



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 9 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" denotes a situation where a domestic insolvency event has arisen, and it is not possible to resolve the insolvency event solely under domestic law due to there being some aspect of the insolvency event that is subject to the law of a foreign state in some way. For example, a creditor of the debtor company might be a foreign-registered company and the debt might be subject to the law of the state of the foreign registered company.

2

Question 2.2 [maximum 5 marks]

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

Universality is the theory that there should be a single set of insolvency proceedings to deal with a debtor's assets and debts, and therefore, once one set of insolvency proceedings has been opened in one jurisdiction, it should not be possible for a second set of insolvency proceedings dealing with any aspect of the debtor's insolvency to be commenced thereafter in a separate jurisdiction.

Territoriality on the other hand is effectively the reverse of universality, as under this principle it is theoretically possible to have insolvency proceedings in every single jurisdiction where the debtor holds assets, since the principle is that proceedings dealing with a debtor's assets should be restricted to assets/property within the jurisdiction where the proceedings are commenced.

Both universality and territoriality have pros and cons. It cannot be denied that universality would have the effect of significantly reducing costs, which would in turn ultimately benefit the creditors of the debtors, but the reality is that it is not generally possible for local courts to disregard national constitutions.

Also, note, these theories involve two key aspects of private international law - recognition and effect as well as jurisdiction:

For example, with universalism, (1) the jurisdictional aspect requires all States to agree on the place for the one set of insolvency proceedings in respect of the debtor and, to be successful, (2) recognition and effect requires that other States recognise that one set insolvency proceedings 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, the Hawkamah Institute for Corporate Governance, the World Bank, the OECD and INSOL International came together as a joint initiative to conduct a comparative survey in the insolvency systems in the Middle East region.

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

In 2016 and in 2019, the UAE brought out legislative changes to its domestic insolvency laws.

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

In 2018, Bahrain joined the extensive list of countries who have substantially implemented the Model Law on Cross-Border Insolvency into their domestic legislation.

1.5

Marks awarded 7 out of 10

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

Question 3.1 [maximum 5 marks]

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

The objectives of insolvency for individuals and corporations are inherently distinct by nature. From the outset, it is obviously not possible to dissolve an individual after insolvency in the same way as it is for a corporate entity, so the objectives for the outcome of the insolvency will clearly be very different.

As the individual will continue to live (so-to-speak) after the insolvency, an objective for the insolvency of the individual can be to order contributions from his or her future income or current assets to his creditor(s) or insolvency estate. Elaboration re exempt assets is warranted This will generally not be possible in the insolvency of a corporation as the closest equivalent objective might be to preserve potentially valuable parts or assets of the corporation's business.

There is generally more of an incentive to provide support or assistance to an individual in insolvency which may enable him or her to have a fresh start, especially if the reason for the individual's insolvency is lacking mala fides; whereas in corporate insolvencies, there will generally be provisions in place for the imposition of personal liability on those individuals who may have personally contributed to the corporation's insolvency.

On an empathetic level, there are clear incentives to have consumer protection measures in place for individuals facing or in insolvency who might suffer at the hands of a large corporate creditor.

4

Question 3.2 [maximum 5 marks]

Write a brief note on the difficulties that may be encountered when dealing with insolvency law in a cross-border context relating to pertinent differences in the relevant systems.

It is not possible to describe an exhaustive list of the difficulties that may be faced in a cross-border context when matters of insolvency are in issue, as each jurisdiction has its own domestic legislation and will in turn handle the conflicting law of the second jurisdiction in its own distinct way.

However, the fundamental difficulties which might be said to arise in a cross-border insolvency situation are (1) the choice of forum (being the venue) to exercise jurisdiction for the insolvency proceedings; (2) the issue of recognition and enforcement of foreign judgment(s) relating to the same insolvency; (3) choice of law.

In terms of forum, intrinsic with the issue of choice of forum is that of jurisdiction for the insolvency proceedings. Jurisdiction is the competence of a court, by law, to hear and decide upon the insolvency proceedings. The issues as to forum and/or jurisdiction will typically arise at the opening of an insolvency proceeding, as that is when a court will generally be presented with all or most of a corporation's or an individual's issues as to insolvency, i.e., the debts and assets will generally be laid out and this is when a court may be forced to look at whether it has jurisdiction to deal with specific assets or debts.

The issue as to recognition of foreign judgments relating to the same or substantially the same insolvency matter may also cause difficulties for the domestic court or insolvency practitioner who is hearing or handling the insolvency proceedings on a domestic level. It may be the case that the foreign judgment infringes upon the domestic laws of the country hearing the insolvency proceedings.

The third fundamental difficulty that might be encountered when dealing with insolvency law in a cross-border context is that of the choice of law (which is quite apart from choice of forum and jurisdiction). This issue might arise in situations where one country has determined that it has jurisdiction to hear the insolvency proceedings, but in the course of the insolvency proceedings it is met with a contract to which the debtor is a party and in which the debtor contractually agreed that a foreign law must apply to the contract.

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.

There are a number of examples of multilateral steps that have been taken in the context of both hard law and soft law, which have had the effect of promoting harmonisation of domestic insolvency laws. A non-exhaustive list of examples is below:

Soft law examples:

- *UNCITRAL Legislative Guide on Insolvency Law (2004)*
- *Model Law on Secured Transactions (2016)*
- *UNCITRAL Model Law on Recognition and Enforcement of Insolvency-Related Judgments (2018)*
- *"Principles for Effective Insolvency and Creditor / Debtor Regimes", the World Bank (2005, 2011, 2015, 2021)*

Hard law examples:

- **European Insolvency Regulation (2000)**
- **Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on Insolvency Proceedings (Recast) (EIR Recast)**
- **Regulation 2021/2260 of 15 December 2021 (replacing Annexures A and B)**

The aforementioned examples have already had a positive and extensive impact in addressing issues in international insolvency. Part One Recommendation 5 of the UNCITRAL Legislative Guide on Insolvency Law (2004) states that "[t]he insolvency law should include a modern, harmonized and fair framework to address effectively instances of cross-border insolvency. Enactment of the UNCITRAL Model Law on Cross-Border Insolvency is recommended." The World Bank guidelines are of particular importance in the context of insolvency reform as the World Bank frequently will make it a condition of loan support for developing countries to enact insolvency legislative reform. In doing so, the World Bank generally refers the developing countries to the INCITRAL Legislative Guide which accordingly promotes the harmonisation of domestic insolvency laws.

The European Insolvency Regulation (2000) has already had a significant influence over the convergence of domestic insolvency laws and this is further strengthened by the fact that these laws are consistently and regularly reviewed and revised.

5

Marks awarded 12.5 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.

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.

Additional information that is required in order to provide fully informed advice would be (1) when was the contract (entered into by emails) actually entered into between Nadir and Apex? Was it before or after the change of registered office of Nadir, noting that Nadir only moved its registered office one month ago, (2) did the contract specify any choice of forum/jurisdiction in the event of a dispute between the parties, (3) was the winding-up order obtained against Nadir made before or after Apex issued proceedings against Nadir, (4) was the winding-up order against Nadir made before or after it changed its registered office from Erewhon to Utopia.

The liquidator in Erewhon is likely to struggle to stop the Apex court action in Utopia as, on the facts provided, Apex is suing Nadir in the jurisdiction in which it is currently registered (which is conducive with the UNCITRAL Model Law on Cross-Border Insolvency) and, separately, the fact that a liquidator has been appointed and a winding up order granted against Nadir in a jurisdiction in which it is not registered, is not conducive to the UNCITRAL Model Law on Cross-border Insolvency which would have favoured a winding-up order in the jurisdiction in which the debtor is registered.

The MLCBI is significant for its provisions on recognition and relief in 4.1. Details in this respect were to be discussed.

0.5

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) We are not told where Apex has filed these proceedings but let us assume it is Utopia. Either way, the answer is no as the matter has not yet been heard.

(b) Yes. Why?

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?

I have selected England as the jurisdiction for the company's incorporation. Based on the insolvency laws of England and the brief facts provided, four key international insolvency issues facing the insolvency practitioner are:

- 1. Is there any international treaty or international instrument that applies as between England and each of the other States;*
- 2. The choice of forum to exercise jurisdiction in each of the scenarios;*
- 3. The recognition and enforcement of any foreign judgment involving the same subject matter;*
- 4. Whether the parties have privately contracted to select their own choice of law.*

The Insolvency Act 1986 will apply to apply to issues 2, 3 and 4. An example of an international instrument which may apply to issue 1 is the Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on Insolvency Proceedings (Recast) (EIR Recast).

Provide detail on the English CBI laws to the issues you identify (for this 8 mark question).

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.

3.5

Marks awarded 4.5 out of 15

* End of Assessment *

TOTAL MARKS 33/50

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