



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 8 out of 10

QUESTION 2 (direct questions) [10 marks]

Question 2.1 [maximum 2 marks]

Explain what the term "international insolvency law" means.

While Wessels' definition of the term in *International Insolvency Law* (Kluwer Law International, 2006) is a useful starting point, "international insolvency law", in practice, encompasses the many rules and guidance which relate to insolvency proceedings in a given jurisdiction but to which an international element applies, forcing the Court or the insolvency practitioners (as appropriate) to take account to a varying extent of the insolvency rules of another jurisdiction.

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Question 2.2 [maximum 5 marks]

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

Under the concept of universality, a single set of insolvency proceedings should apply to any given debtor, regardless of where their assets are located in. Such proceedings would cover all of the debtor's assets and would have the benefit of treating all claims on an equal basis and, due to the more streamlined approach, lower costs. It would, however, leave the choice of forum and jurisdiction open to debate.

Conversely, under the concept of territoriality, several sets of proceedings could be started in each jurisdiction in which the debtor has assets. Each set of proceedings would only cover assets located in the relevant jurisdiction, and each jurisdiction would have its clear set of

insolvency rules. While this would avoid assets being moved abroad before a local insolvency practitioner could distribute them to local creditors, this could lead to a situation where the deemed solvency of the debtor is not identical in all jurisdictions or where certain creditors might be forced to stop pursuing their claims on account of the prohibitive costs of engaging in foreign proceedings.

There is scope to elaborate with respect to recognition and effect 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.

The Hawkamah Institute for Corporate Governance, the World Bank, the Organisation for Economic Co-operation and Development and INSOL International launched a survey of insolvency systems based on the World Bank's Principles for Effective Insolvency and Creditor Rights Systems.

The UAE passed the Federal Law by Decree No. (9) of 2016 on Bankruptcy and the Federal Decree Law No. (19) of 2019 on Insolvency, Saudi Arabia passed a new bankruptcy law in February 2018 together with accompanying regulations in September 2018, and Dubai passed a new insolvency law administered by the Dubai International Financial Centre in 2019.

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

3

Marks awarded 8.5 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.

Where individuals are concerned, the main objectives of insolvency proceedings are to protect the relevant individual and, as far as possible, to consider the individual's personal circumstances in order to enable them to "turn the page" and, once creditors have been repaid, start a new chapter. To that end, the relative blameworthiness of the individual is likely to be a factor relevant to the conduct of the insolvency proceedings and any repayment schedule will be carefully balanced against the individual's personal needs. In some jurisdictions, the debtor may even be allowed to keep certain assets out of the reach of creditors if these are considered necessary for their maintenance. As a result, it is arguable that the objectives of individual insolvency are, to a large extent, pro-debtor.

By contrast, in a corporate insolvency, rescuing the company is not necessarily the main objective. To the extent possible, attempts will be made to rescue the business of the relevant entity however this does not preclude the eventual liquidation of the debtor if no viable alternatives are available. No assets of a corporate debtor are considered exempt or excluded from distributions to creditors, and where officers of the company are found to have breached their duties personal sanctions may be imposed on these officers. As a consequence, the objectives of corporate insolvency can generally be seen as more pro-creditor.

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 lack of a universal system of insolvency rules and proceedings (as would be seen in the concept of universality discussed above) presents a number of challenges.

Certain jurisdictions derive their rules from statutes whilst other are based on common law (either in addition to, or instead of, statutes) and finding the appropriate sources can therefore be difficult where several jurisdictions are involved. Even where the source is known, it may be the case that several statutes have to be read together before the full extent of the relevant rules is understood.

The appropriate forum to use may also be different depending on the jurisdiction, with some countries having specific bankruptcy courts in which proceedings must be started whilst general courts are able to deal with insolvency proceedings in other countries. There may therefore be procedural steps to be aware of in each individual jurisdiction.

The presence (or absence) of statutory insolvency dispensation will also impact of the proceedings, as this will affect how assets of the debtor located in another jurisdiction will be dealt with. In addition to this, it is also very likely that each jurisdiction will have a number of "endemic" rules and policies which might differ from those of other jurisdictions, and these will need to be adhered to. Depending on the number of jurisdictions involved, this exercise may become challenging very quickly.

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.

A brief timeline would include the following:

- The American Law Institute NAFTA Guidelines Applicable to Court-to-Court Communications in Cross-Border Cases (2000)
- European Insolvency Regulation (2002)
- UNCITRAL Legislative Guide on Insolvency Law (2004)
- The World Bank's Principles for Effective Insolvency and Creditor/Debtor Regimes (2005, 2011, 2015, 2021)
- European Guidelines on Communication and Cooperation (2007)
- UNCITRAL Legislative Guide on Secured Transactions (2007)
- UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation (2009)
- European Parliament's report on the Harmonisation of Insolvency Law at EU Level (2010)
- UNCITRAL Legislative Guide on Secured Transactions Supplement on Security Rights in Intellectual Property (2010)
- ALI III Global Principles for Cooperation in International Insolvency Cases and Global Guidelines Applicable to Court-to-Court Communications in Cross-Border Cases (2012)
- Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on Insolvency Proceedings (Recast) UNCITRAL Model Law on Recognition and Enforcement of Insolvency-Related Judgments (2018)
- European Commission's Action Plan on Building a Capital Markets Union (2015)
- The EU JudgeCo Guidelines (2015)
- The Judicial Insolvency Network's Guidelines for Communication and Cooperation between Courts in Cross-Border Insolvency Matters (2016)

While it is clear from the above that harmonisation is a key priority where cross-jurisdiction insolvency proceedings are concerned, I think that the perfect solution is yet to be found. Of course, the steps outlined above have gone a very long way in smoothing such proceedings out and reducing the amount of potential issues. There can be no doubt that cross-jurisdiction proceedings nowadays benefit from a lot more certainty (not to mention procedural ease) than used to be the case. However, we can also see from this list that this is an area of the law which keeps developing and being refined, as judgments are handed down and additional countries join various agreements and treaties. As a result, I think we are not yet in a situation where cross-jurisdiction matters can yet be resolved simply and in a straightforward manner. Despite the definite improvements which we have seen over the course of the 21st century, I think this is perhaps not quite enough yet and we will keep seeing new developments as time passes.

There is scope to consider political pressure, foreign investor pressure and/or loan conditions.

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Marks awarded 12.5 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.

Here we would ideally need to know the date when the liquidation started and the date of the proceedings against Nadir in Utopia. However, since we do know that Utopia has adopted the UNCITRAL Model Law on Cross-border Insolvency, we can advise the liquidator that Utopia’s courts will recognise the liquidation process started in Erewhon and, more importantly, the automatic moratorium which we can assume applies in relation to further insolvency proceedings being brought against Nadir. This means that, although located in a different jurisdiction, the claim brought by the creditors of Nadir in Utopia will have to be stayed for the duration of the moratorium started pursuant to the Erewhon liquidation. In order to avail itself of this right, the liquidator will need to apply to court in Utopia but we can advise them that no issues are anticipated.

The question requires candidates to apply the relevant MLCBI articles to the facts provided in more detail than that above.

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.
- (a) This scenario would not make any difference to the above answer.

(b) We would need to determine whether Erewhon had adopted the UNCITRAL Model Law on Cross-border Insolvency. If this was the case, then the winding-up order in Erewhon would have to be stayed because Erewhon would have to recognise the moratorium started by the winding-up order in Utopia, as per the answer to 4.1 above.

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?

England

1. Some of the directors are located in other states – if the directors are found to have personal liability in relation to the duties they owed to the company, then the question of how to pursue their assets and where to start proceedings against the directors will arise.
2. There appear to be taxation/revenue authorities among the creditors in several states – English authorities are likely to be preferential creditors, however the insolvency representative will need to determine whether this is also the case for foreign authorities.
3. The company has assets in multiple jurisdictions and this may require the insolvency representative to approach courts in the relevant countries and to determine whether these jurisdictions will recognise orders made in an English court to recover the relevant assets.
4. There are creditors in other states – it may be that these creditors have already started (or will start) proceedings of their own against the company. If this is the case then whether or not these states have adopted the UNCITRAL Model Law on Cross-border Insolvency will be relevant, as if they have (any the proceedings in England started before any others), then they will be forced to recognise the English moratorium but if they have not, the validity of the English moratorium for the purposes of the foreign proceedings may need to be determined in court. Equally, if foreign proceedings started before the English insolvency proceeding, because England has adopted the UNCITRAL Model Law on Cross-border Insolvency, the insolvency representative would be forced to respect the foreign moratorium.

In all of the above possibilities, the UNCITRAL Model Law on Cross-border Insolvency is likely to apply (depending on whether, and to what extent, the foreign jurisdictions have adopted it), as well as the Insolvency Act 1986 for the purposes of the English proceedings. The Foreign Judgments (Reciprocal Enforcement) Act 1933 is also a relevant piece of legislature if the foreign jurisdictions include Australia, Canada, India or Israel. Finally, if the insolvency

proceedings in England started prior to Brexit, then the EU Regulation on Insolvency Proceedings (Recast) may apply.

For another approach that is 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.

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**Marks awarded 10 out of 15
MARKS AWARDED 39/50**

*** End of Assessment ***