



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.

The various legal rules governing a situation in which the relevant insolvency proceedings, at the national level (within a particular state's legal system), cannot be exclusively and immediately applied without having regard to the international aspect of the relevant insolvency case.¹

These are authoritative sources. While you have combined their information into other words, it could perhaps better convey your personal understanding.

1.5

Question 2.2 [maximum 5 marks]

¹ Module 1 Guidance text, p 34 (paraphrasing Wessels' and Fletcher's definitions).

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

Universalism is the theory that in an insolvency situation the relevant debtor's debts and assets, across the globe, should be subject to one insolvency proceeding only.² There are different routes to that end - including ensuring that only one legal jurisdiction directs the insolvency process, or that multiple processes in different jurisdictions are all subject to the same law (i.e. a global insolvency law, covering the relevant *fora*) and, similarly, the entity / officeholder directing the process would be equipped with the required legal mechanisms to identify and secure any assets globally.³

Conversely, territorialism encapsulates the opposing view of universalism, in that insolvency processes can be commenced in multiple states and be limited, in terms of territory, to the various states in which they are commenced.⁴ In other words, more than one insolvency process could be advanced, in more than one country, in respect of the same debtor. As part of this notion, national interests might take priority, rather than multi-national creditors being ranked in parity under a global approach, albeit that territorialism is sometimes defended on the basis of it requiring a 'cooperative approach' among the various states.⁵

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.

- 1. In 2018 Bahrain implemented the UNCITRAL Model Law as part of its domestic law;**
- 2. In 2019 the Dubai International financial centre adopted the UNCITRAL Model Law; and**
- 3. In 2016 and 2019 the UAE implemented legal reforms by way of federal law decrees.⁶ Further details would be beneficial**

2.5

Marks awarded 7.5 out of 10

QUESTION 3 (essay-type questions) [15 marks in total]

Question 3.1 [maximum 5 marks]

² Ibid, p 37

³ Ibid, rephrasing content.

⁴ Ibid, p 38.

⁵ Ibid, pp 38-39.

⁶ Ibid, pp 66-67.

Write a brief note on the differences regarding the objectives of insolvency for individuals and corporations.

Although there are various objectives which overlap between the two, differences in objectives also arise, including that:

- 1. Excluded or exempt assets will only apply in relation to individual insolvency, i.e. various systems will allow an insolvent individual to retain certain assets required by that individual to maintain his dependents or himself/herself;**
- 2. To stop creditors harassing the individual debtor;**
- 3. To allow the individual debtor to make a fresh start;**
- 4. To take into account the fact that the individual debtor may have engaged in no or minimal wrongdoing;**
- 5. To take into account the overall personal circumstances of the individual debtor.⁷**

There is scope to elaborate regarding corporate objectives

3

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.

Various difficulties arise, including:

- 1. Different legal thresholds under different laws for commencing proceedings;**
- 2. Differences in definition of 'insolvency' across different systems;**
- 3. Different legal requirements for standing;**
- 4. Different tests for creditor participation;**
- 5. Different priorities within national law, e.g. some systems more 'pro creditor' than others; and**
- 6. Conflict of laws issues and differing national approaches (civil contra common law etc as well).⁸**

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.

Examples of attempts to promote harmonisation include:

- 1. The 2004 UNCITRAL legislative guide on insolvency law;**

⁷ Ibid, p 22.

⁸ Ibid 41-42.

2. *The World Banks Guidelines Principles for Effective Insolvency and Creditor / Debtor Regimes;*
3. *The European Union insolvency regulation (originally Council Regulation (EC) 1346/2000 on insolvency proceedings, which imposed conflicts of law rules for insolvency proceedings in respect of debtors based in the EU with operations across more than one member state);⁹*
4. *European Union reforms to harmonise the laws of member states on insolvency proceedings (e.g. 2010 report of the EU Parliament).¹⁰*

The likelihood of the impact depends upon the relevant legal systems in question, and the breadth of the law / issues covered by the law across those systems, in addition to where any relevant commercial entities are based. In particular, maximum harmonisation within the European Union is likely to be far more legally meaningful, and effective, in the context of imposing the same of rules, across more than one jurisdiction, than, for example, isolated bilateral agreements among non-EU states, or soft law guidance documents, which simply set objectives to be achieved (by legal provisions adopted as the individual participating state sees fit). The same point is made, unsurprisingly, by Fletcher regarding regional groups.¹¹ EU provisions which impose directly applicable law and which fully harmonise the member states legal systems as a consequence are, in my view, likely to be highly effective in addressing international insolvency issues - certainly, at least, in so far as all of the relevant entities, subject to the insolvency process, are based within EU member states (given that the same 'rule book' and conceptual tools etc would apply).

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.

⁹ Practical Law, EC Regulation on insolvency proceedings (Insolvency Regulation 2000).

¹⁰ Module 1 Guidance text, p 54

¹¹ Ibid, 59.

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.

Information I have not been given includes:

- the state of the *Apex v Nadir* litigation and its legal basis (presumably breach of contract) - I infer from the question though that the *Apex v Nadir* litigation is still at a stage that it can be stayed**
- what unsecured / secured creditors there are etc**
- what assets / operations Nadir has in Erewhon (excluding head office etc)**
- what other legal provisions there are in Utopia which might impact matters**

The potential relevance of the UNCITRAL Model Law (adopted via the Cross-border Insolvency Act of Utopia) to the Erewhon liquidator includes (*n.b.* References to Articles are to those in the MLCBI unless indicated otherwise):

- 1. Liquidator would be a foreign representative with a right of direct access (Articles 2(d) and 9);**
- 2. Liquidator could seek to obtain recognition of the liquidation in Erewhon, via Article 15(1), as a foreign proceeding (Article 17(1)(a)) which is a foreign non-main proceeding (Article 17(2)(b));**
- 3. If recognition granted, the Erewhon liquidator could then participate in, intervene in access and/or commence proceedings in Utopia, if it were relevant and/or appropriate to do so (depending upon provisions of Utopian law), pursuant to Articles 11 to 13 and 23 to 24;**
- 4. Utopia would be presumed to be the centre of main interest (Article 16(3));**
- 5. Liquidator may need to seek provisional relief, depending upon circumstances (Article 19);**
- 6. Liquidator would not obtain automatic stay on basis of liquidation in Erewhon, given that Erewhon liquidation is likely *not* a foreign *main* proceeding (Article 20(1));**

7. Liquidator could apply for relief under Article 21 though, including a stay of the *Apex Nadir* litigation; and
8. Liquidator entitled to maximum cooperation from Erewhon Court (Article 25).

This is a good effort. There are gaps in logic at times

4

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.

Question (a)

The question does not say where the proceedings have been filed (but presumably in Utopia if that is where Nadir is now registered and a creditor in Erewhon has already obtained a winding-up order in Erewhon). Assuming that to be the position, the answer is that this makes a difference in the sense that the Erewhon liquidator may, at the very least, wish to participate *in the Utopia winding-up proceedings* as a foreign representative after obtaining recognition).

Question (b)

The facts mean that concurrent proceedings are taking / have taken place. Moreover, if the Erewhon liquidator sought recognition in Utopia Article 29(a)(i) would apply - relief granted to the Erewhon liquidator would have to be consistent with proceedings in Utopia.

See the model answer please

2

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?

System = England & Wales

- 1. Obtaining recognition in the foreign countries of the liquidation in England & Wales ('E&W'). Any foreign countries which have adopted the Model Law (e.g. the US) would have provisions adopting Article 15 of the Model Law on recognition of the proceedings.**
- 2. Obtaining stays on any third-party actions against entities/assets located abroad (e.g. a creditor suing to enforce a debt in the foreign state). Foreign countries which have adopted the Model Law would have implemented Articles 20 and 21, which would assist the E&W liquidator.**
- 3. Conducting litigation in the foreign states to secure assets, and/or bring in debts owed to the company. For example, the Insolvency Act 1986, s 167 provides that liquidators may exercise powers in Parts 1 to 3 of Schedule 4, including bringing proceedings in the name of the company.**
- 4. A foreign creditor that is a tax authority may pose problems for the insolvency representative in E&W. For example, if the foreign tax authority is in a state which has adopted the Model law there may be a public policy exception (under Article 6) from allowing the E&W liquidator to secure assets in that third state which the tax authority may be seeking for itself, so as to secure payment of the relevant tax obligation *in full* rather than on a *pari passu* basis with *all* of the other creditors.**

This was answered quite well. 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.

6

Marks awarded 12 out of 15

*** End of Assessment ***

TOTAL MARKS 38/50

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