



FORMATIVEASSESSMENT: 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 **9pages**.

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 7 out of 10

QUESTION 2 (direct questions) [10 marks]

Question 2.1 [maximum 2 marks]

Explain what the term "international insolvency law" means.

Wessles defines international insolvency law as that part of law that:

International insolvency law refers to a set of rules and regulations relating to some insolvency proceedings, having some international connections, thus, cannot be enforced and executed fully.

The international connections can be in form of foreign creditors, foreign assets, foreign market (e-commerce), foreign control etc.

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

1.5

Question 2.2 [maximum 5 marks]

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

Universality approach means the legal system of one country should regulate the insolvency and hence, take precedence over foreign laws, over cross border insolvency issues. This one country is where the "centre of main interest" lies. The centre of main interest can be the place of domicile, place of head office, place of registration and/or main place of business.

Territoriality means multiple insolvency proceedings as per the law of land of that country. When debtor has assets in more than one country then, insolvency proceedings opens up in every country.

Modified Universality is the modified version of universality approach to combine the gains of universality (Uniformity and predictability) and territoriality (which has easy acceptability by states). In this approach, the “main proceeding”, opened in the State where the centre of main interests lies, supported by secondary proceedings in another state/states. The courts dealing with the respective proceedings are supposed to co-operate with each other.

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. Dubai International Financial Centre in 2019: The newly-enacted law compliments the DIFC’s commitment to international best practice by introducing a new debtor in possession bankruptcy regime, with the Insolvency Law aiming to balance the needs of all stakeholders in the context of distressed and bankruptcy related situations in DIFC, facilitating a more efficient and effective bankruptcy restructuring regime. It is modeled on the lines of UNCITRAL Model Law on cross border insolvency
2. In 2018, the Reorganisation and Bankruptcy Law was adopted in the Kingdom of Bahrain aims to maximise the value of bankrupt estates in the country and encourage corporate reorganisation over liquidation. Whilst local in its implementation, the Bankruptcy Law is international in scope and design. The Bankruptcy Law incorporates restructuring concepts from the U.S. Bankruptcy Code, including a moratorium on enforcement proceedings, the ability to sell assets out of the bankrupt estate free from security, obtain financing on super-priority terms and implementing a reorganisation plan giving confidence to foreign investors. Bahrain also adopted the Model Law on Cross-Border Insolvency in 2018.
3. Similarly, Saudi Arabia in 2018 has reformed its domestic insolvency laws on the lines of international bankruptcy regime.

3

Marks awarded 9.5 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.

1. To protect:

Individuals: To protect the debtor from harassment by his creditors

Corporations – To preserve the business or division or the company.

2. To make a fresh start

Individuals: To enable the debtor to make fresh start – especially in no fraud cases (where insolvency has not been brought about by the bad actions or conduct of the debtor) basically to protect his socio economic status.

Corporations: There is no need to protect the socio economic status of a corporation, in extreme cases liquidation may also take place.

3. To take personal circumstances into consideration

Individual: To reduce indebtedness by making contributions from present and future income to the estate while at the same time taking his personal circumstances into consideration.

Corporations: There is no need to consider personal circumstances, as an entity is an artificial person.

4. To impose personal liability

Individuals: There can be personal liability for individuals.

Corporations: Where personal liability has been abused, to impose personal liability on responsible persons like directors and key managerial persons.

There is scope for elaboration, for example regarding exempt assets in the case of individuals.

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.

Please note that there is no global parliament, global insolvency law system and a global court to deal with cross-border insolvency matters, therefore, it poses lot of difficulties when dealing with cross border aspects. Few are stated below:-

1. Common insolvency language and definitions. Example- Definition of Insolvency, Creditor etc.
2. The choice of forum to exercise jurisdiction in the matter (Especially in cases where registration and head office of the debtor/creditor shifted to another country prior to insolvency proceedings)
3. The recognition and effect accorded foreign proceedings
4. The choice of law
5. Cooperation among courts in different countries (Difficulties in collective proceedings)
6. Difficulties in conflict of domestic laws, domestic norms
7. Conflicts and complexities by the presence of qualifications, security, set-off and netting arrangements, retention of title clauses and other means of protecting title available to creditors in national laws.

This answer displays a satisfactory understanding of the issues. To improve your responses, ensure they are commensurate with the mark allocation – while Q 3.2 asks

for a brief note, it is for 5 marks. 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

In the early 2000s, the World Bank also produced guidelines on the regulation of Insolvency, entitled Principles for Effective Insolvency and Creditor / Debtor Regimes. The Principles have been revised in 2005, 2011, 2015 and in April 2021 there was a further revision of these C15 Principles. These principles gained significance in the context that the International Monetary Fund (IMF) and the World Bank require bankruptcy reform in developing countries as a condition of loan support.

The UNCITRAL Legislative Guide is another soft law setting the international best practice standards for insolvency regimes.

Insolvency proceedings may have international aspects, and a country's legal system should establish clear rules pertaining to jurisdiction, recognition of foreign judgments, cooperation among courts in different countries, and choice of law. Key factors to effective handling of cross-border as per World bank principles typically include:

- i) A clear and speedy process for obtaining recognition of foreign insolvency proceedings;
- ii) Relief to be granted upon recognition of foreign insolvency proceedings;
- iii) Foreign insolvency representatives to have access to courts and other relevant authorities;
- iv) Courts and insolvency representatives to cooperate in international insolvency proceedings;
- v) Non-discrimination between foreign and domestic creditors

What is your opinion on how much impact these are likely to have in addressing international insolvency issues?

3.5

Marks awarded 10.5 out of 15

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

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

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

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

Question 4.1 [maximum 5 marks]

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

[Erewhon Liquidator may press for Foreign non-main proceedings doctrine. It refers to the place of operations where the debtor carries out non-transitory economic activity.

Since Nadir has shifted its head office to Utopia only a month back to create confusion on Centre of main interest (COMI). Therefore, Erewhon Liquidator should press that COMI lies in Erewhon not in Utopia.

Erewhon Liquidator should press that the Ordinary course of business carried out in Erewhon not in Utopia]

Can the liquidator obtain a stay?

3.5

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.

[Type your answer here]

Take care to answer each sub-question

0

Question 4.3 [maximum 8 marks]

NB: This question is not related to Questions 4.1 and 4.2

A court has ordered the commencement of an insolvency proceeding against a corporate debtor in the State of its incorporation and head office. The company has operated business in a number of States and has assets (real property or interest in land, other tangible assets and intangible assets); creditors (including taxation/ revenue authorities) and directors in several States.

Select a country for the company's incorporation and, based on the insolvency laws of the country you select and the brief facts provided, describe four key international insolvency issues facing the insolvency representative in this scenario. For each issue, what domestic laws or international instruments apply to assist the insolvency representative address these four issues?

[Type your answer here]

Take care to answer each sub-question

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Marks awarded 3.5 out of 15
MARKS AWARDED 30.5/50

End of Assessment