



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**.

Commented [DB1]: Please read and follow the instructions! I had to do this for you.

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 9 out of 10

QUESTION 2 (direct questions) [10 marks]

Question 2.1 [maximum 2 marks]

Explain what the term "international insolvency law" means.

There are many points of view regarding the notion of international insolvency law. Wessels B, *International Insolvency Law* (Kluwer, 2006) defines international insolvency law as, *inter alia*,

"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 concedes that, by virtue of the definition being connected to the existence of a national legal framework of insolvency law, is limited.

Fletcher, *The Law of Insolvency*, London (Sweet and Maxwell, 5th ed, 2017) proposes that it should be considered as a situation:

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

These are authoritative quotes. The answer would be improved if it also included information in your own words to indicate your personal understanding of the explanation also.

1.5

Question 2.2 [maximum 5 marks]

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

Universality – Effectively, globally there ought to be only one insolvency proceeding which deals with all of the assets and creditors of the debtor. Further, once this proceeding is commenced no other insolvency proceeding can be ought to be possible nor any other forms of execution of the debtor's assets.

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.

Territorialism – Effectively, insolvency proceedings may be commenced in each and every jurisdiction in which the debtor holds assets. However, the proceedings are strictly limited to the assets within that jurisdiction.

Accordingly, unlike Universality:

- it would be possible to have multiple insolvency proceedings running concurrently in regard to the same debtor;
- the proceedings would also then be restricted in respect of which creditors may file their claims and the officeholders would have a mandate which would be confined to the national borders of the State where the insolvency proceedings are taking place; and
- the national interest should be protected, being the interest of local creditors, before any assets are transmitted abroad.

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.

1. The UAE reformed its domestic insolvency law in 2016 (Federal Law by Decree No (9) of 2016) and 2019 (Federal Decree Law No (19) of 2019 on Insolvency);
2. Saudi Arabia reformed its domestic insolvency law in 2018;
3. Dubai reformed its domestic insolvency law in 2019; and
4. Bahrain and the Dubai International Financial Centre adopted the Model Law on Cross-Border Insolvency in 2018 and 2019 respectively.

3

Marks awarded 8 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.

In M A Clarke *et al*, *Commercial Law* (Oxford University Press, 2017) Chap 28, Sealy and Hooley consider the objectives of insolvency for individuals and corporations.

While it notes there are principles which can apply to both individual and corporations insolvency, there are also many differences. In particular, it appears the individual insolvency has a focus on protecting the debtor, whereas corporations insolvency focuses of salvaging the maximum amount of value from the assets.

When considering the principles which overlap both situations, these are to:

1. ensure *pari passu* distributions to the extent possible (except in so far as creditors have priority);
2. ensure that secured creditors deal fairly towards the debtor and the other creditors; and
3. investigate the reasons for failure and to reclaim voidable dispositions where the insolvent debtor dealt improperly with assets

As mentioned above, there are also certain differences with respect to the objectives. When considering the objectives of insolvency for individuals, particularly in the case of the less culpable individuals (whose insolvency has not been caused by their actions or conduct) there is an aim to ensure the individual is protected from harassment by his creditors. Further, there is an objective to reduce the level of debt through the making of contribution from income to the estate (while taking into account the person circumstances).

When considering the objectives of the insolvency for corporations there is a greater focus the preservation of the viable parts of the business and to impose personal liability on the responsible person (where appropriate).

This was well answered and almost addressed all of the issues.
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 a multitude of difficulties that may be encountered when dealing with insolvency law in a cross-border context.

The first issue is the lack of a globally accepted or common language for insolvency and indeed the definition of insolvency.

The next issue arises by virtue of there being no singular global system for cross-border insolvency. This issue is the issue of conflict of laws. J P Omar, "The Landscape of International Insolvency" (2002) 11, IIR173 states:

"apart 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 claim in more than one State, this will inevitably raise issues of conflict of laws. The conflict may itself be made

more complex by the presence of qualifications, including the presence of security, set-off and netting arrangements, retention of title clauses and other means of protecting title available to creditors in national laws."

J L Westbrook "Global Insolvency Proceedings for a Global market: The Universalist system and the Choice of a Central Court" (2018) 96 Texas Law Review highlights nine cross-border issues:

1. standing for recognition of the foreign representative;
2. moratorium on creditor actions (ei the ability for creditors to commence claims);
3. creditor participations);
4. executory contracts;
5. co-ordinated claims procedures;
6. priorities and preferences;
7. avoidance provision powers;
8. discharges; and
9. conflict of law issues.

Some of these issues arise by virtue of the fact that many States have either developed their legal system from the English common law system or under a Civil law system. These different foundations can lead to the various issues raised above.

Further, there are the issues which arise by virtue of different cultural norms with pervade different societies and accordingly influence different countries insolvency laws. For instance, different views on basic rights, security and labour issues. Some countries will be more debtor friendly and others will be more creditors friendly and accordingly the insolvency laws will differ. Further, sometimes a country will simple opt to protect local creditors to the detriment of foreign creditors. All of this cumulatively can result in different States competing for the debtor's assets.

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.

In the 21st century there have been several attempts to harmonise domestic insolvency laws, these are as follows:

1. EC Convention on Bankruptcy and Related Matters in 1970, which attempted to require States to enact a "Uniform Law". While it was never enacted, subsequent attempts at European insolvency conventions never attempted to achieve uniform laws other than to the extent they related to jurisdiction, choice of law and recognitions and enforcement.
2. The Draft Model Bankruptcy Code prepared by the International Bar Association in 1997, while never adopted it contributed to the UNICTRAL Legislative Guide.
3. The UNCITRAL Legislative Guide on Insolvency Law was created in 2004 and was drafted with the intent to be used as a reference by the relevant national legislative bodies when drafting new laws and regulations (or reviewing existing ones).
4. The World Bank created the "Principles for Effective Insolvency and Creditor/ Debtor Regimes" which have been revised in 2005, 2011, 2015 and 2021.

Individually, they are likely to have minimal impact. However, cumulatively, they provide progressive steps towards a more harmonised system. Each appears to leverage the work of the previous attempt, while addressing gaps or weaknesses of the earlier version.

Further, the creation of these various guidelines and principles is providing developed nations with resources to utilize when they reform their insolvency systems (which is often a requirement of the IMF and the World Bank when they provide loans to these developing nations). In the circumstances that the World Bank's Principles and the UNICTRAL Legislative Guide form the international best practice, the continual implementation of these by countries, ensures that there is a constant convergence of insolvency laws.

Accordingly, while it is not likely that we will have a completely harmonised system, these attempts are making it easier to law makers in their respective nations to draft the next version of their domestic insolvency laws with the same guide as other nations with whom they engage in trade and commercial activity.

This is well answered. There is scope to all consider political issues, pressure from foreign investors and/or loan conditions.

5

Marks awarded 14 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 circumstances that Utopia have adopted the UNCITRAL Model Law on Cross-border Insolvency without modifications, its provisions that facilitate co-operation and co-ordination of concurrent proceedings are significant.

Therefore, given the liquidators have been appointed in Erewhon and there are proceedings in Utopia, the Courts of Utopia pursuant to Chapter IV of the Model Law, will mandate co-operation and direct communication between the local court of Utopia and the foreign court in Erewhon or the foreign representatives (in this case the liquidators).

The Utopia court may require Apex to enter into a co-ordination agreement with the liquidator for the purpose of co-ordinating the proceedings. However, the Model Law does not require reciprocity, accordingly the onus will largely be on Apex as it is under the jurisdiction of the

Utopia Court. However, for the purpose of achieving a stay, the liquidators would likely be able to achieve this through a co-ordination agreement which is approved by the Utopia court.

They could follow the summary set out in the UNCITRAL Practice Guide, where under the agreement they set two goals being to 1) maximize the value of the estate; and 2) harmonize the proceedings to minimize expense, waste and jurisdictional conflict.

Accordingly, the liquidators could seek to enter into the agreement by with the Utopia Court stay the proceeding and/or defer to the Erewhon proceedings. Specifics of this agreement could include, *inter alia*,

1. The liquidators could include debt or file a reorganisation plan with the consent of the Utopia representative;
2. Utopia representatives to be given notice prior to the liquidators undertaking any major transaction on behalf of the Nadir; and
3. Liquidators be allowed to undertake minor transactions without seeking authorisation.

The MLCBI is significant for its provisions on recognition and relief in 4.1. (Its provisions on cooperation and coordination are secondarily important as the liquidator is primarily seeking advice about staying court proceedings in Utopia.) The question requires candidates to apply the relevant MLCBI articles to the facts provided.

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 circumstances, the liquidators would be able to proceed to seek recognition of their appointment in Utopia and attempt to avoid the unnecessary costs of a second set of proceedings and liquidators being appointed. Further, prior to making any winding up order, the Utopia Court can consider the impact the proceedings in Erewhon will have on any winding up order and determine the effect, if any, of the foreign proceedings upon whether the Utopia court can and will hear the matter.

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

Where there is a foreign judgment on the same matter, such as here where there are winding up orders in two jurisdictions. It raises the question of recognition or effect of the judgment.

Further, it may raise a question as to the choice of law the court will seek to apply.

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

.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?

Country: England

Accordingly, when a company is incorporated in England there are the following issues to be addressed:

1. The choice of forum to exercise the jurisdiction in the matter;
 - a. In the circumstances that the Company is incorporated and has its head office in the UK, it would make sense to commence the winding up in that jurisdiction. However, there is a risk that by virtue of there being assets and creditors in other states, that parties may seek to commence winding up in those states. Particularly, in the case that those respective states may not recognise a UK judgment. (Note below regarding the UK no longer being part of the EU).
 - b. Where an English registered company has been ordered to be wound up by an English Court, it may face various international insolvency issues due to the existence of foreign assets or foreign creditors. Particularly as liquidators have a duty to take into their control and custody all the property (tangible and intangible) to which the company is entitled. This will be impacted by the extent to which the liquidators appointment is recognised in foreign countries. Further, the liquidators are authorised to accept proofs of debts from foreign creditors.
2. The recognition and effect accorded foreign proceedings in the same matter; and
 - a. As noted above, if the UK is where the proceedings are commenced and liquidators are appointed, they may face other parties seeking to enforce a judgment from a foreign jurisdiction. This will raise questions regarding the court that has issued the judgment and the type of judgment on whether the UK will recognise it.
 - b. However, the UK as a signatory to the UNICTRAL Model Law on Cross-border insolvency, would mandate co-operation and direct communication between the UK courts and the foreign court.
 - c. If there are proceedings in a foreign state, the English Courts will generally apply the principle of modified universalism. As stated by Lord Hoffman in *McGrath v Riddell* [2008] UKHL 21 "That principle requires that the English Courts should, so far as it is consistent with Justice and UK public policy, co-operate with the courts in the country of the principal liquidation to ensure that all the company's assets are distributed to its creditors under a single system of distributions". However, Lord Scott notes the co-operation between courts is provided for under section 426 of the Insolvency Act 1986.
 - d. Note the case of *Rubin v Eurofinance SA; New Cap Reinsurance Corp (in liq) v Grant* which considered the enforcement of judgments with respect to avoidance provisions. Where the court declined to accept there was a unique category of insolvency orders or judgments subject to special rules. Further, Lord Collins noted "there is nothing to suggest that [Article 21 of the Model Law on Cross-Border insolvency] applies to the recognition and enforcement of foreign judgments against third parties.
3. The choice of law to apply to the matter.

- a. In the case of a winding up by an English Court there are issues regarding the choice of law where international elements are involved.
- b. However, in an English winding under the Insolvency Act 1986 English law applies to matters of procedure and substance.

Further, due to the UK's departure from the European Union, under the UK law the European Insolvency Regulations (Recast) 2015 no longer apply to post 11pm 31 December 2020 proceedings in the UK. However, if the insolvency was commenced prior to that the EIR does apply.

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. Then apply the current English laws on CBI to such issues.

4.5

**Marks awarded 7.5 out of 15
MARKS AWARDED 38.5/50**

*** End of Assessment ***