



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.

Wessels defines international insolvency law as that 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, Wessels also concedes that this definition is limited since it is connected to the existence of a national legal framework of insolvency law.

This is an authoritative quote. The answer would be improved if it also included information in your own words to indicate your personal understanding of the explanation also.

1

Question 2.2 [maximum 5 marks]

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

A simplified explanation of universalism or universality is that there should only be one insolvency proceeding covering all of the debtor's assets and debts worldwide. In other words, the concept of universality envisages that once proceedings are opened in one forum (i.e., in one state), no other insolvency proceedings ought to be possible nor any other forms of execution of the debtor's assets. Proponents for universality argue that, ideally, only one forum should have jurisdiction. The chosen state could, for example, be where the centre of the debtor's interests is located. This would mean that the law of the "main proceeding" would have worldwide effect, even outside the territorial jurisdiction of the state where the so-called main proceeding has opened. It calls for "unity of proceedings", allowing the law of the state where the "main proceeding" is opened to regulate the matter.

By comparison, the principle of territorialism is diametrically opposed to the principle of universalism and is based on the premise that insolvency proceedings may be commenced in every state / jurisdiction where the debtor holds assets, but that they should be territorially limited and restricted to property within the state where the proceedings are opened. Thus, proponents of territorialism argue that it should be possible to have multiple insolvency proceedings running concurrently in regard to the same debtor. Under the principle of territorialism, the national interest should be protected (i.e., the interests of local creditors) before any assets are transmitted abroad.

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.

The three recent developments are as follows:

- **The Gulf Cooperation Council of countries (i.e., Bahrain, Kuwait, Oman, Qatar, Saudi Arabia and UAE) have worked closely with the World Bank for c. 40 years.**
- **what impact did this have on reforming domestic insolvency laws or addressing international insolvency Issues in the Middle East?**
-
- **In 2009, the first regional, 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 OECD and INSOL International. It was based on the World Bank's Principles for Effective Insolvency and Creditor Rights Systems (2005) as an indicator of best practice.**

- what impact did this have on reforming domestic insolvency laws or addressing international insolvency Issues in the Middle East?
-
- *In recent years, a number of Middle East States have reformed their domestic insolvency laws. Such as the UAE in 2016 and 2019, Saudi Arabia in 2018 and Dubai in 2019. On international insolvency specifically, Bahrain adopted the Model Law on Cross-Border Insolvency in 2018 as did the DIFC in 2019.*
- More detail would have improved the mark awarded for this sub-question.

2

Marks awarded 7 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 distinguish the objectives of insolvency for individuals and corporations as follows:

- **For individuals: to protect the debtor from harassment by his creditors and to enable the debtor to make a fresh start. This is particularly the case in less blameworthy cases where, for instance, the insolvency has not been brought about by the actions or the conduct of the debtor. To reduce indebtedness by making contributions from present and future income while at the same time taking the individual debtor's personal circumstances into consideration. Exempt property is also relevant**
- **For corporations: to, where possible, preserve the business or the viable part(s) of the business (but not, necessarily, the company). Where personal liability has been abuse to impose personal liability on responsible persons (i.e., directors who have made avoidable dispositions).**

4

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 are various fundamental difficulties in insolvency law in a cross-border context and they arise due to the non-existence of a global insolvency law system and a global court to deal with cross-border insolvency matters. One such difficulty is, as Friman mentions, is addressing "cross-border insolvency" cases when it is problematic to find a common insolvency language. For example, the definition of "insolvency", in the sense of the test to be applied to determine when an individual or corporation is

"insolvent" is not universal and differs between States. The effect of this is obvious - whilst an individual or corporation may be "insolvent" as judged against the definition of one State, it may not be as judged against the definition of another State. That lack of uniformity causes difficulties in the context of cross-border insolvencies. Friman also mentions that cross-border insolvency cases usually deal with insolvency (or collective proceedings) and that these must also be sufficiently defined or ascertained, since systems all over the world apply a variety of procedures to deal with non-payment of debt.

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 State, this will inevitably raise issue 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."

Further detail would be beneficial. For example, consideration of Westbrook's 9 key issues.
3.5

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.

There have been a number of multilateral steps taken in the 21st century to promote harmonisation of domestic laws, such as:

- **the draft EC Convention on Bankruptcy and Related Matters in 1970;**
- **the IBA's attempt to introduce a Model Bankruptcy Code in 1997 which, whilst it did not proceed, the IBA contributed to UNCITRAL's project which later became the Legislative Guide;**
- **as noted above, the UNCITRAL Legislative Guide in 2004;**
- **the World Bank's guidelines on the regulation of insolvency, entitled "Principles of Effective Insolvency and Creditor/Debtor Regimes" which have been revised in 2005, 2011, 2015 and April 2021.**

Whilst these steps are positive for the promotion of harmonisation, in my opinion, they will only be of reasonably limited influence in addressing international insolvency issues. I take this view because, in an increasingly global market where businesses can trade with each other globally, quickly and in complex transactions (i.e., crypto is a good example of this) and in transactions which involve multiple corporations and individuals, absent a concerted effort by the legislature in States to promote a uniform law and procedures for cross-border insolvency which is binding on the said States, it is difficult to see how international insolvency issues will be fundamentally addressed.

To really effect change, what is needed is for more States to adopt the UNCITRAL Model Law on Cross-Border Insolvency to achieve more uniform recognition laws across States.

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

4

Marks awarded 11.5 out of 15

QUESTION 4 (fact-based application-type question) [15 marks in total]

Nadir Pty Ltd (Nadir) is a company registered in Utopia. Originally it was incorporated in the neighbouring country of Erewhon before moving its registration and head office to Utopia one month ago. Apex Pty Ltd (Apex) is incorporated and has its head office in Erewhon. Apex and Nadir enter into a contract by exchange of emails between their head offices for Apex to supply goods to Nadir in Utopia. Nadir has failed to pay for the goods which have been delivered in accordance with the contract. Apex issues court proceedings against Nadir in Utopia for monies owing for the goods sold and delivered.

Meanwhile, Nadir also owes monies to creditors in Erewhon. One Erewhon creditor obtains a court winding-up order against Nadir in Erewhon and a liquidator is also appointed by that court.

If you require additional information to answer the questions that follow, briefly state what information it is you require and why it is relevant.

Question 4.1 [maximum 5 marks]

Assume the UNCITRAL Model Law on Cross-border Insolvency has been adopted by Utopia without modification, except as required to domesticate it. For example, the Cross-border Insolvency Act of Utopia names its local laws relating to insolvency and its competent court under the Act. The Erewhon liquidator's investigations detect that Apex is suing Nadir in Utopia. The liquidator would like to stop Apex court action against Nadir in Utopia. Advise the Erewhon liquidator on the potential relevance of the Cross-border Insolvency Act of Utopia.

The Model Law, as incorporated into Utopia's Cross-Border Insolvency Act (the "Utopia Act"), does not dictate where insolvency proceedings should or should not be stated. However, since a winding up order (the "Order") has been obtained in Erewhon, the Utopia Act provides that the effect of the Erewhon wind up proceedings will be limited to Utopia's assets in Erewhon.

Since Nadir is, currently, registered in Utopia and operates its head office from Utopia, it can be said that Utopia is its centre of main interests (COMI), therefore, it seems from

the information available that the Erewhon proceedings would be categorised by the Utopia Act as a foreign non-main proceeding. If it is correct to categorise those proceedings as a foreign non-main proceeding then the liquidator would not be entitled to obtain an "automatic" or prescribed stay on the proceedings in Utopia. However, the liquidator would be able to do so if the Utopia Act recognised the Erewhon proceedings as a foreign main proceeding. It would be helpful, therefore, to have further information as to where Nadir's COMI is and whether a cogent argument could be made that Erewhon is its COMI.

In short, based on the information presently available, the liquidator could not obtain an "automatic" or prescribed stay on the proceedings against Apex's court action against Nadir in Utopia. However, the liquidator could apply to the Utopia court for a stay of Apex's court action against Nadir since the Utopian courts have the discretion to impose a stay or other "appropriate relief" in domestic proceedings on account of insolvency proceedings commenced by way of a foreign non-main proceeding.

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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.***

Yes because in both scenarios, a moratorium would apply on other insolvency proceedings.

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

0

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?

For the purposes of this answer, I shall assume that the corporate debtor ("D") is incorporated in England & Wales.

Since we are told that D has operated a business in "a number of States" and "has assets (real property or interest in land, other tangible assets and intangible assets)" and "creditors (including taxation / revenue authorities) and directors in several States", the four key international issues will be:

- **Standing for (and recognition of) any foreign insolvency representative in the domestic proceeding in England & Wales. This would be a domestic law issue and, since D is incorporated in England & Wales, it will be an issue for determination by reference to the English Insolvency Act 1986.**
- **Whether there would be a moratorium on creditor actions. Since England & Wales adopted the UNICTRAL Model Law and incorporated it into its domestic legislation, that would be question to be determined by reference to the English Insolvency Act 1986.**
- **Realisation of D's assets across the various States. This would be an issue for domestic and foreign law. [Elaboration is warranted](#)**
- **The prosecution of any claims against directors based in other States in respect to, for example, any avoidable dispositions entered into. This would be an issue to be determined by reference to the English Insoveny Act 1986 but foreign law issues would arise on the enforcement of any order obtained domestically against individuals in foreign States.**

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.

4.5

Marks awarded 9.5 out of 15

*** End of Assessment ***

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

TOTAL MARKS 35/50