



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 Course Administration page of the course web pages after the submission date on 15 October 2021.

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: 202122-514.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 2021**. The assessment submission portal will close at **23:00 (11 pm) BST (GMT +1) on 15 October 2021**. 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 **9 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.

Mark 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 regulations for the treatment of financially distressed debtors whereby those debtors have assets and/or various creditors in more than one country. International Insolvency law was created due to States having varying approaches, policies and differences in substantive and procedural rules.

2

Question 2.2 [maximum 5 marks]

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

The concept of universality states that "there should only be one insolvency proceeding covering all of the debtor's assets and debts worldwide." The concept of territoriality takes on the exact opposite viewpoint and states 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." In short, under universality only one insolvency proceeding is permitted and under territoriality multiple insolvency proceedings may be running simultaneously.

These theories also involve recognition and effect (as well as jurisdiction) 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.

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.

Three example of developments in the Middle East region to reform domestic insolvency laws and/or address international insolvency issues are as follows:

UAE 2016 – The UAE government sought to create a robust legal insolvency framework in that all businesses can operate and parties can be sufficiently protected with the implementation of this law. This Bankruptcy Law will assist the owners of small to medium sized companies that are operating within the UAE and facing challenging economic conditions. In more general terms, the Law is expected to provide comfort to those doing business in the UAE, as well as future potential investors.

Saudi Arabi 2018 – This specific bankruptcy law was adopted in hopes that it would help facilitate foreign and local investments within the Saudi Arabi economy. Paul Latto, a Riyadh-based partner in international law firm DLA Piper stated that “Previously Saudi Arabia had no single bankruptcy law setting out procedures for businesses which get into financial trouble.” Therefore, the goal of this new law is to simplify and commit the process of an organization going out of business in order for new organizations to come in. The legislation being discussed provided a multitude of benefits including general regulations, preventive actions, measures for financial restructuring and settlement procedures.

Dubai 2019 – This legislation was implemented to assist in balancing the needs of all stakeholders who are involved in bankruptcy related matters within the Dubai International Financial Centre (DIFC). The new Laws and Regulations implemented a new debtor in possession bankruptcy regime which was more in line with global best practices. Additionally, the law also provides for a new administration process where there will now be evidence of mismanagement or misconduct. Lastly, the law improves the rules surrounding the winding up procedures and also integrates the UNITRAL Model Law on cross border insolvency proceedings with certain modifications for application in the DIFC.

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 objectives of insolvency for individuals is to assist in protecting the debtor from the harassment of his/her creditors. Therefore, assisting the debtor to wipe his/her slate clean. This can be done by eradicating the indebtedness by the debtor by making contributions from his/her present and/or future income while also taking into consideration the debtors personal circumstances.

The objectives of insolvency for corporations is to assist in preserving the business or specific parts of the business wherever possible. It is important to note that preserving the business doesn't always mean preserving the entire company. Additionally, if there are circumstances whereby personal liability has been abused, insolvency for corporations will hold those individuals accountable by imposing personal liability.

This answer displays a satisfactory understanding of the issues. To improve your responses, ensure they are commensurate with the mark allocation – while Q 3.1 asks for a brief note, it is for 5 marks.

3.5

Question 3.2 [maximum 5 marks]

Write a brief note on the difficulties that may be encountered when dealing with insolvency law in a cross-border context relating to pertinent differences in the relevant systems.

Various difficulties may arise when dealing with insolvency law in a cross-border context

First and foremost, one of the biggest difficulties arises from not having a global insolvency law system and a global court to deal with cross-border insolvency matters. Additional difficulties that may be encountered when dealing with insolvency law in a cross-border context are further outlined below:

Difficulty in defining the term “Insolvency” – International conventions and other instruments have struggled profusely to define the term “insolvency.” Rather, they have instead put their focus on defining “insolvency proceedings”

Differences in domestic norms – These differences can significantly impact the position of particular creditors and their overall priorities in insolvency. (I.e. a debtor will most likely face challenges relating to confliction of laws when he/she has creditors in more than one State)

Various other issues that can cause difficulties include: standing for (recognition of) the foreign representative, moratorium on creditor actions, creditor participation, executory contracts, co-ordinated claims procedures, priorities and preferences, avoidance provision powers, and discharges.

Finding a common insolvency language – Friman advises that at an international level it can be quite difficult to describe the term “insolvency.”

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.

Multilateral steps that have been taken in the 21st century to promote harmonisation of domestic insolvency laws include:

1. *Legislative Guide on Insolvency Law* put in place by UNCITRAL in 2004 – this guide was intended “to be used as a reference by national authorities and legislative bodies when preparing new laws and regulations or reviewing the adequacy of existing laws and regulations.”
2. *Principles for Effective Insolvency and Creditor / Debtor Regimes* – this was implemented by the World Bank in the early 2000s. These principles have since been revised in 2005, 2011, 2015 and in 2021. These principles have gained popularity over the years as the International Monetary Fund and the World Bank have used them as a guide in developing countries as a condition of loan support.

Have you considered the European Parliament report on Harmonisation of Insolvency Law at EU Level (2010)?

Together, the Legislative Guide and the Principles mentioned above have helped to form the international best practice standard for Insolvency.

In my opinion, both the Legislative Guide and the Principles have and will have a significant impact in addressing international insolvency issues. **Why? Substantiation is needed.**

3.5

Marks awarded 12 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.

There can only be one insolvency proceeding against a company under the UNCITRAL Model Law on Cross-border Insolvency. As such, this means that the Erewhon liquidator should reach out to Apex and advise them that a winding up order has already been granted (putting Nadir into liquidation) and therefore Apex will be unable to commence their own proceedings. However, the Erewhon liquidator should also advise Apex that they will not be at any disadvantage due to not being able to undertake the winding up proceedings as a major benefit of this model is that any creditor who submits a claim (worldwide) has to be treated on an equal basis.

The question requires candidates to apply the relevant MLCBI articles to the facts provided in more detail than that above.

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

'a) No – My answer would not change as the proceeding to wind-up Nadir had not yet been heard by the court.

b) Yes - in the case that Apex ad obtained a court order to wind-up Nadir in Utopia prior to the Erewhon winding up order, Erewhon would be unable to obtain a winding up order under the UNCITRAL Model Law on Cross-border Insolvency as there can only be one insolvency proceeding against a company.

Apply the MLCBI provisions on concurrent insolvency proceedings (see Article 29)

.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?

Selected country of incorporation: Cayman Islands

Four Key Insolvency Issues

1. Operated business in a number of states
2. Has assets in several states
3. Creditors in several states
4. Directors in several states

Domestic Laws/International Instruments to assist in the above mentioned issues:

1. Chapter 15 – This law was enacted in 2005 to govern cross-border bankruptcy and insolvency proceedings. Chapter 15's stated purpose is "to provide effective mechanisms for dealing with cases of cross-border insolvency" – therefore, the main objective being, cooperation between U.S. and non U.S. courts.
2. . Purposefully left blank
3. . Purposefully left blank
4. . Purposefully left blank

This answer appears incomplete and lacking in detail. You have raised some relevant matters to consider but you have not applied them in any detail. For another approach that is 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.

1

Marks awarded 4.5 out of 15

MARKS AWARDED 30/50

*** End of Assessment ***