



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 9 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 refers to the body of laws in the public international law context, consisting either of soft or hard law, that structures, guides and/or dictates the manner in which questions concerning the management of cross – border insolvency proceedings are addressed and determined.

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Question 2.2 [maximum 5 marks]

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

Universality refers to the idea that the commencement of one insolvency proceeding against the debtor must resolve all issues relating to the debtor's assets and debts. The materialisation of this concept is seen in the commencement of foreign main proceedings in the State where the debtor has its Center of Main Interest (COMI) with all other proceedings commenced in other States where the debtor has a presence (Establishment) being secondary proceedings.

Territoriality refers to the idea that insolvency proceedings may be commenced in every State in which the debtor has assets with such proceedings being territorially limited and restricted to the assets within that State in which the proceedings are commenced.

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.

a) The Federal Law by Decree No (9) of 2016 on Bankruptcy:

This Law came into force in December 2016 and provides a legal framework to help distressed companies in the United Arab Emirates to resolve insolvency through methods such as consensual financial restructuring.

b) The Federal Law by Decree No (19) of 2019 on Insolvency:

Issued on 29th August 2019, this Law was passed with a view to regulate the cases of insolvency of natural persons..

c) Adoption of the UNCITRAL Model Law on Cross – Border Insolvency by Bahrain in 2018 and the International Dubai International Financial Center (DIFC) in 2019:

Bahrain's Law No (22) of 2018; Issuing Reorganization and Bankruptcy Law introduced the concept of cross – border insolvency modelling the same on the UNCITRAL Model Law which it adopted under the new law. This did not exist in its laws prior to the aforementioned law.

The DIFC enacted the new DIFC Insolvency Law, Law No. 1 of 2019 (the "New DIFC Insolvency Law"), which became effective in June 2019. Part 7 of the Law introduces aspects of foreign courts or foreign representatives' assistance in dealing with foreign proceeding among others.

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.

For individuals, the objectives of insolvency are essentially cause a rearrangement of the debtor's affairs in a way that enables him/her reduce his/her indebtedness to the creditors while at the same time taking his/her personal circumstances, such as livelihood, into account.

For corporations, the objectives are the preservation of the business which may entail splitting off the non-performing or toxic parts of the business to ensure not just a health balance sheet but also to ensure that the future of the business is guaranteed. Secondly, where the assets have been alienated from the company to the detriment of the general body of creditors, the avoidance provisions apply to ensure the preservation of their rights.

Lastly, in both instances, the principle of *pari passu* applies to the extent that it is not limited by the exceptions such as the treatment of secured creditors' and preferred creditors' claims.

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.

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.

Other the absence of a global insolvency law system and global court to deal with cross – border insolvency matters, other challenges include finding a universally accepted definition and test for insolvency. The divergent views on what amounts to insolvency for the purpose of opening insolvency proceedings remains very much a matter for the domestic courts.

There are differences in the domestic norms and laws especially those with a bearing on the insolvency proceedings. Particular aspects of insolvency likely to be affected by the difference in domestic laws include the laws applicable to the treatment of securities (and realisation of the same, such as mortgage law), the treatment of insolvency practitioners' qualifications, laws on set – off and netting arrangements, among others.

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.

To begin with, the promotion of harmonisation of domestic law in a cross – border context is meant to answer three key issues; the Forum, recognition and enforcement and, importantly, the choice of insolvency (or related) law. As such, harmonisation of domestic insolvency law has been achieved through hard and soft law.

For hard law, States have ratified treaties and Conventions which, upon ratification, become part of the Hard Law applicable to insolvency proceedings. For Soft Law, the International Institute for the Unification of Private Law (UNIDROIT) and the United Nations Commission of International Trade Law (UNCITRAL) cooperated to generate the UNCITRAL Model Law on Cross – Border Insolvency and its Legislative Guide (2004). It has been referred to as the most influential soft – law approach/response to the harmonisation of domestic insolvency law. The Model Law Initiative did not take the form of a treaty or convention, but rather that of a model/draft legislation that UNCITRAL recommended Member States to adopt, with or without modification.

While adoption of the MLCBI may harmonise various domestic insolvency laws in so far as they address international insolvency issues, the question addresses more broadly the harmonisation of domestic insolvency laws in general. See the ‘model’ answer on this sub-question.

3.5

Marks awarded 11 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 potential relevance of the Utopian Cross – border Insolvency Act (“UCBIA”) is seen in the fact that to participate in the proceedings before the court in Utopia, the Liquidator will have to first be recognised as a foreign representative by a competent court (Article 4 of the UNCITRAL Model Law), thereby being clothed with standing before the court (Paragraph 116 of the Legislative Guide to Enactment and Interpretation of the UNCITRAL Model Law on Article 12).

Since the UCBIA names its local laws relating to insolvency and its competent court, and proceeding on the presumption that the UNCITRAL Model law was adopted without modifications (the only addition being the local laws), the UCBIA would assist the Liquidator

in applying for recognition of the foreign proceeding commenced in Erewhon (the Liquidation of Nadir Pty Limited) and for recognition of himself as the foreign representative.

Additionally, the UCBI would also inform the Liquidator of the consequences of recognition. First and foremost, the Liquidator would have the assurance that upon recognition of the foreign proceeding, he, as the foreign representative, would be entitled to participate in the proceedings regarding Nadir Pty Limited under the laws of Utopia (Article 12 of the UNCITRAL Model Law).

The UCBI would also inform the Liquidator of the reliefs available. From the time of filing the application for recognition until the application is decided upon, the court has the power, at the request of the foreign representative, where relief is urgently needed to protect the assets of the debtor or the interests of the creditors, to grant relief of a provisional nature, including a stay of execution (Article 19(1) of the UNCITRAL Model Law).

Further consequences of recognition in the UCBI would comply with Article 19 and 20 of the UNCITRAL Model Law especially the stay of continuation of the proceedings under Article 20(1) of the UNCITRAL Model Law.

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) It would make a difference if Apex had filed winding – up proceedings against Nadir but the matter not yet heard because at that point, a liquidator would not have been appointed. In the UCBI, we are likely to find a reproduction of Article 15 of UNCITRAL Model Law which requires either a certified copy of the decision commencing the foreign proceeding and appointing the foreign representative or a certificate from the foreign court affirming the existence of the foreign proceeding and of the appointment of the foreign representative or, in the absence of evidence referred to above, any other evidence acceptable to the court of the existence of the foreign proceeding and of the appointment of the foreign representative.

If the matter has not yet been heard, then it is highly unlikely that any of the above will be available to satisfy the competent court of the liquidator's right to participate in Nadir Pty Ltd's proceedings.

- b) The answer in 4.1 would be modified to emphasise that the Liquidator would apply for recognition of the proceeding in Utopia as a foreign main proceeding citing the fact that its center of main interest is in Utopia. The court in Erewhon would be called upon to determine whether Utopia corresponds to the place where Nadir conducts the administration of its interests on a regular basis and is therefore ascertainable by third parties such as the creditors (Paragraph 144 of the Legislative Guide).

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

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?

The country of incorporation and situation of the debtor's registered office shall be Uganda. The applicable law in Uganda relating to insolvency is the Insolvency Act, No. 14 of 2011. Part 9 of the Act deals with cross – border insolvency and incorporates certain provisions of the UNCITRAL Model Law.

The central question that the insolvency representative is likely to be confronted with is how to trace and assemble the assets and co-ordinate the winding – up or reorganisation of the company or sale the same to benefit the general body of creditors.

The primary issues likely to face the representative are as follows:

- a) Whether a Ugandan Court has jurisdiction over a foreign company and, if so, whether it may decline jurisdiction?
- b) Whether the winding – up of the company in Uganda extends to the foreign asset?
- c) Whether the foreign creditors are entitled to equal treatment with the Ugandan creditors in Uganda insolvency proceedings?
- d) What is the law applicable to the substance and procedure of the proceedings in relation to the company's other offices?

In proceedings commenced in Uganda, all the aforementioned issues are governed by the Ugandan private international law, following the universal principle that issues of jurisdiction, choice of law and enforcement are governed by the *lex fori*. This abides by the position in England as highlighted by Prof. Kristin Van Zwieten, *Goode on the Principles of Corporate Insolvency Law*, 5th ed., p.897, para.16 – 03.

However, there are certain common principles in Uganda's national law that may influence the approach to the resolution of cross – border insolvency problems, notably the collective nature of insolvency proceedings, *pari passu* distribution, the avoidance or deferment of liquidation where rescue, reorganisation or arrangements with creditors are likely to improve prospects for creditors, the principle of respect for the pre-insolvency entitlements such as the priority accorded to secured creditors, the conferment of preferential status on certain unsecured creditors notably the unpaid wages and taxes, among others, the rules by which the creditors are bound to a restructuring plan agreed by a prescribed majority, rules for the avoidance of transaction concluded in the run – up to collective insolvency proceedings which are detrimental to the general body of creditors and the absence of discrimination against foreign creditors although in Uganda, this would be dependant on the approach taken by the insolvency representatives and the courts of both jurisdictions where parallel proceedings

have been commenced or on whether a particular State has been declared as reciprocating State by the responsible Minister.

As such, the primary tools used by the Ugandan courts in dealing with the cross – border issues are common law, comity (to a limited extent), the local law, that is the Insolvency Act, 2011 and its 2013 regulations, the persuasive direction offered by the UNCITRAL Model Law and its legislative guide and well as the regulatory framework on the enforcement of foreign judgments specifically the Foreign Judgments (Reciprocal Enforcement) Act Cap. 9 of the Laws of Uganda.

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Marks awarded 14 out of 15
MARKS AWARDED 44/50

*** End of Assessment ***