



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 7 out of 10

QUESTION 2 (direct questions) [10 marks]

Question 2.1 [maximum 2 marks]

Explain what the term "international insolvency law" means.

As a starting point, the term "international insolvency law" is defined by Professor Bob Wessels 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 a given case.*" To expand, the term "international insolvency law" encompasses a framework to be applied when Courts of different States are required to co-ordinate and co-operate to deal with an insolvency which transcends the confines of a single legal system. Such co-ordination and co-operation is required because a single set of domestic insolvency law provisions would not be applied immediately or exclusively without regard to the foreign elements of the case.

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Question 2.2 [maximum 5 marks]

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

The concept of universality contemplates that there be only a single insolvency proceeding to cover all of the debtor's assets worldwide. All of the debtor's creditors worldwide would have an equal opportunity of participating in the insolvency and have their claims being treated on an equal basis. The law of the *lex concursus* would regulate the insolvency.

In contrast, the concept of territoriality contemplates the possibility of insolvency proceedings being commenced in every State or jurisdiction where the debtor is established by way of a non-transitory economic activity. Such insolvency proceedings would only cover the debtor's assets within that State or jurisdiction and allow the participation of the creditors within that State or jurisdiction.

The key focus of universalism in insolvency is to ensure that the trustee of the insolvent estate can maximise recovery for the debtor's creditors by having the ability to collect all of the debtor's assets worldwide. This would not be possible under territorialism, as the trustee would only be able to realise the assets within the jurisdiction. Universalism also recognises that it is a key feature of the modern world for businesses and businesspeople to operate across borders.

In addition, universalism enables the debtor's creditors worldwide to be distributed with a share of the debtor's assets. It would prevent an "asset grab" by creditors rushing to declare a debtor insolvent in a State / jurisdiction where the debtor has most of its assets so that those creditors can recover a larger share of the debtor's assets.

Universalism is said to also possibly be more cost-effective, as the insolvency of the debtor is centralised, and only one trustee (or one set of trustees) is appointed. This is in contrast to territoriality which makes multiple concurrent proceedings running.

Universalism, however, is practically not possible since there is no single piece of legislation which all States can or will subscribe to as law. One main difficulty is the fact that States are premised on different legal systems – civil or common law – with very different concepts. Further, even if there were a single piece of legislation, each State will have varying degrees of applying such law, having different levels of efficiencies, and be subject to different types of possible manipulations. Thus, a universalist system may be prone also to abuse.

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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.

First, in 2009, the first regional, comparative survey of insolvency systems in the Middle East and North Africa (MENA) was launched as a joint initiative of the Hawkamah Institute for Corporate Governance, the World Bank, the OECD and INSOL International, based on the World Bank's Principles for Effective Insolvency and Creditor Rights Systems (2005) as an indicate of best practice,

Second, UAE (in 2016 and 2019), Saudi Arabia (in 2018), and Dubai (in 2019) have reformed their domestic insolvency laws.

Third, Bahrain and the Dubai International Financial Centre adopted the Model Law on Cross-Border Insolvency in 2018 and 2019 respectively.

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.

In an insolvency for individuals, the objectives are to: (1) protect the debtor from harassment by his creditors; (2) allow the debtor to start afresh; and (3) reduce indebtedness by making contributions from his present and future income. Accordingly, certain assets are excluded or exempt from the insolvencies due to socio-economic reasons.

In contrast, in an insolvency for corporations, the objectives are to: (1) preserve the viable parts of the business where possible; and (2) investigate and attribute liability to the natural persons who control the corporation where they have abused the concept of separate legal personality. In a corporate insolvency, all of the corporation's assets form part of the estate and are distributed.

There is scope to elaborate.

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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.

To begin, there is no single global insolvency law system or a global court to deal with cross-border insolvency matters. Hence, conflicting rules and policies will come into play. Different States also have different approaches towards insolvency. Some may be pro-debtor and offer the debtor plenty of opportunities to try to regain financial health before being declared insolvent. Others may be pro-creditor and offer creditors greater rights of participation in the debtor's insolvency.

States also do not universally recognise what it means to be "insolvent" in a technical sense. Some States measure insolvency by looking at the debtor's balance sheet while others look at the debtor's cash flow.

The duration of the insolvency and terms of discharge also differ. In some states, an insolvent individual may be discharged within a year while in others, the insolvent individual may only be discharged after 10 years.

States also have different general rules on how to establish a creditor's pre-acquired rights over the debtor's assets, such as the creditor's security. That is because of the differences in States' general laws.

Avoidance laws in each State may also differ. This would be particularly challenging when the asset is not in the jurisdiction of the Court of the main procedure.

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 21st century, UNCITRAL promulgated a *Legislative Guide on Insolvency Law* intended to be used as a reference point for legislatures when drafting new laws or reviewing the adequacy of existing laws. It has expanded in subsequent years to also address the insolvency of enterprise groups and directors' obligations in the period approaching insolvency. The World Bank also produced the *Principles for Effective Insolvency and Creditor / Debtor Regimes* which have been revised 4 times since. Together, they form the internal best practice standard for insolvency regimes (the “**Insolvency Standard**”).

The Insolvency Standards set a benchmark for States to refer to when seeking to draft and formulate their own domestic insolvency regime. In my view, while this will not solve international insolvency issues, this is a positive step towards bridging the differences between states (e.g. as to the language used, principles for international cooperation, access to domestic courts by foreign insolvency representatives, and the recognition of foreign insolvency proceedings).

In addition to the Insolvency Standard, the European Parliament also published a report on the Harmonisation of Insolvency Law at EU level in 2010. In my view, this is a significant step towards addressing some of the larger cross-border insolvency problems within the European Union, such as the existence of different legal systems and legislations. A harmonised insolvency law system at the European Union level can effectively deal with insolvencies with cross-border elements. However this will not resolve the cross-border issues if the debtor has creditors, assets, or a presence, in countries outside of the European Union.

The Harmonisation of Insolvency Law at the EU level can also provide a guidance globally for the harmonisation of insolvency law at a larger scale.

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Marks awarded 13.5 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.

The Erewhon liquidator may apply to the Utopia Court for recognition of Nadir's liquidation in Erewhon under Article 15 of the UNICTRAL Model Law on Cross-Border Insolvency ("**Model Law**"). If the requirements under Article 17 are met, then the Erewhon liquidation would be recognised in Utopia. To this end: (a) the liquidation of Nadir is a "foreign proceeding" under Article 2 of the Model Law; (b) the Erewhon liquidator is a "foreign representative" within the meaning of Article 2 of the Model Law; (c) it is assumed that the procedural requirements under Article 15(2) of the Model Law will be met; and (d) the Utopia Court is a competent court under Article 4 of the Model Law.

Since Nadir moved its head office to Utopia one more ago, its centre of main interests would likely be in Utopia. However, assuming that Nadir has an "establishment" (Article 2(f) of the Model Law) in Erewhon (given its creditors and business dealings with parties in Erewhon), then the Erewhon liquidation would nonetheless be recognised as a foreign proceeding in Utopia under Article 17(2)(b) of the Model Law.

Upon the recognition of the Erewhon liquidation, the Erewhon liquidator may apply to the Utopia Court to stay the continuation of Apex's actions or proceedings against Nadir in Utopia under Article 21(1)(a) of the Model Law.

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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.

For (a) – no, as the Utopia Court may still order for the administration or realisation of all of Nadir's assets in Utopia to be entrusted to the Erewhon liquidator (Article 19(a)(b) of the Model Law).

For (b) – yes, if Apex had already obtained a court order to wind-up Nadir, then its action against Nadir would already be stayed by virtue of the existing winding up proceedings in Utopia.

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

The first issue is that the insolvency representative should ensure that creditors of the debtor do not commence actions in foreign jurisdictions to try to steal a march on the company's other creditors. The insolvency representative should seek to recognise the insolvency order in those countries where the company has assets and creditors to avail itself to stays or moratoriums in those jurisdictions to prevent any further actions being commenced against the company. The insolvency practitioner may seek to utilise the provisions in the UNCITRAL Model Law on Cross border insolvency where the foreign jurisdictions have adopted the same, or by the relevant domestic law rules on the recognition of foreign judgments.

The second issue is whether the insolvency representative has standing to collect the company's assets which may be situated in foreign jurisdictions, especially the company's real assets. This would be resolved by way of the recognition of the insolvency in England in the other countries where the company operates.

The third issue is whether the insolvency representative would like to avoid any transactions which took place prior to the company's insolvency. The insolvency representative would need to identify and familiarise him/herself with the domestic laws on to void such transactions and commence actions within those jurisdictions.

The fourth issue is to identify the differences in the treatment of the company's global creditors' pre-acquired security interests. The insolvency representative may have regard to the UNCITRAL Legislative Guide on Secured Transactions (2007), UNCITRAL Legislative Guide on Secured Transactions Supplement on Security Rights in Intellectual Property (2010), and the UNCITRAL Model Law on Secured Transactions (2016).

This is a satisfactory response. For an approach more closely applied to the facts, see the 'Model' Answer for four key international insolvency issues raised by the facts and facing the insolvency representative in this scenario.

5.5

**Marks awarded 11 out of 15
MARKS AWARDED 41.5/50**

*** End of Assessment ***