



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 6 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 means the collection of domestic and international rules, procedure and rights harmonise (or at least attempt to) the insolvency rules of different countries so that international insolvency issues can be solved across borders.

There is scope to elaborate

2

Question 2.2 [maximum 5 marks]

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

In the context of cross-border insolvency, universality and territoriality are opposed in how insolvency proceedings should be managed. Under universality, the idea is that insolvency should be dealt with under one proceedings (i.e. only in one country) which covers all assets of the debtor. In contrast, territoriality as a concept means that insolvency proceedings should be opened in each jurisdiction where the debtor has assets. Universality would involve creditors on a world-wide basis being able to be involved in one process rather than a process simply against the local entities which they have a claim over. One of the benefits (or perhaps drawbacks) of territoriality would be the benefit local creditors would get: easier access to local assets and proceedings (provided assets of value exist in that jurisdiction).

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.

Developments in Middle East include:

1. World Bank Co-operation: *countries in the Middle East such as Qatar, Saudi Arabia and Bahrain (among others) have worked closely with the World Bank for the last forty years.*
what impact did this have on reforming domestic insolvency laws or addressing international insolvency Issues in the Middle East?
2. Regional Survey: *a regional survey launched by Hawkamah Institute, World Bank, the OECD and INSOL launched the first regional, comparative survey of insolvency systems in the Middle East in 2009. This would show what further progress is needed and where differences lie between them.*
what impact did this have on reforming domestic insolvency laws or addressing international insolvency Issues in the Middle East? Elaboration is warranted
3. Domestic Insolvency Law: *several countries in the Middle East have reformed their domestic insolvency laws (i.e. UAE: 2016 & 2019 or Dubai: 2019) while Bahrain and Dubai both adopted international insolvency rules in 2018 and 2019 respectively.*

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

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.

Objectives of insolvency of individuals and corporates have differences and similarities.

Similarities

- 1. To ensure that distributions of the insolvency estate are as fair as possible subject to any priority of creditors.*
- 2. To ensure that secured creditors have a fair relationship with other creditors and the debtor.*
- 3. Where assets are dealt with improperly, they can be investigated and reclaimed in favour of the creditors.*

Differences

- 1. Corporate insolvency objective is to ensure that the business is preserved where possible (or parts).*
- 2. Corporate insolvency puts blame on individuals if possible whereas individuals are to be protected from creditors under individual insolvency where possible and allow for individuals (where no blame is to be had) to have a fresh start.*

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.

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.

When dealing with cross-border insolvency law, there are difference approaches and policy to insolvency across jurisdictions. One of the issues is that countries have not often designed their insolvency rules to deal with insolvency outside of their borders (i.e. they only deal with domestic issues), therefore, resolving differences across borders may be difficult where there is little help in domestic law to assist when international issues. And, even where are solutions to cross-border issues, countries may not have adopted the same rules.

Equally, there is also a risk that multiple insolvency proceedings being opened against the same debtor which may be in competition where the relevant jurisdictions do not coordinate. This may be counterproductive for creditors.

Furthermore when dealing with cross-border insolvency, is often defined domestically. In some, insolvency relates to balance sheet insolvency whereas in some countries it is defined in relation to cashflow. Equally, insolvency proceedings are defined differently across jurisdictions.

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.

Under choice of law rules, there have been attempts (mainly across Europe) to standardise insolvency laws. For example, Scandinavian countries have adopted the Nordic Convention on Bankruptcy which assists with recognition issues. Equally, EIR Recast regulates applicable law in the EU. Attempts to harmonise laws across jurisdictions with the same laws are of course the most effective way to harmonise laws but likely the most likely to achieve as they require the most effort to implement. However, given that in order to implement these types of cross-border harmonisation you would need some level of cooperation to begin with, we should query if these solutions have made significant changes to the existing position.

There have also been attempts in the context of recognition so that jurisdictions (where they don't agree on certain issues) may agree on main vs. non-main proceeding locations. This was developed by the IBA after 1989 but no jurisdictions adopted this as domestic legislation. The IBA's Concordat was more successful in adoption by jurisdictions but there were gaps in the rules. While these rules did help cooperation amongst jurisdictions they should be seen as steps towards harmonisation rather than a solution.

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

3

Marks awarded 10 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 provisions of the Cross-border Insolvency Act of Utopia as it has adopted the UNCITRAL Model Law on Cross-Border Insolvency will require / mandate that jurisdictions co-operate and co-ordinate concurrent proceedings. This could then result in the Erewhon liquidator to come to an agreement with the relevant professionals in Utopia such that maximum value could be achieved for all creditors.

Additional information required:

- 1. Has the MLCBI also been adopted by Erewhon? This is not important as MLCBI does not require reciprocity.**
- 2. Are there any key differences in insolvency rules between the two countries as it would be important to know if they are compatible / where issues might arise in any agreement.**

The MLCBI is significant for its provisions on recognition and relief in 4.1 and on concurrent insolvency proceedings in 4.2. Its provisions on cooperation and coordination are secondarily important as the liquidator is primarily seeking advice about staying court proceedings in Utopia.

Note that the Apex has issued court proceedings against Nadir in Utopia for monies owing for the goods sold and delivered – not insolvency proceedings.

1.5

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.

a. It would make a difference as it would be judge-led under the MLCBI.

b. If there a court-order that was already existing that would be a final decision so no further decisions could be made unless an appeal was made in Utopia.

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?

France

- In France, insolvency is defined as a cessation of payments meaning it is on a cash-flow basis. This could be different to the rules of the domestic insolvency proceedings. It would be crucial to know if this entity was reliant on cash-flow from another entity. However, if a debtor is not yet insolvency but are facing difficulties that they are unable to overcome, they may file a request to open a safeguard proceedings / or request that a mandat ad hoc is opened. These domestic proceedings would assist a debtor to reach an agreement with its creditors.*
- Equally, in France the debtor has to file with the relevant court within 45 days of insolvency. This may be different from other jurisdictions so would have to be managed appropriately.*
- It may be difficult for creditors (domestic and international) to recover assets but in relation to assets which have been dealt with improperly, a court can*

move back the date of insolvency up to 18 months before the opening of proceedings. Elaboration is warranted

- *Directors in France can also incur personal / criminal liability in circumstances where they contributed to a shortfall in the assets of the company / wrongful trading.* Elaboration is warranted

5.5

Marks awarded 7.5 out of 15

*** End of Assessment ***

TOTAL MARKS 31/50

A satisfactory paper that identifies some of the issues raised, generally substantiating its answers satisfactorily. More detail would have strengthened a number of answers.