



FORMATIVE ASSESSMENT: MODULE 1

INTRODUCTION TO INTERNATIONAL INSOLVENCY LAW

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

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

INSTRUCTIONS FOR COMPLETION AND SUBMISSION OF ASSESSMENT

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

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

ANSWER ALL THE QUESTIONS

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

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

Question 1.1

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

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

Question 1.2

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

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

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

Question 1.3

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

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

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

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

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

Question 1.4

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

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

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

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

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

Question 1.5

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

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

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

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

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

Question 1.6

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

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

(a) Public International Law.

(b) UNCITRAL Legislative Guide on Insolvency Law.

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

(d) Private International Law.

Question 1.7

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

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

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

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

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

Question 1.8

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

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

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

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

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

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

Question 1.9

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

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

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

(b) Definition of “centre of the debtor’s main interests”.

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

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

Question 1.10

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

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

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

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

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

Marks awarded: 6 out of 10

QUESTION 2 (direct questions) [10 marks]

Question 2.1 [maximum 2 marks]

Explain what the term “international insolvency law” means.

Wessels defines international insolvency law as the part of the law that “[i]s commonly described in international literature 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.”

However, it is noted by the author that this definition is limited in practise/application, one other aspect as referred to by Wessels himself to note the limitations is this definition, as evidenced in the provision of Fletchers definition, who proposes that “international insolvency” or “cross-border insolvency” should be considered as a

situation "...in which an insolvency occurs in circumstances which in some way transcend the confines of a single legal system, so that the a single set of domestic insolvency law provisions cannot be immediately and exclusively applied without regard to the issues raised by the foreign elements of the case."

These are authoritative sources. While you have combined their information into other words, it could perhaps better convey your personal understanding.

1.5

Question 2.2 [maximum 5 marks]

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

Universality/universalism and territoriality/territorialism are two fundamental concepts in cross-border insolvency that describe different approaches that can be taken when dealing with insolvency cases that span multiple jurisdictions/legislations.

Universality is a concept that commonly deals with presenting an insolvency case on a single basis, thereby emphasizing an approach of unity/centralization for insolvency. When taking his approach, all debtor's assets (regardless of location) are taken in a wholistic view as a single estate and thereby dealt with both domestically and internationally as one unified estate. In practise this is achieved via a single insolvency proceeding (typically initiated in the debtor's home/main jurisdiction), this is commonly referred to as the "centre of main interests" ("COMI") and is set via "main proceedings" which have a worldwide effect. The main purpose of this is to ensure the efficient administration of the debtor's assets and the equitable distribution of proceeds to creditors, with all parties from the varying jurisdictions generally being treated equally.

Territoriality is in essence the opposite of this, whereby the separation of the assets and thereby their treatment is emphasized, thereby the insolvency proceedings only apply to the State where the insolvency proceedings were actually lodged. This can lead to a plurality or multiplicity of insolvency proceedings, with the often called "local" insolvency proceedings causing the application of the home jurisdictions own insolvency laws and procedures. This often results in different outcomes for creditors depending on their jurisdiction and the local approach

A concept of "modified universalism" has also been coined/actioned in practise to try and reach a middle ground for both of these approaches, allowing for coordination and recognition of foreign insolvency proceedings while still respecting the autonomy of individual jurisdictions.

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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.

Three examples of local changes/developments to local law in the Middle East in respect of their local insolvency laws are:

UAE Bankruptcy Law Reforms (2020) - Enacted through the Federal Decree-Law No. 9 of 2016, also known as the UAE Bankruptcy Law - Bringing in items such as restructurings and providing for companies in financial distress.

Saudi Arabia's Insolvency Framework (2018) - Enacted through their revised bankruptcy law - Bringing in procedures for debtor and creditors during insolvency, aligning the jurisdiction more inline with global best practises.

Adoption of UNCITRAL Model Law in Qatar (2020) - Aligning the nation further with global best practises and international standards and allowing for the more efficient administration of cross border insolvency dealings in country.

3

Marks awarded 9.5 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.

Sealy and Hooley state the varying objectives of insolvency for individuals and corporations as follow:

Individuals: To protect them against harassment from creditors, thereby enabling them to make a fresh start (in focus predominantly for where the individual may not be directly responsible for the proceedings), this is enabled by allowing debtors to make contributions of current and future income into their estate whilst also factoring in their current circumstances.

Corporations: To preserve the business/its viable parts where possible, and to seek action against parties who may be in breach of their duties to the company, personal liability is often sought in these circumstances.

Principles of both: Due to both areas still being covered by the standard principles of insolvency legislation, actions against both classes are to ensure pari passu distributions as far as possible to all creditors (in so far as a creditor has

security/priority), ensure the secured creditors treat the debtor fairly and to investigate the reasons for failure (and to seek proceedings against the debtor where their conduct is deemed improper).

In both circumstances exempt/excluded assets only apply to natural persons.

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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.

There is varying issues to be considered when considering the difficulties of conducting international insolvencies and the cross-border dealing of debtors, creditors and assets of the company/individual. Elements.

Definitions - Friman mentions the problems arising due to the non-existence of common insolvency language, whereby domestically the term "Insolvency" is commonly defined and typically mean a situation where the combined assets don't meet that of the combined liabilities of a company/individual, timing can also effect this whereby a party could be illiquid but solvent thereby causing doubt of its ability to service its debt rather than settle. The global lack of set definitions for insolvency proceedings and also, they types of appointments varying from jurisdiction to jurisdiction.

Omar states that "[a]part from the general situation in conflict of laws, differences in domestic norms have a particular impact on the position of creditors and the priorities they assert in insolvency. Where the debtor faces creditors pressing their claims in more than one jurisdiction, this will inevitably raise issues of conflict of laws. The conflict may itself be made more complex by the presence of qualifications, including the presence of security, set-off and netting arrangements, retention of title clauses and other means of protecting title available to creditors in national laws."

Westbrook, a strong proponent of universalism, has identified nine key issues in cross-border cases:

- (1) Standing for (recognition of) the foreign representative;*
- (2) Moratorium on creditor actions;*
- (3) Creditor participation;*
- (4) Executory contracts;*

(5) (5) Co-ordinated claims procedures;

(6) Priorities and preferences;

(7) Avoidance provision powers;

(8) Discharges; and

(9) Conflict

Other areas to consider would also be conflicts of laws, the recognition of these proceedings, cultural/language issues, cost/time delays due to added complexities and political and economic considerations.

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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.

Several Multilateral steps and initiatives have been implemented during the course of the 21st century to harmonize the international insolvency process especially in cross border situations, such as:

UNCITRAL Model Law on Cross-Border Insolvency: The United Nations Commission on International Trade Law (UNCITRAL) developed the Model Law on Cross-Border Insolvency in 1997, its adoption/influence have been driven further in the 21st century with more jurisdictions organising/accepting these cross-border legislations/understandings. - Key focus for international insolvency, creating a founding basis for all international insolvency having the most invested countries, this policy has come a long way to harmonize dealings with varying matters and also the principles in which international insolvencies should be managed.

While adoption of the MLCBI may harmonise various domestic insolvency laws in so far as they address international insolvency issues, the question addresses more broadly the harmonisation of domestic insolvency laws in general. See the 'model' answer on this sub-question.

European Union Insolvency Regulation (EIR): The European Union has taken varying actions to harmonize member states insolvency laws. (Regulation (EU) 2015/848), establishes a comprehensive framework for cross-border insolvency cases involving EU member states. It streamlines jurisdictional issues, enhances cooperation among insolvency practitioners, and provides mechanisms for the recognition and enforcement of insolvency judgments.

Regional Initiatives: In various regions, including Asia, Latin America, and Africa, there have been efforts to promote harmonization of insolvency laws among neighbouring

countries. Regional organizations and agreements, such as the ASEAN Insolvency Framework in Southeast Asia or the OHADA Uniform Act on Insolvency Law in Africa, aim to standardize insolvency practices and foster cross-border cooperation within their respective regions. - These regions had varying similarities in their respective local laws, the recent push to harmonize these systems has taken their respective local markets a long way in terms of dealing with insolvency, especially when considering the novel nature of this in local cultures/religions and business practises.

Overall, where implemented these legislations / agreements have come along way in terms of harmonizing local and international insolvency law, with each direct initiatives bring a more local focus on areas of similarity and difference to their respective corporate law. By its very nature and the its problem solving focus alongside its longstanding nature countries have a clear path of policies that are needed to allow for successful cross border insolvencies and policies which should naturally be considered in their own local laws.

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

2.5

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.

On the basis Utopia has accepted UNCITRAL Model Law on Cross-border Insolvency there is an agreed set of local principals in which Apex can pursue Nadir. This means that Utopian courts should recognize Erewhon liquidator's appointment and the winding-up order issued in Erewhon as valid.

A key point of UNCITRAL Model Law, is the ability to use a "stay of proceedings" in foreign jurisdictions where insolvency proceedings are pending. A request could thereby be put to the Utopian court to stay or halt Apex's court action against Nadir in Utopia. This would allow Erewhon's liquidator to coordinate the insolvency proceedings and ensure the fair treatment of all creditors.

The cross boarder insolvency adoption by Utopia will allow for the equitable treatment of all creditors, thereby protecting against duplicative actions.

A good understanding of the issues and the answer could be strengthened by more detail.

4.5

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) Since the matter is yet to progress to the court Utopia court will be in the best position to grant a stay order, allowing for prior coordination with Erewhon and the potential for the recognition of the foreign proceedings.**
- B) The existence of this order complicates this matter, the liquidator could push to have the order invoked on local proceedings, this will lead to potential alienate decisions and contradicting verdicts.**

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?

[Type your answer here]

Take care to answer each sub-question

0

Marks awarded 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.