



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.

The international insolvency laws defined by Wessel states that, the rules concerning certain insolvency proceedings and measures which cannot be fully enforced because the applicable law, cannot be executed immediately and exclusively without consideration being given to the international aspect of the given case.

Further, it should be also noted that there is no single set insolvency rule that applies globally, as all states have their own set of rules and procedures which they follow.

Some further elaboration is warranted.

2

Question 2.2 [maximum 5 marks]

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

Universality states that there should be only one insolvency proceeding covering all debtor's assets and debt worldwide, mostly the chosen state could be where the centre of the debtor's interest is located. While Territoriality is opposite of Universality which states that the insolvency proceedings may be commenced in every state where the debtor holds assets, but that they should be limited to that territory i.e. limited to the property within that state where the proceedings are opened.

Universalism relates well to globalisation and large multinational corporations which have operations worldwide while Territorialism addresses local interests and local creditors in the state where the insolvency proceedings are commenced.

Further, universalism is regarded as the best approach in satisfying the interest of those involved in cross-board insolvency cases and it also has lower cost. Territorialism is costly as the insolvency proceedings are commenced individually in different states.

Lastly, in universalism the proceeds are shared equally within all group of similar creditors while in territorialism the recovery to creditors will depend on the state in which proceedings take place and the assets/ debt owned in that state by the debtor. Further in territorialism there can be a case where in one state debtor can be declared insolvent and in another state it is not.

There is scope to expand upon 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.

4.5

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.

Till date, there are no international insolvency instruments governing or regulating insolvencies in the Middle-East region. However in the recent years some of the Middle East states have renewed their domestic insolvency laws.

In 2018, Saudi Arabia approved new Bankruptcy Law. It is said that it was part of Vision 2030 mainly to facilitate healthy business environment to attract FDI and to boost credit growth. The Saudi Arabia's bankruptcy law includes general regulations, measures for financial restructuring, settlement procedures and preventive actions.

In 2018, Bahrain adopted the Model Law of Cross-Border Insolvency. The law aimed at maximizing value of bankruptcy estate and encourage corporate reorganisation over liquidation. *References-* <https://www.clearygartlieb.com/-/media/files/emrj-materials/issue-9-2018/bahrains-new-bankruptcy-law-pdf.pdf>

In 2016, UAE approved the Domestic Bankruptcy Law with the aim to modernise and streamline the bankruptcy procedures for UAE companies. This law applies to corporate and individual traders and not for government bodies. *References-* <https://www.lw.com/thoughtLeadership/COVID-19-Managing-Financial-Difficulties-in-the-United-Arab-Emirates#:~:text=On%2011%20June%202019%2C%20the,effective%20on%2013%20June%202019.>

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.

There are certain common principles that apply to both individual and corporate insolvency, but there are also some differences among the both. Firstly, the individual insolvency deals with the natural person while in the corporate insolvency the artificial company or corporation is involved. Further, the individuals cannot be dissolved after bankruptcy is completed however the companies in corporate insolvencies can be dissolved once its affairs have been wound-up. Secondly, in some states/ regions not all assets of the individual are considered as bankruptcy's estate, i.e. there will be exemption/exclusion of some assets. It means that some systems allow the insolvent individual to keep some assets such as essential household goods. However this is not the case in corporate insolvency. Thirdly, in case of individual insolvency, the individual is held liable for all the rights, duties and liabilities, however, in the corporate insolvency the directors or company officials can be held liable also if any directors or company officials has given the personal guarantee on the corporate debt, they can be held liable in that scenario. Lastly, the rehabilitation and discharge, individual bankrupt once discharged, will able to make a fresh start without the pre-bankruptcy debt. However, corporates cannot be rehabilitated, as once a corporate is liquidated it ends up being dissolved. In the reference guide, Sealy and Hooley has highlighted the difference between the two stating Individuals' in the Individual insolvency needs to be protected from the harassment by his creditors so that in the less blameworthy cases the debtor can make a fresh start to reduce the indebtedness by making contributions from present and future income of the estate while in corporate insolvency where possible one can preserve the business.

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.

The cross-border insolvency cases arise when the debtor has operations in various jurisdiction or the debtor's property is located in more than one jurisdiction or when a foreign creditor is involved. If in this case, debtor is unable to perform its obligations, the insolvency proceeding can be initiated in more than one state which would lead to cross border insolvency issues. The main difficulties faced in the cross-border insolvency is that different states/ regions have different laws and different approaches. There is no uniform law or a global court or a parliament to deal with cross-border insolvency. Further, there is no structure to deal with cross boarder insolvencies in both domestic and international law. It should be also noted that the technical meaning of insolvency differ from State to State i.e. balance sheet insolvency wherein liabilities exceed asset or cash flow Insolvency wherein debtor cannot repay the debt due to cashflow shortage. Also, in many countries the insolvency law is either outdated or has been recently developed. Further, different countries have various national approaches to deal with insolvency proceedings, for example some countries consider labour rights as priority over all the other claims. Treatment to creditors, avoidance laws also differ from one region to another which create difficulties when it comes to cross boarder insolvencies.

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.

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

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.

Given increasing interest in international trading and commercial activities, many regions as well as international bodies have drafted treaties, conventions and solutions to address the international insolvency issues. Further, most of the regions have taken initiatives to promote harmonisation of Domestic Insolvency laws to resolve insolvency issues. In 2004, UNCITRAL published a Legislative Guide on Insolvency law which could be used as a reference guide by many national authorities and legislative bodies, when they had to modify their existing laws or prepare new laws. In early 2000s, the World Bank also developed guidelines on the regulation of insolvency naming it as “*Effective Insolvency and Creditor / Debtor Regimes*”. These guidelines were further revised in 2005, 2011, 2015 and in April 2021. European parliament has also published the report on the Harmonisation of Insolvency law at EU level, which outlines the difference between domestic insolvency laws within EU and also identifies number of areas of insolvency law where harmonisation at EU level is worthwhile and achievable. Recently, it can be seen many states/ countries are amending their domestic laws to incorporate the international insolvency issues.

However, these domestic laws still don't cover all the international insolvency issues. Further, when it comes to international insolvency there are multiple countries involved and almost all countries have different insolvency laws e.g. Labour laws, treatment to creditors, security rights over property etc. which make it difficult to resolve the insolvency issues.

There is scope to elaborate and discuss political pressures, foreign investor pressure and loan conditions.

5

Marks awarded 14 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.

Liquidators/ administrators play an important role in the cross-border insolvency cases as they have to deal with different regions for negotiating the commercial solution which is best to the company. They also have to deal with different insolvency law as the laws differ from State to State. Further, the commercial laws also differ from jurisdiction to jurisdiction. Till now, there is no uniform law or a global court or a parliament to deal with cross-border insolvency. However, to some extent the UNCITRAL Model Law on Cross-border insolvency focus on four elements which are key for Cross-border insolvency cases i.e. access, recognition, relief and corporation and coordination.

UNCITRAL Model Law enables corporation and coordination between the concurrent proceedings. Here in this case, given Utopia has adopted UNICITRAL Model Law, the law allows direct communication between the local court in this case Erewhon and foreign court as well as with the administrator. The Erewhon liquidator should sought the court approval for coordinating the insolvency proceedings. At the end of the day, the coordination and corporation between the two administrators/ liquidators will only help the creditors of the company to maximize the value of the asset. Further, two or more proceedings on the same company involves cost and if both the proceedings are independently worked upon than this can result in conflict of interest to certain parties leading to several litigations, thus increasing the costs. If there is agreement between the two it help minimize the expenses as well as jurisdictional conflicts.

The MLCBI is significant for it provisions on recognition and relief in 4.1 and on concurrent insolvency proceedings in 4.2. Its provisions on cooperation and coordination are secondarily important as the liquidator is primarily seeking advice about staying court proceedings in Utopia.

2.5

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.

No, given the Apex has filed the insolvency proceedings in Utopia, which follows the UNCITRAL Model Law on Cross border insolvency. As said above this Law follows four elements which are key for Cross-border insolvency cases i.e. access, recognition, relief and corporation and coordination.

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

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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?

Assuming that the company is incorporated in EU and it has operations in many other jurisdiction. Below listed are the some of the issues an insolvency representative can face:

1. Different States have different law and procedures: EU has developed treaties to address international insolvencies. Further in 2010, EU Parliament published the report on Harmonisation of Insolvency Law at EU Level, which highlighted differences between domestic insolvency laws within EU. This law helps the courts, administrators as well as regulators to resolve international insolvency issues.
2. Judicial cooperation between bankruptcy courts/administrators of different jurisdictions, in case of concurrent insolvency proceedings in several jurisdictions: In Europe, to focus on this issue many guidelines came into existence, which would guide the administrator in the Cross-Border insolvencies. In 2007, Wessels & Virgos in coordination with INSOL Europe developed, the European Guidelines on Communication and Cooperation which contained the non-binding rules and draft protocol for international insolvencies. EU has also developed EU Cross-Border Insolvency Court-to-Court Communication Guidelines 2015 which one can use to strengthen effective and efficient communication between courts in EU member states in insolvency cases with cross-border effects. EIR Recast also promotes the corporation and corporation.
3. Protecting the value of asset of the insolvency estate when assets are in different jurisdiction: This issue arise when a company has assets in different countries and those countries have different laws governing the insolvency proceedings. Some states follow Universalism approach which states that only one insolvency proceeding covering all debtors assets worldwide while some states follow Territorialism approach. The administrator's aim should also be to protect the value of the assets of the estate and generate the greater value to creditors of the company as well as reduce the administration cost. To some extent these problems can be dealt with the corporation and coordination between the different jurisdiction and the report published by EU Parliament on Harmonisation of Insolvency Law at EU Level covers this topic.
4. Classification of creditors and Distribution of estate to the creditors: EU Member States itself have different classification of creditors which reduces the likelihood of the outcome for creditors. The process of the filing and verification of claims also differ between EU Member States which also increases the inefficiency of proceedings for creditors. However, European Union is also looking to develop the uniformity in the domestic insolvency laws of its member states which can solve this issue in the near future.

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 8.5 out of 15
MARKS AWARDED 39/50**

*** End of Assessment ***