



FORMATIVE ASSESSMENT: MODULE 1

INTRODUCTION TO INTERNATIONAL INSOLVENCY LAW

This is a formative assessment relating to Module 1 and is designed to provide candidates on the Foundation Certificate course with some direction and guidance as to the form and content of assessments on the course as a whole. The submission of this assessment is not compulsory and the mark awarded will not count towards the final mark for Module 1 or the course as a whole. However, students are encouraged to submit this assessment as part of their orientation for the submission of the formal (summative) assessments for all the modules on the course.

The Marking Guide for this assessment will be made available on the web pages for Module 1 as well as the Course Administration page for this course after the submission date of 15 October 2023.

INSTRUCTIONS FOR COMPLETION AND SUBMISSION OF ASSESSMENT

Please read the following instructions very carefully before submitting / uploading your assessment on the Foundation Certificate web pages.

- 1. You must use this document for the answering of the assessment for this module. The answers to each question must be completed using this document with the answers populated under each question.**
- 2. All assessments must be submitted electronically in MS Word format, using a standard A4 size page and a 11-point Arial font. This document has been set up with these parameters - please do not change the document settings in any way. DO NOT submit your assessment in PDF format as it will be returned to you unmarked.**
- 3. No limit has been set for the length of your answers to the questions. However, please be guided by the mark allocation for each question. More often than not, one fact / statement will earn one mark (unless it is obvious from the question that this is not the case).**
- 4. You must save this document using the following format: [studentID.assessment1formative]. An example would be something along the following lines: 202223-336.assessment1formative. Please also include the filename as a footer to each page of the assessment (this has been pre-populated for you, merely replace the words "studentID" with the student number allocated to you). Do not include your name or any other identifying words in your file name. Assessments that do not comply with this instruction will be returned to candidates unmarked.**
- 5. Before you will be allowed to upload / submit your assessment via the portal on the Foundation Certificate web pages, you will be required to confirm / certify that you are the person who completed the assessment and that the work submitted is your own, original work. Please see the part of the Course Handbook that deals with plagiarism and dishonesty in the submission of assessments. Please note that copying and pasting from the Guidance Text into your answer is prohibited and constitutes plagiarism. You must write the answers to the questions in your own words.**
- 6. The final submission date for this assessment is 15 October 2023. The assessment submission portal will close at 23:00 (11 pm) BST (GMT +1) on 15 October 2023. No submissions can be made after the portal has closed and no further uploading of documents will be allowed, no matter the circumstances.**
- 7. Prior to being populated with your answers, this assessment consists of 10 pages.**

ANSWER ALL THE QUESTIONS

QUESTION 1 (multiple-choice questions) [10 marks in total]

Questions 1.1. - 1.10. are multiple-choice questions designed to assess your ability to think critically about the subject. Please read each question carefully before reading the answer options. Be aware that some questions may seem to have more than one right answer, but you are to look for the one that makes the most sense and is the most correct. When you have a clear idea of the question, find your answer and **mark your selection on the answer sheet by highlighting the relevant paragraph in yellow. Select only ONE answer. Candidates who select more than one answer will receive no mark for that specific question.**

Question 1.1

It should be relatively easy to develop a single system to deal with cross-border insolvency since all jurisdictions have more or less the same local insolvency law rules.

- (a) This statement is true since all countries have implemented the UNCITRAL Model Law on Cross-Border Insolvency.***
- (b) This statement is untrue since there are huge differences in both the approach and insolvency legislation of various jurisdictions.***
- (c) This statement is true since all systems have at least the same general insolvency concepts.***
- (d) The statement is true since the historical roots of all insolvency systems are the same.***

Question 1.2

The Statute of Ann, 1705 was a very important piece of legislation for the development of English insolvency law.

- (a) This statement is true since this Act introduced imprisonment of debt.***
- (b) This statement is untrue because it dealt with the distributions of the proceeds derived from the proceeds of selling the assets of the estate.***
- (c) This statement is true since it introduced the notion of discharge.***

(d) This statement is true since it introduced fraudulent conveyances into English law.

Question 1.3

The purpose of the UNCITRAL Legislative Guide (2004) has direct application in all the member States of the UN.

(a) This statement is true because UNCITRAL's model legislative guidelines apply automatically to all member States.

(b) This statement is true because all member States supported its automatic implementation in their respective jurisdictions.

(c) This statement is untrue because the Legislative Guide serves merely as soft law and contains best practice to be considered when countries revise their own insolvency legislation.

(d) This statement is untrue since the Legislative Guide is only available for use by developing countries when reforming their own insolvency laws.

Question 1.4

Modern rescue proceedings have replaced liquidation as an insolvency procedure in most systems.

(a) This statement is true since business rescue is important for socio-economic reasons.

(b) This statement is true because liquidation is viewed as a medieval and outdated process.

(c) This statement is untrue since there is still a need for both liquidation and rescue procedures in insolvency systems.

(d) This statement is untrue since some systems have no formal rescue procedure.

Question 1.5

The principles and requirements for avoidable dispositions and executory contracts are the same in all jurisdictions - hence these do not pose problems in a cross-border insolvency matter.

(a) The statement is untrue, the requirements and principles do differ and pose problems in a cross-border case.

(b) This statement is untrue because the insolvency laws of the State where the original insolvency order is issued will apply to all the other States involved in the matter.

(c) This statement is untrue since avoidable dispositions and executory contracts do not pose any problems in a cross-border case.

(d) The statement is untrue since avoidable dispositions and executory contracts may be disregarded in a cross-border case.

Question 1.6

The domestic corporate insolvency statute of a country makes no mention of the possibility of a foreign element in a liquidation commenced locally. The country has ratified a regional treaty on insolvency proceedings that contain provisions on concurrent insolvency proceedings over the same debtor in a neighbouring treaty state.

In a local liquidation commenced under the domestic corporate insolvency statute, to what law can the local court refer in order to resolve an international law issue that has arisen because of concurrent insolvency proceedings in the neighbouring state?

(a) Public International Law.

(b) UNCITRAL Legislative Guide on Insolvency Law.

(c) World Bank Principles for Effective Insolvency and Creditor Rights Systems.

(d) Private International Law.

Question 1.7

Which one of the following documents mandates co-operation or communication between courts in concurrent insolvency proceedings on the same debtor, which are being conducted in different nation states?

(a) ALI / III Global Guidelines Applicable to Court-to-Court Communication in Cross-Border Cases (2012).

(b) EU Cross-Border Insolvency Court-to-Court Communications Guidelines (2014).

(c) UNCITRAL Model Law on Cross-border Insolvency (1997).

(d) JIN Guidelines for Communication and Cooperation between Courts in Cross-Border Insolvency Matters (2016).

Question 1.8

Latin and Middle America states have ratified various multilateral conventions and treaties that address international insolvency issues. While they promote unity of proceedings in the treaty states where a debtor has a single commercial domicile, they acknowledge the possibility of concurrent proceedings.

Which of the following conventions and treaties does not provide for judicial co-operation where there are surplus funds remaining in a proceeding in one treaty state and there are concurrent insolvency proceedings over the same debtor in another treaty state?

(a) Montevideo Treaty on International Commercial Law (1889).

(b) Montevideo Treaty on International Commercial Terrestrial Law (1940).

(c) Montevideo Treaty on International Procedural Law (1940).

(d) Havana Convention on Private International Law (1928).

Question 1.9

The Council Regulation on Insolvency Proceedings (European Insolvency Regulation) (2000), which applies in all European Union member states except Denmark, was reviewed after a decade's operation. An amended European Insolvency Regulation (EIR) Recast (2015) was adopted in 2015 and took effect in June 2017.

Which of the following aspects of international insolvency is not addressed in the EIR Recast?

(a) Proceedings to restructure a debtor that is facing the likelihood of insolvency.

(b) Definition of "centre of the debtor's main interests".

(c) A centralised insolvency register of insolvency proceedings opened in member states.

(d) Co-operation and co-ordination provisions applicable to corporate groups.

Question 1.10

An unsecured Creditor is owed monies by the Debtor for services it supplied locally. It has issued proceedings to recover the debt in the local Court. The Debtor has moved its registration and head office to the local country from its original place of incorporation in a foreign country. The Creditor is incorporated and has its head office in that foreign country. The contract to supply, which was created by exchange of emails sent between the head offices, denominates the debt in the currency of the foreign country. The Debtor is being wound-up in the foreign country and the foreign liquidator seeks recognition and a stay in the local Court proceedings. What aspect is an international insolvency issue?

(a) The local Court's jurisdiction over the Debtor.

(b) The standing of the foreign Creditor to sue for its debt in the local Court.

(c) The foreign liquidator's standing to request a stay of the local proceedings.

(d) The fact that the debt owed to the Creditor is in a foreign currency.

Marks awarded: 8 out of 10

QUESTION 2 (direct questions) [10 marks]

Question 2.1 [maximum 2 marks]

Explain what the term "international insolvency law" means.

International Insolvency Law refers to the law regarding an insolvency scenario that is not solely limited to a single jurisdiction and instead system of insolvency rules in a country and the corresponding fact that those rules must take into account an international aspect in a particular insolvency related proceeding within that country.

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Question 2.2 [maximum 5 marks]

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

Universality is the concept that there should only be one form of insolvency proceedings one country which will then govern all of the assets of the debtor across the world, regardless of which territory those assets reside within. The state chosen for the insolvency may be the one that is centre of the debtor's assets and interests. The law of the state where the main insolvency proceeding has been opened will regulate the matter.

Territoriality centres around the belief that separate insolvency proceedings may be commenced in separate jurisdictions, specifically in every country where the debtor has assets. There will be therefore be many separate insolvency proceedings in insolvency which relies upon this concept.

Civil law countries typically utilize the territorial approach and common law countries typically believe in universalism. It should be noted however that this is not in every single case.

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.

Firstly, there was a regional comparative survey of insolvency systems in the Middle East. This was a joint effort by the World Bank, The Organization for Economic Co-operation and Development, the Hawkamah Institute and INSOL International.

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

Secondly, there have also been reforms of individual country's domestic insolvency laws. The United Arab Emirates reformed its law in 2016 and 2019. Saudi Arabia reformed its law in 2018 and Dubai reformed its law in 2019.

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

Thirdly, the UNCITRAL model law on insolvency was adopted by Bahrain in 2018 and the Dubai Financial Centre in 2019.

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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.

Answer:

Insolvency is less harsh for individuals definitely. Insolvency for individuals is typically focused on allowing the debtor to have a second chance by allowing them to make contributions towards the debt from the debtor's other income sources with the court's being relatively sympathetic to the circumstances of the debtor. In some cases for insolvency proceedings against an individual, certain assets will be off limits so as to allow the individual to keep some assets to maintain him or herself. Prevention of harassment is relevant

Insolvency for companies is not necessarily about preserving the business, unless it is necessary for the realization of the debts. In some situations, such as a breach of director duty or negligent spending, personal liability can be imposed on the responsible persons within the company.

There is scope to elaborate, for example with respect to exempt property

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.

Answer: At a starting point, the term insolvency already does not mean the same thing in different jurisdictions. Insolvency in some jurisdictions refers to the situation where the combined total of all outstanding liabilities exceeds the measurable value of all of the debtor's assets whereas in others it makes reference to a liquidity crisis or a short-term inability to service debts.

There are also differences because many systems of the world are based on a civil law legacy whereas other systems are based on a common law legacy. This is part of the second problem which is essentially a conflict of laws between the insolvency proceedings in the various states in a cross-border insolvency proceeding.

Additionally, and contemporaneously, there are nine issues in cross border cases generally, which have been defined by J L Westbrook in his article "Global Insolvency Proceedings for a Global Market: The Universalist System and the Choice of Central Court" (2018) 96 Texas Law Review, - 1473. These are: 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.

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.

Answer:

Firstly, in 2004 there was the UNCITRAL Legislative Guide on Insolvency Law which can be used as a reference by any country when reviewing its current insolvency law or the adequacy of its existing laws and regulations or also implementing insolvency law for the first. The more countries that reference the UNCITRAL Legislative Guide when implementing or amending their insolvency laws, the more uniformity there will be globally in international insolvency law.

Secondly, there were guidelines furnished by the World Bank called Principles for Effective Insolvency and Creditor / Debtor Regimes. The World Bank principles and the UNCITRAL Legislative Guide work in tandem to provide the world with the international best practice guide.

The European Union has also published a report on Harmonisation of Insolvency Law in 2010. This report identified areas where there is hope for achievable harmonisation for example the rules regarding detrimental acts and a possible common test of insolvency.

Lastly, there was the action Plan on Building a Capital Markets Union by the European Commission which aimed to outline a plan for the "convergence of insolvency and restructuring proceedings."

In my opinion, the UNCITRAL Legislative Guide is bound to make an impact and has already provided an impact by providing jurisdictions that perhaps do not have much insolvency knowledge within their population with a tool that can allow them to draft sensible insolvency legislation. I believe that this is also the case for the World Bank's principles.

However, the final two steps which I have outlined, the Report and the action plan by themselves do not mean much. There must be legislative which puts the principle in this report and action plan into place.

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

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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:

Article 9 of the UNCITRAL Model Law (adopted in Utopia) provides that a foreign representative is allowed to apply directly to a Court in this State.

A foreign representative is defined under the Act as "a foreign representative including one appointed on an interim basis authorized in a foreign proceeding to administer the reorganization or the liquidation of the debtor's assets" The Erewhon liquidators fit this definition.

Article 15 grants the foreign representative the power to apply to the court for recognition of a foreign proceeding and Article 19 states that: from the time of filing an application for recognition until the application is decided, the applicant may, at the request of the foreign representative grant relief of a provisional nature including a stay of execution of the debtors assets.

There are other reliefs which could be sought by the foreign representative (in this case Erewhon liquidators) such as providing for the examination of witnesses or the raking of evidence or suspending the right to transfer or otherwise dispose of any assets of the debtor.

Upon recognition of the foreign proceeding, Article 20 states that execution of the insolvency action in that country is stayed.

In short, the creditors in Erewhon may utilize the above provisions and thus request an automatic stay or moratorium in proceedings in Utopia.

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.

My answer would not be impacted in particular and in fact I would emphasize that action by the Erewhon liquidators should be taken quickly now while there is still time.

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

In terms of practical advice, it may be more difficult to challenge the Utopian wind-up proceedings as the Court Order has already been granted. An injunction may be needed to be filed by the liquidators in Erewhon in the local Utopian courts.

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?

Answer:

The company will be incorporated in the United States.

Issue 1: It has to be ensured that insolvency proceedings which have been initiated in the United States are recognizable in the other jurisdictions and vice versa.

The U.S. Bankruptcy Code specifically Chapter 15 will be useful in this context and for the recognition of overseas Insolvency proceedings in the United States, there is the uniform foreign money-judgments recognition act.

Issue 2: Co-operation and co-ordination with foreign bodies.

There must be co-ordination with local statutory bodies and courts in jurisdictions that also have assets that the company wants to enforce against. The UNCITRAL Model law can provide guidance in this regard.

This answer appears incomplete as 4 issues were to be addressed. **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.**

2.5

Marks awarded 8 out of 15

*** End of Assessment ***

TOTAL MARKS 36/50

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