



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: 10 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 is an instrument which regulates the treatment of financially distressed debtors where such debtors have assets and creditors in more than one country. Professor Dr. Bob Wessels in his publication of "International Insolvency Law" 2006, defines international insolvency law as "a body of rules concerning certain insolvency proceedings or measures, which cannot be fully enforced, because the applicable law cannot be executed immediately and exclusively without consideration being given to the international aspect of a given case."

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Question 2.2 [maximum 5 marks]

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

The theory of universality is one of the main approaches when it comes to dealing with problems associated with cross-border insolvency. A basic definition is the principle that there should be only one insolvency proceeding covering all of the debtor's assets and debts worldwide. This approach is seen to be more favourable by international observers and commentators. This location of primary insolvency proceedings in this instance is usually decided by where the debtor has its Centre of Main interest ("COMI"). A practical example of the presence of aspects of universality being adopted is usually evident in Anglo-American driven by (*common law*) insolvency systems such as: the UK, USA and Australia.

On the other hand, the concept of territorialism is based on the premise that insolvency proceedings may be commenced in every state / jurisdiction where the debtor holds assets (also seen as the notion of plurality), these assets should be territorially limited and restricted to the property within the states where the proceedings are opened. Evident in contently European (*civil law*) insolvency systems, this concept is considered less favorable by the international insolvency community.

While both approaches look to issues which arise from cross-border insolvency, neither are adopted in their entirety. Universalism encounters the issue of the establishment of the "home state", meaning where the insolvency proceedings will be exclusively opened. In its unaltered form this concept is often politically and practically difficult to achieve. Similarly, the issues with territorialism in its purest form, can be the determination of solvency for a debtor in different states. For example, if the debtors holds all the debts in one state they could be considered insolvent whereas the state where they hold all the assets they could be considered solvent. In addition the pursuit of this approach can be very costly due to the opening of the various insolvency proceedings.

Keeping this in mind, in recent years the approaches have been adapted to form modern universalism: the main (primary) proceedings being in one state and supported by secondary or ancillary proceedings in another state. And modern territorialism: every state will have authority over tangible or intangible assets in its jurisdiction. For assets in different states the courts will be required to communicate and collaborate for the overall benefit of the creditors internationally.

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.

4

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.

- Bahrain adopted the UNCITRAL Model Law on Cross-Broder Insolvency ("Model Law") in 2018. This was in an attempt to encourage transparency and efficiency in the current insolvency framework and attract businesses to Bahrain.
- The Dubai International Finance Centre ("DIFC") and Abu Dhabi Global Markets ("ADGM") adopted the Model Law in 2019. The DIFC and ADGM recognised that as a result of increased globalisations, corporations held assets and conducted business activities in multiple jurisdictions around the world, giving rise to the need for a comprehensive and effective way to address multi-jurisdictional restructurings and insolvency proceedings.

- Middle East member states have reformed their domestic insolvency laws such as the UAE in 2016 and 2019, Saudi Arabia in 2018 and Dubai in 2019. **There is scope to elaborate**

2.5

Marks awarded 8.5 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.

To understand the differences regarding the objectives of insolvency for individuals and corporations, the difference in terminology and meaning of insolvency must be highlighted in the first instance. The definition of insolvency in its basic form is when a debtor is generally unable to pay his debts as they mature (commercial insolvency / cash flow insolvency) or when a debtors' liabilities exceed the value of their assets (balance sheet insolvency). As individual insolvency and corporate insolvency differ which is explored below, we see the emergence of these differences around the world. For example, in Australia the term "insolvency" is usually used to refer to the insolvency of a corporation, whereas the term "Bankruptcy" is often associated with the insolvency of an individual natural person.

Sealy and Hooley distinguish between the objectives of insolvency for individuals and corporations in that for individuals, the main aim is to safeguard the debtor from persistent harassment by their creditors to encourage the possibility of a fresh start, specifically in situations where insolvency proceedings have been opened against the debtor but which have not been the a direct result of the actions of the debtor. The objective would also be to reduce indebtedness by making payments from current and future income to the estate, while at the same time taking into account the personal situation of the debtor.

For Corporations, the main aim is to preserve and keep the essential parts of the business but not necessarily in its current status. Additionally, where personal liability has been abused, to impose personal liability on responsible persons.

The similarities in both situations are to ensure *pari passu* distribution as far as possible: ensuring that secured creditors deal fairly towards the debtor and the other creditors, and to inspect reasons for why the ventures were not successful and to reclaim voidable dispositions where the insolvent debtor dealt improperly with assets.

In addition to the above, while similarities can be drawn from the principles of insolvency in this context, one point to note is that unlike corporate insolvency, it is only in relation to individuals that the notion of exempt or excluded assets will apply. Furthermore, after the subsequent dissolution of a company once all affairs have been wound up, individuals are not "dissolved" after insolvency proceedings.

Moreover, it is important to draw attention to how different sources of insolvency laws are employed to direct individual and consumer insolvency proceedings. Some states will have a uniformed piece of legislation such as England and Wales who look to the Insolvency Act 1986 to deal with consumer (individual) and corporate insolvency, while other states such as Australia, use the Corporations Act 2001 to regulate corporate insolvency and the Bankruptcy Act 1966 to deal with the insolvency of individuals or natural persons.

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.

In the first instance, dealing with insolvency law in a cross-border context is difficult as there is not a single set of insolvency rules that apply globally. Different states have different laws and as such problems arise due to the difference in approaches and policies as well as variances in substantive and procedural rulings.

Furthermore, Westbrook has identified nine key issues in cross-border cases: standing for (recognition of) the foreign representative; moratorium on creditor actions; creditor participation; executory contracts; co-ordinated claims procedures; priorities and preferences; avoidance provision powers; discharges and conflict-of-law issues.

Additionally, most domestic systems are ill-equipped when dealing with cross-border insolvency matters and therefore a state's enforcement of its jurisdiction usually ends with its national borders. This develops the need for co-ordination and co-operation between courts of different states to promote effective and efficient international insolvency which is not always achieved. For example, concurrent proceedings involving the winding up or liquidation of a debtor versus corporate rescue / restructuring. The incompatible nature of these two proceedings may lead to unnecessary capital losses for creditors as resources are wasted attempting to resolve financial distress under a rescue or restructuring scheme.

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 have been various efforts to promote the harmonisation of domestic insolvency laws in the 21st century, mainly through 'soft law' options. The two most globally recognised systems are the UNCITRAL Legislative Guide on Insolvency law (2004) ("UNCITRAL Legislative Guide") and the World Bank Principles for Effective Insolvency and Creditor / Debtor Regimes ("World Bank Principles").

The UNCITRAL Legislative Guide is intended as a resource for national authorities and legislative bodies in the drafting of new laws and regulations or in examining the effectiveness and applicability of existing laws and regulation. The system addresses a wide range of insolvency law in an effort to promote the harmonization of legislation by providing a modern framework to deal with matters in relation to cross-border insolvency. The UNCITRAL Legislative Guide has been expanded in recent years to cover insolvency of enterprise groups and directors' obligations in the period approaching insolvency, including the directors of enterprise group companies.

The World Bank Principles, developed in 2001, received revisions in 2005, 2011, 2015 and in April 2021. These principles promote a synchronization of insolvency law through

recognizing the importance of insolvency systems when creating stability for a country's financial systems.

In my opinion, the notion of a harmonization of domestic insolvency laws would be difficult to achieve by adhering to just these approaches. More often than not, insolvency laws interact with other areas of law, such as property law or secured transactions law, which would result in issues, even if the same legislation was being followed across all states. **There is scope to elaborate here.** With that said the UNCITRAL Legislative Guide and the World Bank Principles are recognized as the international best practice standard for insolvency regimes. It is worth noting that the impact of these systems on addressing international insolvency issues will also be determined by a country or states willingness to adopt a uniformed approach of cross-border insolvency.

4.5
Marks awarded 14.5 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.

The main question in this instance is the establishment of the location of the main proceedings, noting that Nadir was originally incorporated in Erewhon but has subsequently now registered in Utopia. The Centre of Main Interest ('COMI') would be Utopia and the winding-up order in Erewhon would be viewed as secondary (Ancillary) proceedings. In this instance, the Erewhon

liquidator will have to investigate the Cross-border Insolvency Act of Utopia along with the relevant articles and provisions prescribed by the UNCITRAL Model Law on Cross-border Insolvency (“MLCBI”) which have been adopted by Utopia.

If the liquidator would like to stop Apex court proceedings against Nadir in Utopia, I would advise them to consult Chapter IV of the MLCBI which discusses the co-operation and direct communication between a local court and foreign courts, or foreign representatives. In this case, the liquidator would need to apply for the relevant recognition order from the Eutopia court to enact a stay of proceedings in an effort to safeguard the assets of the Nadir for the future distributions to Nadir's creditors.

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

3.5

Question 4.2 [maximum 2 marks]

Would it make any difference to your answer in question 4.1 in the following two alternative scenarios to Apex suing for its debt?

(a) Apex had filed proceedings to wind-up Nadir, but the matter had not yet been heard.

(b) Apex had obtained a court order to wind-up Nadir in Utopia prior to the Erewhon winding-up order.

Answer (a) – No as those proceedings have not been heard, there is no change to the current situation.

Answer (b) – No as the Erewhon would still be seen as secondary (ancillary) proceedings.

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

0.5

Question 4.3 [maximum 8 marks]

NB: This question is not related to Questions 4.1 and 4.2

A court has ordered the commencement of an insolvency proceeding against a corporate debtor in the State of its incorporation and head office. The company has operated business in a number of States and has assets (real property or interest in land, other tangible assets and intangible assets); creditors (including taxation / revenue authorities) and directors in several States.

Select a country for the company's incorporation and, based on the insolvency laws of the country you select and the brief facts provided, describe four key international insolvency issues facing the insolvency representative in this scenario. For each issue,

what domestic laws or international instruments apply to assist the insolvency representative address these four issues?

I have chosen the incorporation of the company to be the Cayman Islands. Insolvency in the Cayman Islands is governed by the Cayman Companies Act (2022) & the Companies Winding Up Rules (2023 Consolidation).

The main issues facing insolvency representatives, also known as 'liquidators' or 'restructuring officers', in this jurisdiction, would be: foreign regulators and ancillary proceedings - where protection is required both onshore and offshore or in multiple jurisdictions, access to books and records, and terminology and nature of term 'provisional Liquidation' and recognition by foreign courts.

In regard to foreign regulators and ancillary proceedings, a common issue encountered in the Cayman Islands is in relation to office holders. For example, if an entity has assets in the USA, and the Securities Exchange Commission, which is the USA regulator, makes an appointment of a receiver, this can create issues for the concurrent insolvency proceedings overseen by the Grand Court of the Cayman Islands ("Grand Court") who have appointed a liquidator. Specifically if a protocol has not been agreed upon, In this case the issues will be overcome through establishment of control in different parts of the process and applying the relevant law in those instances. These issues also require communication and coordination by the respective courts.

The recovery of books and records from subsidiaries with registered offices in foreign states will be determined by the location of those offices and the laws enacted in their respective states. For example, if the country has modern insolvency laws related to the cooperation and coordination of foreign office holders, this process will be more achievable than if the state does not operate on a reciprocity basis.

In relation to the different mechanisms in place in the Cayman Islands for insolvency procedures, a typical issue encountered is if a holding company, which operates in Asia or other jurisdictions, is a Cayman Islands registered entity and a restructuring process is promoted by way of a scheme with a provisional liquidation process. Insolvency practitioners have seen a level of discomfort around the issuance of a winding-up petition and the use of the term 'liquidation' which is more associated with the term bankruptcy rather than restructuring. A way this has been addressed by Cayman Islands legislation is with the restructuring officer regime, which came into effect on 31 August 2022 and effectively replaces the term provisional liquidator and also does not require a winding-up petition.

Lastly, is the issue of recognition by foreign courts for the approval of liquidators' fees to be paid out of assets liquidation due to conflicting law. The question of which court order to follow in the concurrent proceedings comes into play and communication and coordination by the courts is required. This usually results in a form of validation order being filed.

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. Then apply the current Cayman Islands laws on CBI to such issues.

**4
Marks awarded 8 out of 15**

*** End of Assessment ***

TOTAL MARKS AWARDED 41/50

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