forum has jurisdiction over the matter; whether and to what extent foreign proceedings related to the matter will be recognised; and which jurisdiction's law governs a particular issue.

2

Question 2.2 [maximum 5 marks]

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

Universality is a principle under which cross-border insolvency is dealt with according to the law of one jurisdiction. Under universality a "main" jurisdiction may be identified whose law is applied to all proceedings in relation to the insolvency irrespective of the jurisdiction affected. Alternatively a worldwide law could be identified applying to all proceedings. The aim is to provide uniformity and ensure that similarly placed creditors are treated equally even if they are in different jurisdictions.

By contrast territoriality requires that the law of each jurisdiction affected in a cross-border insolvency be applied to the assets within that jurisdiction. It is a concept more in line with the sovereignty of nations. It reflects the reality that local creditors would only have been in a position to evaluate local assets in determining whether to do business with the debtor. It avoids the hardship of decisions impacting a creditor being made in a jurisdiction which the creditor's means might not permit it to access.

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 of insolvency proceedings (that all agree 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 comparative survey of the insolvency systems of the Middle East and North Africa region was conducted. What impact did this have on reforming domestic insolvency laws or addressing international insolvency issues in the Middle East? In 2018 Bahrain adopted the Model Law on Cross-Border Insolvency and in 2016 the UAE reformed their domestic insolvency laws by passing the Federal Law by Decree No. (9) of 2016 on Bankruptcy.

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.

With individual insolvency, human considerations require that a set of assets be set aside out of the estate in order to support the debtor and his dependents; further a principle aim is allowing the debtor a "fresh start" after all claims have been settled.

While rehabilitation may feature as an aim in a corporate insolvency under the “rescue” paradigm, if the company cannot be returned to trade it may be dissolved. Indeed rescue may entail separating viable businesses of a company which may continue to trade from other businesses. These considerations cannot be applied to a natural person.

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.

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

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.

Different legal regimes have different central aims of their insolvency laws. They may be creditor focused or debtor focused. This poses obvious challenges in recognising decisions made in on jurisdiction in another where their application conflicts with the central aim of the recognising jurisdiction’s insolvency regime.

Pertinent differences also include different approaches to the key considerations that underpin any insolvency regime. For example the nature and scope of avoidance provisions and preferences, which mean that a transaction which legitimately reduces the pool of assets available for distribution in one jurisdiction may not be recognised in another.

These differences may be resolved if there are shared choice of laws principles so that it is clear which jurisdiction’s law will apply to a particular issue. However, there may not necessarily be uniformity in this area either.

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.

New guidelines have been implemented by the ALI-III, UNCITRAL and JIN to facilitate co-ordination between practitioners across borders in international insolvency without the need for legislative reform or treaties.

These have the obvious drawback of requiring ad hoc consensus. However, it is my view that practitioners are more likely to be alive to the practical considerations of international insolvency than political leaders of states. Further, as the world becomes more interconnected, the requirement for effective international insolvency solutions can only increase. Thus, I consider that in providing for a flexible and consensual adaptation of shared principles to municipal differences, these agreements are likely to achieve successful outcomes which encourage further participation.

Further, multilateral organisations have promoted review and collaboration among practitioners with a view towards identifying and promoting further harmonisation initiatives. These include the General Colloquium hosted by UNCITRAL in 2017 at which papers on insolvency issues were presented; the International Lawyers Association which proposed a convention to standardise recognition of proceedings and representatives across jurisdictions. However, even here reservations were expressed as to the feasibility of achieving multilateral agreement.

It is my view that a particularly useful development has been the production of texts by UNCITRAL and the International Institute for the Unification of Private Law which would promote a shared understanding of the key aims of insolvency law and the impact of municipal variations, as well as the work of Insol International in promoting a shared understanding of municipal differences and joint exploration of how they may be bridged.

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

4

Marks awarded 11 out of 15

QUESTION 4 (fact-based application-type question) [15 marks in total]

Nadir Pty Ltd (Nadir) is a company registered in Utopia. Originally it was incorporated in the neighbouring country of Erewhon before moving its registration and head office to Utopia one month ago. Apex Pty Ltd (Apex) is incorporated and has its head office in Erewhon. Apex and Nadir enter into a contract by exchange of emails between their head offices for Apex to supply goods to Nadir in Utopia. Nadir has failed to pay for the goods which have been delivered in accordance with the contract. Apex issues court proceedings against Nadir in Utopia for monies owing for the goods sold and delivered.

Meanwhile, Nadir also owes monies to creditors in Erewhon. One Erewhon creditor obtains a court winding-up order against Nadir in Erewhon and a liquidator is also appointed by that court.

If you require additional information to answer the questions that follow, briefly state what information it is you require and why it is relevant.

Question 4.1 [maximum 5 marks]

Assume the UNCITRAL Model Law on Cross-border Insolvency has been adopted by Utopia without modification, except as required to domesticate it. For example, the Cross-border Insolvency Act of Utopia names its local laws relating to insolvency and its competent court under the Act. The Erewhon liquidator's investigations detect that Apex is suing Nadir in Utopia. The liquidator would like to stop Apex court action against Nadir in Utopia. Advise the Erewhon liquidator on the potential relevance of the Cross-border Insolvency Act of Utopia.

The Cross-border Insolvency Act of Utopia will require Utopia to recognise the Erewhon proceedings, which would be thwarted unless a moratorium is granted over proceedings in Erewhon against Nadir. Thus, the Erewhon liquidator is likely to achieve the objective of obtaining a stay of Apex's action against Nadir if he applies for recognition before the Utopia courts. The Erewhon liquidator may also apply to have the distribution of Nadir's assets in Utopia entrusted to the Erewhon liquidator.

The question requires candidates to apply the relevant MLCBI articles to the facts provided in more detail than that above.

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.**

If Apex had filed proceedings in Utopia to wind-up Nadir, the Erewhon proceedings would be held to be "non-main proceeding" since Utopia is where Nadir has its centre of main interest at the date of commencement of the proceedings. Thus Utopia would have principal responsibility for the managing of Nadir's insolvency and not Erewhon. Further, any relief granted to the Erewhon liquidator would have to be consistent with the Utopian proceedings.

Again, since Utopia is where Nadir has its centre of main interest at the date of commencement of the proceedings, if Apex had obtained a court order then the Erewhon proceedings' recognition would be subordinate to the Nadir proceedings.

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?

Assuming the country of incorporation to be the United Kingdom, the insolvency representative will have to consider:

Whether its insolvency proceeding and any reliefs granted thereunder will be recognised in the jurisdiction where the company holds land (a question to be determined by private international law principles of the United Kingdom's law but subject to the domestic law of the state in which the real property is located);

Whether the insolvency representative will be directly recognised in the jurisdictions in which he/she/they must appear or whether they would need to initiate local proceedings there to administer the debtor's assets under the local regime (a question to be determined by the domestic law of the relevant state)

To what extent the English Courts will recognise the interests of the taxation authorities from the other states (a question to be determined by the application of the Insolvency Act 1986); and

Whose law will determine title to the intangible assets (a question to be determined by private international law principles of the United Kingdom's law but subject to the domestic law of the state in which the real property is located).

This is a satisfactory response. Greater and more specific application is warranted.

5

Marks awarded 9 out of 15

*** End of Assessment ***

TOTAL MARKS 35.5/50

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