



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 7 out of 10

QUESTION 2 (direct questions) [10 marks]

Question 2.1 [maximum 2 marks]

Explain what the term "international insolvency law" means.

There is no universally accepted definition of "international insolvency law". In fact, it is difficult to define "international insolvency law" without referencing the existence of a domestic insolvency legislative framework; this causes the definition of "international insolvency law" to remain constrained and ambiguous given the fact that States have wide-ranging differences in their domestic insolvency legislative framework.

For example, Professor Bob Wessles defines "international insolvency law" as part of the law that:

"[i]s commonly described in international literature as a body of rules concerning certain insolvency proceedings or measure, 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."¹ (emphasis added)

Wessles himself concedes that his own definition is "limited" by its necessity to acknowledge and link the definition to a domestic legal framework of insolvency. However, Wessles does point to the fact that other definitions of "international insolvency law" are equally limiting in the same manner. Such as Professor Ian Flecher's definition, where it is proposed 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 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."² (emphasis added)

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Question 2.2 [maximum 5 marks]

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

Universality and territoriality are the two main theoretical solutions to problems arising with cross-border insolvency.

Universality or, universalism, can be most easily defined as the concept of one insolvency proceeding capable of dealing with all of a debtor's global assets and debts. Where one insolvency proceeding is commenced, no other insolvency proceedings should be issued in any other location against a debtor. Under the universality method, only one forum should have jurisdiction over the insolvency proceedings. Alternatively, if a single forum of jurisdiction is not used, a global framework of international insolvency law should be utilised. Whichever method of universality is proceeded with, it is clear that all of a debtor's assets should be considered under one insolvency proceeding that allows for an insolvency practitioner to control and collect in all of the debtor's assets. Further, creditors - regardless of their location globally - should be able to participate in the amalgamated proceeding on an equal basis to other creditors.

In direct contrast to universality, is the concept of territoriality or territorialism. The territorialism school of thought promotes the idea that insolvency proceedings against the same debtor may be commenced in multiple jurisdictions. However, the proceedings should be limited to assets of the

¹ B Wessles, *International Insolvency Law*, Kluwer Law International, 2nd ed, 2015, p 1.

² *Ibid*, p 1, et seq.

debtor within the relevant jurisdiction in which the proceedings are commenced. Therefore, under territorialism, creditors may only participate in, or file their claims in, proceedings commenced in their respective jurisdictions (i.e. a creditor concerned with a debtor's Hong Kong assets may only participate in Hong Kong proceedings, despite the fact that proceedings against the same debtor may be underfoot in England). Similarly, an insolvency practitioner's powers over proceedings and a debtor's assets would be limited to the jurisdictional borders in which the proceedings are commenced (i.e. using the same example directly above, an insolvency practitioner appointed over Hong Kong proceedings would only be capable of controlling and obtaining the debtor's Hong Kong assets, not the debtor's assets in England). In this way, it can be said that territorialism is concerned with the protection of local creditors and a State's national interests.

Universality and territoriality have distinct advantages and disadvantages.

Promoters of universalism argue that it is the best method to ensure equal treatment of creditors, particularly when faced with the market's ever-increasing trend towards globalisation. Further, a single insolvency proceeding provides for the added benefit of saving costs. However, the concept requires a global agreement of trust in foreign courts and judiciary, given that one insolvency proceeding will be effectual against the world. Subsequently, opponents of universality point to the fact that in establishing a global insolvency framework or allowing a single forum to have jurisdiction over proceedings, inconsistency with domestic rules will arise. This may create uncertainty in domestic markets and open the door to strategic manipulation.³

Conversely, those subscribing to territorialism argue that it protects local creditors. This emphasis on protection of local creditors recognises the fact that not all creditors are equal. When compared to other creditors, local creditors may be economically or strategically unable to participate in an amalgamated insolvency proceeding as envisioned under universalism. Although territorialism protects creditors locally, there is much to be desired when the concept is viewed from the realities of a debtor. Under territorialism, a debtor may be insolvent in one jurisdiction (where the debts are) and yet solvent in another jurisdiction (where the assets are). Given the limitations of an insolvency practitioner's powers under territorialism, this situation would leave a creditor without adequate recourse to the debtor's assets. Additionally, the need to issue multiple proceedings under territorialism increases costs, which in turn devalues the insolvency estate and creditors' returns.

It should be noted that in reality, universality and territoriality are not currently utilised in their purest forms and most likely never will be.

³ L M LoPucki, "Cooperation in International Insolvency: A Post-Universalist Approach", (1999) 84 *Cornell Law Review* 696, pp 696 – 762.

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.

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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.

While there are no international insolvency treaties governing the entirety of the Middle East, certain Gulf Cooperation Council countries have worked closely with the World Bank for the past forty years to address this issue. Namely: Bahrain; Kuwait; Oman; Qatar; Saudi Arabia; and the United Arab Emirates ("UAE").

In 2009, a comparative survey of insolvency systems in the Middle East and North Africa region was launched as a joint initiative of the Hawkamah Institute for Corporate Governance, the World Bank, the Organisation for Economic Co-operation and Development and INSOL International. The survey was based on the World Bank's Principles for Effective Insolvency and Creditor Rights Systems (2005) as an indicator for best practice.

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

Subsequently, numerous nations in the Middle East have reformed their domestic insolvency framework. The UAE enacted the Federal Law by Decree No. (1) of 2016 on Bankruptcy in 2016 and the Federal Law by Decree No. (19) on Insolvency in 2019.⁴ Saudi Arabia approved a landmark bankruptcy law in 2018⁵ and Dubai's new insolvency law and regulations came into force in 2019.⁶

⁴ Federal Law by Decree No. (9) of 2016 on Bankruptcy at <<[https://ded.ae/DED_Files/Files/%D8%A7%D9%84%D9%82%D9%88%D8%A7%D9%86%D9%8A%D9%86%20D9%88%D8%A7%D9%84%D8%AA%D8%B4%D8%B1%D9%8A%D8%B9%D8%A7%D8%AA%20PDF/Federal%20Decree%20Law%20No.%20\(9\)%20of%20%202016%20On%20Bankruptcy.docx.pdf](https://ded.ae/DED_Files/Files/%D8%A7%D9%84%D9%82%D9%88%D8%A7%D9%86%D9%8A%D9%86%20D9%88%D8%A7%D9%84%D8%AA%D8%B4%D8%B1%D9%8A%D8%B9%D8%A7%D8%AA%20PDF/Federal%20Decree%20Law%20No.%20(9)%20of%20%202016%20On%20Bankruptcy.docx.pdf)>> accessed on 15 October 2023; Federal Decree Law No. (19) of 2019 on Insolvency at <<https://elaws.moj.gov.ae/UAE-MOJ_LC-En/00_INSOLVENCY/UAE-LC-En_2019-08-29_00019_Markait.html?val=EL1%22%20target=%22naf%22%3EFederal%20Decree-Law%20No.%2019:%20ON%20INSOLVENCY%3C/a%3E>> accessed on 15 October 2023.

⁵ Saadi, Dania, "Saudi Arabia approves landmark bankruptcy law" at <<<https://www.thenationalnews.com/business/economy/saudi-arabia-approves-landmark-bankruptcy-law-1.707236>>> accessed on 15 October 2023.

⁶ Haoula, Jimmy, "The DIFC Insolvency Law: A First-Of-Its-Kind Procedure for Insolvency in Accordance with International Best Practice" at <<<https://bsabh.com/knowledge-hub/news/the-difc-insolvency-law-a-first-of-its-kind-procedure-for-insolvency-in-accordance-with-international-best-practice#:~:text=The%20New%20Law%20and%20its,of%20managing%20complex%20debt%20restructurings.>>>> accessed on 15 October 2023.

As to international insolvency, Bahrain adopted the Model Law on Cross-Border Insolvency in 2018.⁷ The Dubai International Finance Centre followed suit in 2019.⁸

3

Marks awarded 9 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 objective for individual insolvency is to achieve:

- *protection of the debtor from harassment by its creditors;*
- *the ability for the debtor to make a fresh start, particularly in instances where the insolvency has not occurred due to the actions or conduct of the debtor; and*
- *a reduction of indebtedness by way of contributions from present and future income to the estate while simultaneously taking into account the debtor's circumstances.*

The objective for corporate insolvency is to achieve:

- *where possible, the preservation of the business or variable parts of the business and not necessarily the company (e.g. corporate reorganisation or rescue); and*
- *imposition of personal liability on corporate officeholders where such persons have abused their powers and duties.*

*Regardless of whether individual or corporate insolvency is being pursued, *pari passu* distribution of assets to creditors should be achieved (except in circumstances of creditors having priority e.g. secured creditors over unsecured creditors) and the debtor should be dealt with fairly by creditors alike. Further, investigations should also occur in order to deduce the reasons for the individual or corporate failure. Finally, where the insolvent debtor improperly dealt with assets, reclaiming of voidable dispositions should be accomplished.*

The main difference in objectives for corporate versus individual insolvency is that individual insolvency recognises the need for a debtor to continue onwards following the conclusion of insolvency proceedings. This results in individual insolvency allowing for a debtor to exempt or exclude assets from the corporate estate; these assets are limited to those that are required to maintain the debtor

⁷ Amin, Buthaina and Billington, David "Bahrain's New Bankruptcy Law" at << <https://www.clearygartlieb.com/-/media/files/emri-materials/issue-9-2018/bahrains-new-bankruptcy-law-pdf.pdf>>> accessed on 15 October 2023.

⁸ Haoula, note 6, *supra*.

or their dependents.⁹ Conversely, corporate insolvency seeks to dissolve the corporate entity once insolvency proceedings are completed.

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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.

Apologies - ran out of time.

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.

Apologies - ran out of time.

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Marks awarded 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]

⁹ | Fletcher, *The Law of Insolvency*, London (Sweet and Maxwell, 5th ed, 2017), Ch 1, pp 1 - 30

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.

Apologies - ran out of time.

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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.**

Apologies - ran out of time.

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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?

Apologies - ran out of time.

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Marks awarded 0 out of 15

TOTAL MARKS 21 out of 50

A good paper on the questions answered

*** End of Assessment ***