



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). Chapter IV, if adopted**

**(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.**

**For better understanding of the term, it needs to be broken into two parts: international insolvency and the second part will be the law dealing with the first part, insolvency being the link. The term international insolvency will refer to the treatment of handling transactions of a financially distressed debtor who come into possession of either business assets or got creditors / debtors in one or more country due to business dealings outside the country wherefrom the debtor has been operating. The law that deals with matters where the parties involved are operating from different countries and more particularly when the parties are connected through a deal involving a business which is in distress, then that law will be termed as international insolvency law.**

**While there could be provisions in every country's insolvency law which deal with cross border transactions involving parties situated in countries other than domestic country, there cannot be law by itself which will be applicable globally to call itself an international insolvency law.**

2

Question 2.2 [maximum 5 marks]

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

Under concept of Universality

**Only one proceeding covering all the assets of the debtor and his debts worldwide**

**The person appointed will have the control over the entire assets and deal with all debts**

**Creditors from worldwide will participate in the proceedings and will be treated equally**

**Need to address priority rules of different countries**

Under the concept of Territoriality

**The proceedings will be commenced in every country wherever the stakeholders feel necessary**

**It will cover the debts and assets of the debtor within the jurisdiction of the court**

**The liabilities of the debtor within the jurisdiction will only be taken up for settlement.**

**As it could be understood, both the models have their own pros and cons. Depending upon the debtor and its area of business and the industry involved, the choice needs to be exercised.**

**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

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.**

**UNCITRAL Model Law being adopted in Dubai International Finance Centre and Abu Dhabi Global Market.**

**Recognition of foreign insolvency proceedings in onshore UAE courts even though no framework put in place.**

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

**The Kingdom of Saudi Arabia adopting UNCITRAL Model Law in Cross Border Insolvency in Dec 2022.**

1.5

Marks awarded 6.5 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 for individuals

- 1. Providing an opportunity to smooth exit from business without harassment by creditors;**
- 2. Arrange for arriving at the residual value of business after allowing sufficient estate for the individual for continuing his living ( including his family);**
- 3. Allowing the individual to retain minimum requirement of plant and machinery to continue his trade;**
- 4. Giving an opportunity to the individual clear the liabilities, if necessary, from out of his future revenues.**

Objectives of insolvency for corporations

- 1. Preserve and protect the business and its assets from further deterioration;**
- 2. Arrange for a 'calm period' for the management to reorganise themselves;**
- 3. Find out possibility of maximising the value of the business/assets;**
- 4. Identify any preferential, undervalued, extortionate and fraudulent transactions that took place in the corporate and find possibilities to the effects disgorged from the wrongful beneficiaries of such transactions;**
- 5. Arrange for keeping the company as a going concern and ensure continuity of the economic activity of the corporate and identify another management and handover the operations;**
- 6. Ensure that the corporate is dissolved at the earliest if its revival is impossible so that allocation of economic resources are not wasted.**

Common objectives

- 1. Distribution of realised business value to the stake holders in accordance with laid down rules and regulations;**
- 2. Enlist reasons for failure and record for future reference.**

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.**

**Approaches to Cross border insolvency law is always mired in the diametrically opposite systems such as 'debtor in control' or 'creditor in control' that are being followed in the respective states. In addition to that, both private and public law substantively affect the insolvency proceedings. For example in a cross border insolvency proceedings if claims by public authorities such as taxes are made on the debtor by both foreign and local representative, a piquant situation would arise whether the claims by both should be treated on par. The public law probably would be against such treatment on equity basis. Also, any government in place would like to play for the gallery of general public to project themselves better in a role of a saviour and would be against acknowledging foreign public claims.**

**The IMF paper titled "orderly and effective insolvency procedures" (1999) (Ch 2) details how the insolvency law of countries differ in important respects. Some of them are:**

**Risk allocation rules which should be predictable, equitable and transparent.**

**Protect and maximise value for the benefit of all interested parties and the economy in general.**

**Finalising the beneficiaries while the value is distributed.**

**Hence a cross border insolvency law for a country should keep in mind the above operative requirements while accommodating the foreign proceedings relating to the same debtor.**

**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 21<sup>st</sup> 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.**

**Development of Practice Guide on Cross Border Insolvency Cooperation in 2009 by UNCITRAL is one of the marked developments in promoting harmonisation of domestic insolvency laws. While certain unique problems were faced, as in the case of Maxwell Communication Corporation, the better understanding between the courts paved the way for signing of an insolvency agreement between the administrations in UK and USA and smoothed the entire proceedings. This created an opportunity for following organisations to work in unison and carve out a methodology for the parties to the dispute to voluntarily put in place a workable structure to solve the problem and also paved the way for the courts involved to issue suitable orders.**

**American Law Institute and International Insolvency Institute  
American Law Institute and North American Free Trade Agreement States  
Judicial Insolvency Network - a network of judges from across the globe with experience in cross border insolvency and restructuring matters.**

**On the 50<sup>th</sup> Anniversary of UNCITRAL, a working namely Working Group V was formed to look into modalities of developing simplified insolvency regime which would be applicable for micro, small and medium sized enterprises (MSMEs), the need of the hour.**

**Between the years 2010 and 2020 a flurry of activities providing guidelines for incrementally improved working of UNCITRAL Model Law to enable the same to make it feasible for the enacting states to discuss and approve its implementation in to their territorial insolvency law.**

**It is to be noted that INSOL international with its more than 10000 professionals from countries across the globe has also pitched in promoting harmonisation of domestic insolvency laws.**

**In my opinion, the steps initiated and being implemented are all with the background set under globalisation of trade and commerce, the in thing late nineties and in the first decade of 21<sup>st</sup> Century. But the recent phenomena, particularly by developed nations enacting rules of trade barriers which scuttle the businesses already globalised, promotes more of territorial approach should be quickly taken into the strides by all the working groups. The future recommendations by these groups should be tempered with keeping this trend reversal.**

**There is scope to elaborate re political pressure, foreign investor pressure and/or loan conditions.**

**4**

**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.***

ANSWER

***The liquidator appointed at Erewhon to take up investigations on Apex fits into the definition of a "foreign representative" . It is to be noted that the information as to whether any formal liquidation proceedings have been commenced in Erewhon. However, the Model Law does not specify that the foreign representative must be authorised by a court in Erewhon.***

***While the Model Law has been adopted in Utopia, no such detail has been provided about Erewhon. However, it may be noted that reciprocity is not a requirement under the Model Law.***

***By virtue of Article 9 the liquidator appointed at Erewhon qualifies for direct access to courts in Utopia.***

***Based on Article 19, the liquidator shall seek urgent interim relief and request for stay of action against Nadir in Utopia.***

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.**

ANSWER

**Article 19 and 21 enlist that the courts in Utopia would have acceded to the request of the liquidator of Erewhon and stayed further action.**

**Where the court in Utopia had already heard and disposed of the matter by winding up order on Nadir, still the courts in Utopia would have stayed further action and accommodate the application by the Erewhon liquidator.**

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

1

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?**

**Leaving this question in full.**

***Sorry. I could not comprehend the question. Would like to receive the feed back for this submission and from that I will read and understand question and thereafter the answer.***

**See the 'Model' Answer for four key international insolvency issues raised by the facts and facing the insolvency representative in this scenario. You then needed to pick a State and apply the current laws on CBI from that State to such issues.**

**0**

**Marks awarded 5 out of 15**

***[Type your answer here]***

**\* End of Assessment \***

**TOTAL MARKS 33/50**

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