



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.

Marks awarded 10 out of 10

QUESTION 2 (direct questions) [10 marks]

Question 2.1 [maximum 2 marks]

Explain what the term "international insolvency law" means.

[Type your answer here]

International Insolvency Law (also referred to as cross border insolvency) is a mechanism which regulates the treatment of financially distressed debtors where such debtors have assets or creditors in more than one country. Prof. Dr. Bob Wessels, well known for the publication of *"International Insolvency Law"* in 2006 and subsequent editions, defines international insolvency law 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 the given case."

2

Question 2.2 [maximum 5 marks]

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

[Type your answer here]

Universality is the concept that there should only be one insolvency proceeding covering all the debtor's assets and creditors worldwide. Universality allows for more than one insolvency proceeding from different states to be administered under the provisions of one insolvency

law. For example, the insolvency proceeding may be administered where the debtor has its centre of main interests (“COMI”). Accordingly, the chosen insolvency law (“the main proceeding”) will have worldwide effect and regulate the matter. This includes matters outside the territorial jurisdiction of the main proceeding.

In territoriality, insolvency proceedings can be commenced in every state where the debtor holds assets, potentially leading to a plurality of insolvency proceedings. Consequently, the insolvency proceedings are also limited to the available assets in that state where the proceedings are opened. The insolvency proceedings are also restricted in respect of which creditors are able to file their claim. A creditor can only file a claim in the state where the insolvency proceedings are taking place. The concept imposes that an insolvency proceeding will only apply to the State where the insolvency proceeding has been opened.

Universality allows for reduced costs due to globalisation and the satisfaction of the interests of those involved in cross border insolvency as more than one insolvency proceeding can commence in more than one state. Theoretically, when applying universality, the creditors have access to a greater pool of the debtors assets. However to facilitate aforementioned advantages requires a high level of trust in foreign legal systems due to the difficult legal issues which may arise.

Territoriality protects the local interests of: the courts by alleviating the need to consider foreign proceedings and judgements. In certain circumstances, territoriality also protects the interests of the local creditors as they have a more exclusive right to the potential pool of local assets. On the other hand, creditors may also be disadvantaged by their inability to participate in and benefit from foreign insolvency proceedings. Practically, territoriality may also lead to an entity being insolvent in one State and solvent in another.

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.

[Type your answer here]

Three recent examples of Middle Eastern insolvency law reform are listed and explained below:

1. the UAE in 2016 and 2019;
2. Saudi Arabia in 2018; and
3. Dubai in 2019.

UAE Federal Decree Law no. (9) of 2016 on Bankruptcy provides a legal framework to help distressed companies in the UAE avoid bankruptcy and liquidation through different mechanisms including: consensual out of court financial restructuring; composition procedures; financial restructuring; the potential to secure new loans under terms set by law; and conversion to declaration of bankruptcy and liquidation of a debtor’s assets.

UAE Federal Decree-Law no. (19) of 2019 on Insolvency regulates cases of insolvency of natural persons. The law aims at enhancing the competitiveness of the UAE ensuring the ease of doing business, creating favourable conditions for individuals facing financial difficulties and protecting those who are unable to pay their debts because of their bankruptcy.

The new Bankruptcy Law created in Saudi Arabia in 2018 is a balanced modern means to protect both debtors and creditors in Saudi Arabia. The new Bankruptcy Law facilitates a healthy business environment that encourages participation by foreign and domestic investors, as well as local small and medium enterprises. It focuses on aspects of Bankruptcy

and Insolvency such as: preventative settlement (including for small debtors); financial restructuring (including for small debtors); voluntary liquidation; administrative liquidation and liquidation for small debtors.

DIFC Insolvency Law, Law No. 1 of 2019 aims to balance the needs of all stakeholders. The new Insolvency Law and Regulations introduces a new debtor in possession bankruptcy regime in line with best practice globally; provides for a new administration process where there is evidence of mismanagement or misconduct; enhances the rules of governing winding up procedures; and incorporates the UNCITRAL Model Law on Cross Border Insolvency proceedings with certain modification for application.

3
Marks awarded 10 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.

[Type your answer here]

According to Sealy and Hooley the objectives of insolvency for individuals are: to protect the debtor from harassment by their creditors; to enable the debtor to make a fresh start; and to reduce indebtedness by making contributions from present and future income to the estate whilst also taking into account the personal circumstances of the debtor.

Sealy and Hooley also consider that the objectives of corporate insolvency are: to preserve the business in whole or the viable parts thereof (not necessarily the company; and where personal liability has been abused, to impose personal liability on responsible persons.

Both individual insolvency and corporate insolvency have similarities such as to ensure pari passu distribution as far as possible; ensure that secured creditors deal fairly towards the debtor and other creditors; to investigate reasons for failure; and to reclaim voidable dispositions where assets have been improperly dealt with.

The pertinent difference between insolvency for individuals and insolvency for corporations is insolvency for individuals has built in exemptions to protect certain excluded assets of the individual. These exemptions can include motor vehicles used as a primary form of transport, tools of trade used to earn personal income, personal income up to applicable thresholds and bank balances of a non-material value deemed to be used for an insolvent individuals day to day living expenses. General when assessing these exempt assets, a prescribed threshold is applied. Insolvency for corporations does not directly provide any protection for company assets.

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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.

[Type your answer here]

Difficulties in insolvency law in a cross-border context arise from the non-existence of a global insolvency law system and the absence of a court with the primary purpose of dealing with same.

According to Friman, the problem starts with finding a common reason for commencing proceedings. Friman notes that owing to the differences in defining 'insolvency' it can be difficult to agree whether an entity is insolvent in a cross-border context. For example, the traditional definition of insolvency is where a debtor has insufficient assets to pay its liabilities over a period of time. However, a more short term inability to service debts may also be considered insolvency in some states.

Omar outlines that another difficulty which may be encountered is the priority of creditors. Where debtors face creditors enforcing their claims in more than one state, this may lead to conflict laws. Additionally, means of protecting title should also be considered such as: security, set off, netting arrangements and retention of title.

Westbrook identifies the nine key issues in cross-border insolvency, being: recognition of the foreign representative; moratorium on creditor actions; creditor participation; executory contracts; co-ordinated claims procedures; priorities and preference; avoidance provision powers; discharges and conflict of law issues.

Fletcher outlines three common private international law issues which are choice of forum to exercise jurisdiction, the recognition and effect accorded to foreign proceedings and the choice of law. The first item which needs to be considered is jurisdiction; will a court hear and determine the matter. Once the court has decided to commence the liquidation of a debtor's estate, other disputed issues may arise in the local insolvency proceedings including foreign elements such as overseas creditors potential interest in the insolvency proceedings.

Where there is a foreign judgement on the same matter, private international law raises the questions of recognition (the conclusive effect of a judgement) and enforcement or effect (the execution of the judgment or the defendant's compliance with its terms). The type of judgement can be significant. For example, the recognition of a judgement commencing insolvency proceedings against a debtor versus the recognition an order during the course of insolvency proceedings for a third party to pay monies following a successful action setting aside a voidable disposition.

The local court also has to determine which law to apply. Different systems adopt different approaches. For example, in a common law system choice of law issues only arise if the parties invoke them, otherwise the law of the forum applies. In civil law systems, foreign law must be considered, regardless of whether it is pleaded by the parties or not.

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.

[Type your answer here]

Two primary systems have been created in the 21st century to promote harmonisation of domestic insolvency. Those systems are UNCITRAL Legislative Guide to Insolvency 2004 ("the UNCITRAL system") and the World Bank Principles for Effective Insolvency and Creditor / Debtor Regimes 2011 ("the World Bank system").

The UNCITRAL system is 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. The UNCITRAL system advocates a modern, harmonised and fair framework when addressing cross-border insolvency.

The World Bank system provides five key factors to dealing with international insolvency law. The World Bank system acknowledges that insolvency proceedings may have international aspects and suggests that a country's legal system should establish clear rules pertaining to jurisdiction, recognition of foreign judgements, cooperation among courts in different jurisdictions and choice of law.

In my opinion, the impact of the systems is completely reliant on the adoption of clear principles in each respective country. Harmonisation of international insolvency principles, as both systems advocate, is reliant on the majority adopting a uniform set of principles. The UNICTRAL and World Bank systems both provide recommendations on the major international insolvency issues, however each country's ability to implement a clear set of principles is the defining factor. As there is not one global set of insolvency rules and one global court to attend to same, the principles and recommendations provided by the systems are the most effective available tool for global insolvency law makers and courts to deal with cross border insolvency issues. It is also important to remember that should the systems be adopted by one country, there is no compulsory reciprocity from another country who has chosen not to adopt the system.

This is well answered. There is scope to consider pressures from politics, foreign investors and loan conditions.

5

Marks awarded 15 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.

[Type your answer here]

Whether the Erewhon liquidator considers the cross border insolvency act of Utopia is reliant on the establishment of Nadir's Centre of Main Interest ("COMI"). The COMI will provide whether a potential action from the Erewhon liquidator will be the foreign main proceeding or the foreign non-main proceeding. Where a company is concerned, the COMI will be the location of their registered office. In this scenario the registered office of Nadir is in Utopia.

After establishing the COMI is in Utopia, the Erewhon liquidator will have to apply for foreign recognition of their proceedings in Utopia. Upon recognition of the Erewhon liquidator, where necessary to protect the assets of Nadir or for the interests of Nadir's creditors, the Utopian

court may at the request of the Erewhon liquidator grant certain relief including: staying proceedings, staying execution against Nadir's assets; suspending the right to transfer, encumber or otherwise dispose Nadir's property; entrust the administration or realisation of all or part of Nadir's assets located in Utopia to the Erewhon liquidator or another person designated by the Utopian Court.

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

4

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.

[Type your answer here]

(a) No, as the Erewhon liquidator's non-main proceedings would be the sole proceedings at that point in time.

(b) Yes, the Erewhon liquidator's non-main proceedings would be considered under the circumstances but it is likely that the liquidation of Nadir would be subject to concurrent proceedings at the direction of the Utopian Court.

It would be beneficial to specifically refer to Article 29 on concurrent insolvency proceedings, under which the local proceedings in Utopia maintain pre-eminence over the foreign proceedings in Erewhon.

1

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?

[Type your answer here]

The Company is incorporated and has its registered office in Australia. It is important to note that Australia has adopted the UNCITRAL Model Law on Cross-border Insolvency ("MLCBI") pursuant to the *Cross-Border Insolvency Act 2008*. The four issues to be considered are: the

treatment of foreign creditors, hindrance to realisation of local assets, recovery of foreign assets, and access to documents and information which is overseas.

Foreign unsecured creditors participating in the insolvency proceedings of the Australian Company will be subject to the Australian insolvency regime. As per the MLCBI, foreign unsecured creditors will be afforded the same rights regarding the commencement of, and participation in a proceeding under the Australian Law. Foreign unsecured creditors will rank equally with Australian unsecured creditors. Certain local or international priorities, encumbrances and securities will not be affected.

Further, if a foreign non-main proceeding were to be recognised in Australia, the Court has broad powers to stay the proceedings or the enforcement of proceedings if necessary to protect the assets of the debtor or the interests of the creditors.

The recovery of foreign assets will be dependant on the location of those foreign assets and the applicable cross-border insolvency laws of that jurisdiction. For example, if the assets are located in a state which has adopted the MLCBI, the cooperation of that states court will be forthcoming and the recognition of the main proceedings in Australia should in theory be considered.

Similarly, the access of documents and information which are overseas to assist in the Australian Liquidators investigations will be dependant on the local laws of the foreign jurisdiction and whether that jurisdiction has adopted the MLCBI. If that jurisdiction has adopted the MLCBI, the Courts will cooperate to the maximum extent possible. However, the MLCBI does not operate on a reciprocity basis and therefore a foreign state may not assist the Australian Liquidator.

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Marks awarded 13 out of 15
MARKS AWARDED 48/50

*** End of Assessment ***