



FORMATIVE ASSESSMENT: MODULE 1

INTRODUCTION TO INTERNATIONAL INSOLVENCY LAW

This is a **formative assessment** relating to **Module 1** and is designed to provide candidates on the Foundation Certificate course with some direction and guidance as to the form and content of assessments on the course as a whole. The submission of this assessment is **not compulsory** and the mark awarded will not count towards the final mark for Module 1 or the course as a whole. However, students are encouraged to submit this assessment as part of their orientation for the submission of the formal (summative) assessments for all the modules on the course.

The Marking Guide for this assessment will be made available on the Course Administration page of the course web pages after the submission date on 15 October 2021.

INSTRUCTIONS FOR COMPLETION AND SUBMISSION OF ASSESSMENT

Please read the following instructions very carefully before submitting / uploading your assessment on the Foundation Certificate web pages.

1. You must use this document for the answering of the assessment for this module. The answers to each question must be completed using this document with the answers populated under each question.
2. All assessments must be submitted electronically in MS Word format, using a standard A4 size page and a 11-point Arial font. This document has been set up with these parameters – **please do not change the document settings in any way. DO NOT** submit your assessment in PDF format as it will be returned to you unmarked.
3. No limit has been set for the length of your answers to the questions. However, please be guided by the mark allocation for each question. More often than not, one fact / statement will earn one mark (unless it is obvious from the question that this is not the case).
4. You must save this document using the following format: **[studentID.assessment1formative.]**. An example would be something along the following lines: 202122-514.assessment1formative. **Please also include the filename as a footer to each page of the assessment** (this has been pre-populated for you, merely replace the words “studentID” with the student number allocated to you). Do not include your name or any other identifying words in your file name. **Assessments that do not comply with this instruction will be returned to candidates unmarked.**
5. Before you will be allowed to upload / submit your assessment via the portal on the Foundation Certificate web pages, you will be required to confirm / certify that you are the person who completed the assessment and that the work submitted is your own, original work. Please see the part of the Course Handbook that deals with plagiarism and dishonesty in the submission of assessments. **Please note that copying and pasting from the Guidance Text into your answer is prohibited and constitutes plagiarism. You must write the answers to the questions in your own words.**
6. The final submission date for this assessment is **15 October 2021**. The assessment submission portal will close at **23:00 (11 pm) BST (GMT +1) on 15 October 2021**. No submissions can be made after the portal has closed and no further uploading of documents will be allowed, no matter the circumstances.
7. Prior to being populated with your answers, this assessment consists of **9 pages**.

ANSWER ALL THE QUESTIONS

QUESTION 1 (multiple-choice questions) [10 marks in total]

Questions 1.1. – 1.10. are multiple-choice questions designed to assess your ability to think critically about the subject. Please read each question carefully before reading the answer options. Be aware that some questions may seem to have more than one right answer, but you are to look for the one that makes the most sense and is the most correct. When you have a clear idea of the question, find your answer and **mark your selection on the answer sheet by highlighting the relevant paragraph in yellow**. Select only **ONE** answer. Candidates who select more than one answer will receive no mark for that specific question.

Question 1.1

It should be relatively easy to develop a single system to deal with cross-border insolvency since all jurisdictions have more or less the same local insolvency law rules.

- (a) This statement is true since all countries have implemented the UNCITRAL Model Law on Cross-Border Insolvency.
- (b) This statement is untrue since there are huge differences in both the approach and insolvency legislation of various jurisdictions.**
- (c) This statement is true since all systems have at least the same general insolvency concepts.
- (d) The statement is true since the historical roots of all insolvency systems are the same.

Question 1.2

The Statute of Ann, 1705 was a very important piece of legislation for the development of English insolvency law.

- (a) This statement is true since this Act introduced imprisonment of debt.
- (b) This statement is untrue because it dealt with the distributions of the proceeds derived from the proceeds of selling the assets of the estate.
- (c) This statement is true since it introduced the notion of discharge.**
- (d) This statement is true since it introduced fraudulent conveyances into English law.

Question 1.3

The purpose of the UNCITRAL Legislative Guide (2004) has direct application in all the member States of the UN.

- (a) This statement is true because UNCITRAL's model legislative guidelines apply automatically to all member States.**
- (b) This statement is true because all member States supported its automatic implementation in their respective jurisdictions.

(c) This statement is untrue because the Legislative Guide serves merely as soft law and contains best practice to be considered when countries revise their own insolvency legislation.

(d) This statement is untrue since the Legislative Guide is only available for use by developing countries when reforming their own insolvency laws.

Question 1.4

Modern rescue proceedings have replaced liquidation as an insolvency procedure in most systems.

(a) This statement is true since business rescue is important for socio-economic reasons.

(b) This statement is true because liquidation is viewed as a medieval and outdated process.

(c) This statement is untrue since there is still a need for both liquidation and rescue procedures in insolvency systems.

(d) This statement is untrue since some systems have no formal rescue procedure.

Question 1.5

The principles and requirements for avoidable dispositions and executory contracts are the same in all jurisdictions – hence these do not pose problems in a cross-border insolvency matter.

(a) The statement is untrue, the requirements and principles do differ and pose problems in a cross-border case.

(b) This statement is untrue because the insolvency laws of the State where the original insolvency order is issued will apply to all the other States involved in the matter.

(c) This statement is untrue since avoidable dispositions and executory contracts do not pose any problems in a cross-border case.

(d) The statement is untrue since avoidable dispositions and executory contracts may be disregarded in a cross-border case.

Question 1.6

The domestic corporate insolvency statute of a country makes no mention of the possibility of a foreign element in a liquidation commenced locally. The country has ratified a regional treaty on insolvency proceedings that contain provisions on concurrent insolvency proceedings over the same debtor in a neighbouring treaty state.

In a local liquidation commenced under the domestic corporate insolvency statute, to what law can the local court refer in order to resolve an international law issue that has arisen because of concurrent insolvency proceedings in the neighbouring state?

(a) Public International Law.

(b) UNCITRAL Legislative Guide on Insolvency Law.

(c) World Bank Principles for Effective Insolvency and Creditor Rights Systems.

(d) Private International Law.

Question 1.7

Which one of the following documents mandates co-operation or communication between courts in concurrent insolvency proceedings on the same debtor, which are being conducted in different nation states?

(a) ALI / III Global Guidelines Applicable to Court-to-Court Communication in Cross-Border Cases (2012).

(b) EU Cross-Border Insolvency Court-to-Court Communications Guidelines (2014).

(c) UNCITRAL Model Law on Cross-border Insolvency (1997).

(d) JIN Guidelines for Communication and Cooperation between Courts in Cross-Border Insolvency Matters (2016).

Question 1.8

Latin and Middle America states have ratified various multilateral conventions and treaties that address international insolvency issues. While they promote unity of proceedings in the treaty states where a debtor has a single commercial domicile, they acknowledge the possibility of concurrent proceedings.

Which of the following conventions and treaties does **not** provide for judicial co-operation where there are surplus funds remaining in a proceeding in one treaty state and there are concurrent insolvency proceedings over the same debtor in another treaty state?

(a) Montevideo Treaty on International Commercial Law (1889).

(b) Montevideo Treaty on International Commercial Terrestrial Law (1940).

(c) Montevideo Treaty on International Procedural Law (1940).

(d) Havana Convention on Private International Law (1928).

Question 1.9

The Council Regulation on Insolvency Proceedings (European Insolvency Regulation) (2000), which applies in all European Union member states except Denmark, was reviewed after a decade's operation. An amended European Insolvency Regulation (EIR) Recast (2015) was adopted in 2015 and took effect in June 2017.

Which of the following aspects of international insolvency is **not** addressed in the EIR Recast?

(a) Proceedings to restructure a debtor that is facing the likelihood of insolvency.

(b) Definition of "centre of the debtor's main interests".

(c) A centralised insolvency register of insolvency proceedings opened in member states.

(d) Co-operation and co-ordination provisions applicable to corporate groups.

Question 1.10

An unsecured Creditor is owed monies by the Debtor for services it supplied locally. It has issued proceedings to recover the debt in the local Court. The Debtor has moved its registration and head office to the local country from its original place of incorporation in a foreign country. The Creditor is incorporated and has its head office in that foreign country. The contract to supply, which was created by exchange of emails sent between the head offices, denominates the debt in the currency of the foreign country. The Debtor is being wound-up in the foreign country and the foreign liquidator seeks recognition and a stay in the local Court proceedings. What aspect is an international insolvency issue?

(a) The local Court's jurisdiction over the Debtor.

(b) The standing of the foreign Creditor to sue for its debt in the local Court.

(c) The foreign liquidator's standing to request a stay of the local proceedings.

(d) The fact that the debt owed to the Creditor is in a foreign currency.

Mark awarded 5 out of 10

QUESTION 2 (direct questions) [10 marks]

Question 2.1 [maximum 2 marks]

Explain what the term "international insolvency law" means.

International Insolvency law means is based on the fact that not all insolvency rules are the same. Organisations such as the United Nations Commission for International Trade Law (UNCITRAL) and the World Bank – try to find solutions to overcome the differences. Establishing a practical cross border initiative is a key factor in cross-border insolvency disputes

There is scope to elaborate.

2

Question 2.2 [maximum 5 marks]

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

There should only be one insolvency proceeding in a universality concept, opposed to a territorialism where insolvency proceedings are commenced in every State. Furthermore, in a Universality concept, all creditors are allowed to participate with all claims being treated equally.

A drawback to territorial proceedings is that a debtor may be solvent in one State; however, insolvent in another state; thus, certain creditors may not receive any funds.

These theories also involve recognition and effect (as well as jurisdiction) in that for example, with universalism, recognition and effect requires that other States recognise that one set insolvency proceedings (that all agreed is the appropriate jurisdiction) and recognise it as having extraterritorial effect in their States.

3.5

Question 2.3 [maximum 3 marks]

Describe **three** recent examples of developments in the Middle East region to reform domestic insolvency laws or to address international insolvency Issues.

Recent developments in the Middle East to reform the domestic insolvency law include: Saudi Arabia is currently performing an overall reform in relation to general regulation and settlement procedures, and the reform is part of Saudi Arabia's Vision 2030. The hope is it be more in line with the UAE, and the reform will benefit SMEs.

In 2019, the UAE enacted the DIFC Insolvency Law, Law No. 1 of 2019. The law was created to give investors and businesses in connecting economies in the East to the West.

The UAE enacted new laws introducing a debtor possession bankruptcy regime according to best practice globally **[further detail is warranted]**.

2.5

Total 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.

The key differences regarding the objectives of insolvency are that insolvency for an individual can act as a buffer between the debtors and an individual and stop the creditors from directly contacting or potentially harassing the debtor. Insolvency for individuals can provide a fresh start to debtors, allowing them to consolidate the debt and not continue to pay it off. In bankruptcy proceedings, the debtor may be allowed to maintain control of specific property, such as a family home.

Corporations can use insolvency as a tactical business move; a business may place an underperforming entity into insolvency, so it does not disrupt the business of the profitable entity. In addition, placing corporations into insolvency can assist a company in restructuring debt.

5

Question 3.2 [maximum 5 marks] (5.2)

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.

Cross-border insolvency can lead to a number of difficulties. Insolvency proceedings across many states due to the location of subsidiaries and operating running in different states can lead to a lack of structure, this is particularly prevalent in certain Middle Eastern countries such as Saudi Arabia; however, Saudi Arabia is working to become more developed in line with the UAE.

Under certain jurisdictions, insolvency proceedings can be opened concurrently, specifically in a territorial approach. However, this can lead to the assets being unfairly split amongst the creditors as more assets may lie in certain states.

States have different local laws in relation to employment laws that must be adhered to; for example, France has particular labour rights.

Additionally, varying public policy in relation to tax liabilities and social security obligations will need to be understood and adhered to in cross-border insolvency.

Further detail would be beneficial. For example, consideration of Westbrook's 9 key issues.

3

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.

Harmonisation of domestic insolvency law is a crucial consideration for a number of states. In early 2000 the World Bank published a Legislative Guide on Insolvency Law intended to be used as a reference by states and legislative bodies. **Are you intending to refer to the UNCITRAL legislative guide? Or the World Bank Principles for Effective Insolvency and Creditor Rights Systems? OR Both? Some clarity would be beneficial.**

Insolvency law in developing countries is often outdated. As a result, the World Bank require bankruptcy reform in line with the Legislative Guide on Insolvency Law as a condition to loan support.

In the European Union in 2010, a push towards greater uniformity in domestic insolvency law is underway. Specifically, the European Union have detailed the importance of a standard test of insolvency, the formal aspect of lodging claims, and directors responsibilities.

In September 2015, the European Union published an action plan – Action Plan on Building Capital Markets. The European Union recognise the importance of harmonised insolvency systems as an element of financial system stability.

In my opinion, the development of these legislative systems alongside continued growth will significantly improve cross-border insolvency legislation and move closer to universality. **Elaboration here is warranted. Perhaps reference to loan conditions could be raised again.**

4

Marks awarded 12 out of 15

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

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

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

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

Question 4.1 [maximum 5 marks]

Assume the UNCITRAL Model Law on Cross-border Insolvency has been adopted by Utopia without modification, except as required to domesticate it. For example, the Cross-border Insolvency Act of Utopia names its local laws relating to insolvency and its competent court under the Act.

The Erewhon liquidator’s investigations detect that Apex is suing Nadir in Utopia. The liquidator would like to stop Apex court action against Nadir in Utopia. Advise the Erewhon liquidator on the potential relevance of the Cross-border Insolvency Act of Utopia.

The Erewhon liquidator should contact Apex advising them on the winding-up order granted in Erewhon placing Nadir into liquidation. The Erewhon liquidator should advise Apex that as Utopia has adopted the UNCITRAL Model Law on Cross-border Insolvency, there should only be one insolvency proceeding covering all of the debtor’s assets and debt worldwide. As such, since the creditors have already commenced the proceeding, Apex will be unable to. The Erewhon liquidator should advise Apex that they will not be at a disadvantage considering they did not undertake the winding-up proceedings. The benefit of UNCITRAL Model Law is that all creditors worldwide will be able to submit a claim, and all claims will be treated on an equal basis.

The Erewhon liquidator should be aware that in accordance with the Cross-Border Insolvency Act 2008, they will be able to recognise their winding-up order in Utopia, where Nadir is now a registered company to peruse the assets of Utopia.

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.

(a) Apex, having filed proceedings, having not been heard by the court, will not make a difference to the advice given to the Erewhon liquidator.

(b) Suppose Apex obtains the court order to wind up before the Erewhon winding-up order. In that case, the Erewhon creditor will be unable to obtain the winding-up order under universalism as there should only be one insolvency proceeding covering all Nadir's assets.

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?

The country of incorporation in this scenario is the Cayman Islands, however, the corporation has assets and liabilities in several different States. Regardless of the States where the assets or liabilities are located, the harmonised goal will be to maximise the estate's value and harmonise the proceedings to minimise expenses. The insolvency issues facing the corporate debtor are the following:

- The corporate debtor has property and land interest in the United Kingdom.
- o Due to universalism and the Court order being an English order recognised by the United Kingdom courts the liquidator will not need to seek further recognition in relation to the order and can proceed to take control of the company's property and land to recognise the assets for the benefit of the creditors.

- Other tangible assets and intangible assets located in Lebanon including a power plant and power purchasing agreements with the local government authorities.
The Cayman Islands winding up order will not be recognised by the Lebanese authorities. The Liquidator will have to get local legal counsel and get the winding-up order recognised locally to realise the company's assets.

- The corporate debtor has a tax liabilities in other countries
In the UNCITRAL Legislative Guide on Insolvency Law Part one, the tax liabilities are entitled to be admitted as a claim if the State wishes to do so. According to the legislation, tax claims are admitted and treated in the same manner; as the Cayman Islands does not prioritise foreign tax claims, the government will submit a claim. The Cayman Islands does not afford a "Crown Preference" system.

- The corporate debtor has directors in several States
o The UNCITRAL Legislative Guide on Insolvency Law Part four on Directors' obligations would be the suggested law to apply in the insolvency proceeding. This legislative guidance detailed the obligations of a director of the corporate debtor in the period approaching insolvency. The aim of enforcing these obligations is to protect the creditors and contributories interests.

6.5
Marks awarded 11 out of 15
MARKS AWARDED 36/50

*** End of Assessment ***