



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 5 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 provides effective legal mechanisms for dealing with the treatment of financially stressed debtors, in particular, where such debtors have assets or creditors in more than one country.

Further, international insolvency law seeks to provide States with remedies for the obstacles which may arise in cross-border insolvency disputes, including but not limited to: jurisdiction, executory contracts, conflict-of-law issues, creditor participation and priorities and preferences.

2

Question 2.2 [maximum 5 marks]

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

The notion of universalism or universality is based on the premise that only one forum should have jurisdiction in a cross-border insolvency proceeding, being the State where the debtor has assets and carries on business.

Whereas, the concept of territoriality assumes that separate proceedings may be commenced in each country at which a particular debtor's assets are located.

Whilst universality provides a low-cost option to insolvency disputes, that approach may cause difficulties such as choice-of-law and priority rules.

On the contrary, territoriality may be deemed as costly and inefficient, on the basis that numerous proceedings may be commenced against the debtor in each State where their assets are located, noting the costs of proceedings are ultimately borne by creditors.

Notwithstanding the positive and negative aspects of both approaches to insolvency proceedings, in practice, States often seek to find a compromise based on the elements of universality and territoriality.

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.

Whilst the Middle East region does not currently appear to have any international insolvency instruments to regulate cross-border disputes in that region, Bahrain, Kuwait, Oman, Qatar, Saudi Arabia and the United Arab Emirates have collaborated with the World Bank for over four decades.

That being said, the Middle East have recently taken steps to reform their domestic insolvency laws for the purposes of addressing international insolvency issues.

For example, the UAE developed the Federal Law by Decree No. (9) of 2016 on Bankruptcy and Federal Decree Law No. (19) of 2019 on Insolvency.

Further, Saudi Arabia developed its Bankruptcy Law in 2018, noting that previously, Saudi Arabia had no single bankruptcy law to deal with businesses in financial distress.

In 2019, the Dubai International Financial Centre passed Law No. 1 of 2019 (which repealed and replaced DIFC Law No. 3 of 2009 (Previous Law)). The Dubai insolvency legislation addresses, amongst other things: a debtor-in-possession bankruptcy regime, an introduction of the UNCITRAL Model Law on cross-border insolvency and procedures and rules to govern winding up proceedings.

3

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.

The main objectives of insolvency for an individual include (but are not limited to): protecting the debtor from harassment by their creditors; enabling the debtor to start with a clean slate (if possible); reducing indebtedness by making contributions from present and future income whilst also taking in consideration their personal circumstances. There is scope to also consider exempt property.

Whereas, the objectives of insolvency for corporations are to: where possible, preserve the business, or viable parts there of - not necessarily the company; where personal liability has been abused, to impose personal liability on responsible persons.

I note that in the case of corporate insolvency matters, the objectives of individuals that form part of that corporation in financial distress, for example, employees, must also be considered as required.

Notwithstanding the objectives of insolvency relevant to individuals and corporations, respectively, I note that the key considerations across both types of cross-border insolvency cases include (but are not limited to) ensuring that each of the creditors and the debtor are dealt with fairly; steps are taken to investigate the reasons for failure and reclaim voidable dispositions where the insolvency debtor has dealt improperly with assets.

4.5

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.

Creditors may face a variety of difficulties in cross-border insolvency cases including (but not limited to):

- **standing for (recognition of) the foreign representative;**
- **moratorium on creditor actions;**
- **creditor participation;**
- **executory contracts;**
- **coordinated claims procedures;**
- **priorities and preferences;**
- **discharges; and**
- **conflict-of-law issues.**

In the absence of a single set of insolvency laws for global application, from the outset of any cross-border insolvency law case, issues of conflicting insolvency laws may arise, particularly where the debtor is facing multiple claims in more than one State.

Further, that conflict may be made more difficult in terms of trying to circumnavigate set-off and netting arrangements and other means of protecting title available to creditors in national laws.

There is some scope to elaborate, such as with respect to language and the meaning of 'insolvency'.

4.5

Question 3.3 [maximum 5 marks]

What multilateral steps have been taken in the 21st century to promote harmonisation of domestic insolvency laws? In your opinion, how much impact are these likely to have in addressing international insolvency issues? Include reasons for your opinion.

From the early 2000s, the World Bank have produced guidelines on the regulation of insolvency, entitled *Principles for Effective Insolvency and Creditor/Debtor Regimes*.

Those Principles have been revised in 2005, 2011, 2015 and in April 2021 there was a further revision of those principles.

I note that these principles gain some significant in the context that the International Monetary Fund (IMF) and the World Bank sometimes require bankruptcy reform in developing countries as a condition of loan support.

Further, in 2004, UNCITRAL enacted a Legislative Guide on Insolvency Law to assist national authorities and legislative bodies during their preparation of new laws and regulations or whilst reviewing the adequacy of existing laws and regulations.

Harmonisation of domestic insolvency laws has the ability to, in effect, reduce the significance of an insolvency crossing the boundaries of States and in turn, reduce the need for regulators or courts to resolve international insolvency issues.

However, in my view, harmonisation of domestic insolvency laws cannot, on its own, adequately deal with addressing broader international insolvency issues, for example, in circumstances where debtors carry on business and hold assets in multiple jurisdictions, particularly when there are differences between the legal systems and laws across each of the States.

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

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Marks awarded 13 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.

In the first instance, the Erewhon liquidator must determine the appropriate jurisdiction in which Nadir holds its assets and carries on business as that information is required to determine the best forum in which to commence any proceedings, noting that information has not yet been provided in the above facts.

Further, the Erewhon liquidator may also consider the dates of when Nadir moved its registration and head office as it may be the case that both parties entered into the contract whilst registered in Erewhon (or not) for the purposes of determining the appropriate forum in which to commence insolvency proceedings.

Given that the UNCITRAL Model Law on Cross-Border Insolvency has been adopted by Utopia without modification, except as required to domesticate, the Erewhon may then turn to the Cross-border Insolvency Act to interpret the provisions which relate to co-operation and co-ordination of concurrent proceeding, noting that if the Model Law is adopted as drafted by UNCITRAL, the Model Law mandates co-operation and direct communication between a local court and foreign courts or foreign representatives.

An example of the co-operation permitted under the Model Law on Cross-Border Insolvency can be found under Articles 25 and 26 which provides that “approval or implementation by courts of agreements concerning the coordination of proceedings”.

To this end, co-ordination may occur by way of an agreement also referred to as Protocols or Cross-border Insolvency Agreement which may assist the Erewhon liquidator to deal with any other proceeding currently on foot against the same debtor.

The MLCBI is significant for its provisions on recognition and relief in 4.1 and on concurrent insolvency proceedings in 4.2. Its provisions on cooperation and coordination are secondarily important as the liquidator is primarily seeking advice about staying court proceedings in Utopia.

Note that the Apex has issued court proceedings against Nadir in Utopia for monies owing for the goods sold and delivered – not insolvency proceedings.

2.5

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.

In this case, judgment in the Apex proceeding to wind-up Nadir has not yet been handed down, therefore the Erewhon liquidator may turn to the UNCITRAL Model Law on Cross Border Insolvency. If it is the case that subsequent insolvency proceedings against Nadir are commenced, the Erewhon liquidator may then turn their mind as to the best practice on how to facilitate co-operation and co-ordination of concurrent proceedings, for example by way of entering into a Protocol or Cross-Border Insolvency Agreement.

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

If it was the case that Apex had obtained a court order to wind-up Nadir in Utopia prior to the Erewhon winding-up order, the Erewhon liquidator must then consider that there is a foreign judgment on the same matter, and the impact of that judgment on the Erewhon proceeding (if any).

In any event, the Erewhon liquidator must consider, by way of further investigation, the appropriate jurisdiction in which to commence insolvency proceedings. That determination will include consideration of where Nadir carries on business and holds its assets.

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

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?

Country: USA

For the purposes of this question, I have assumed that the corporate debtor is incorporated and has its head office in the United States of America (USA).

The USA has a single, unified Bankruptcy Code of 1978 (Code).

The Code provides for: liquidation (chapter 7); municipalities (chapter 9); reorganisation (chapter 11); family farmer (chapter 12) and rescheduling of debt (chapter 13). Chapter 15 of the Codes contains the adoption of the 1997 UNCITRAL Model Law on Cross-Border Insolvency.

In light of the corporate debtor having assets, creditors and directors in several other States (outside of the USA), four key international insolvency issues that may be faced by the insolvency representative include:

1. Choice of forum to exercise jurisdiction in the matter

The choice of forum for any insolvency proceeding relating to the debtor may be difficult in this scenario, particularly having regard to the fact that assets or examinable corporate officers of the debtor company are located in several States. Notwithstanding the current insolvency proceeding, issues may come before the local court, which may affect any other foreign proceeding (if for example, there is a concurrent proceeding in another State). Or, alternatively, the local court may decide that it can and will hear those matters. Given that there is not a single set of insolvency rules that apply globally, the insolvency representative will be guided by the laws that apply to the State in which the proceedings are commenced in, which may also be supported by the Model Law.

2. Choice of law to apply the matter

The insolvency representative may also consider that whilst a local court has determined that it will hear a matter relating to the corporate debtor in this scenario, that Court will have to decide the law to apply.

Moreover, the insolvency representative may consider whether there are advantages to applying a particular foreign law.

Given that there is not a single set of insolvency rules that apply globally, the insolvency representative will be guided by the laws that apply to the State in which the proceedings are commenced in, which may also be supported by the Model Law.

3. The recognition and effect of any subsequent foreign proceedings in the same matter

Further, the insolvency representative may also turn its mind to the impacts of any previous or subsequent foreign judgments against the corporate debtor. In particular, for judgments relating to the winding up of the corporate debtor or perhaps, an order that may be made during the course of an insolvency proceeding (for example, an order that a third party pay monies to the estate following a successful action setting aside a voidable disposition). Chapter 15 of the Code, and the Model Law on which it is based provides effective legal mechanisms for dealing with insolvency matters which involve debtors, assets and other parties of interests in more than one country which is the case

in this scenario.

4. Concurrent proceedings

In some instances, where there are concurrent proceedings on foot, for example in the USA and by another creditor, in say, England, the insolvency representative will need to consider the facilitation of co-operation and co-ordination of concurrent proceeding relating to the debtor.

In this scenario, the USA has adopted the Model Law on Cross-Border Insolvency which contains provisions for co-operation under Articles 25 and 26, which provides "Approval or implementation by courts of agreements concerning the coordination of proceedings". The insolvency representative may seek the Court's approval to enter into an "Order and Protocol" Agreement for the purposes of dealing with any concurrent proceeding, which is likely given that the debtor has assets and creditors in several other states. Chapter 15 of the Code, and the Model Law on which it is based provides effective legal mechanisms for dealing with insolvency matters which involve debtors, assets and other parties of interests in more than one country which is the case in this scenario.

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.

5

Marks awarded 7.5 out of 15

*** End of Assessment ***

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

TOTAL MARKS 34/50