



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**.

Commented [DB1]: Please read and follow the instructions – I had to do this for you.

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.

Wessels defined international insolvency law as that part of law which:

'[i]s commonly described in international literature 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 the case.'

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

1.5

Question 2.2 [maximum 5 marks]

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

Universality generally refers to an approach to international insolvency whereby the insolvency law applicable in the debtor's centre of main interest ('COMI') is effective in all other jurisdictions applicable to that insolvency.

Territoriality refers to an approach whereby the insolvency law of the state is only applicable in that state and has no cross-border reach. This can often result in numerous insolvency

proceedings being commenced in respect of the same debtor but with different insolvency laws being applicable.

More detail would have improved the mark awarded for this sub-question. There is scope to elaborate upon 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.

Both Bahrain and Dubai (International Financial Centre) have adopted the Model law on Cross-Border Insolvency, in 2018 and 2019 respectively.

A number of state in the Middle East have reformed their domestic insolvency laws:

- UAE in 2016 and 2019
- Saudi Arabia in 2018
- Dubai in 2019

[further detail would be beneficial]

In 2009 the first comparative survey of insolvency systems in North Africa and the Middle East took place. It used the World Bank's Principles for Effective Insolvency and Creditor Rights Systems (2005) as a measure of best practice.

3

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 main objective in the insolvency of individuals, in situations where there has been no wrongdoing, is to protect the individual from the ongoing pursuit of his/her creditors. The insolvency of an individual will generally allow the individual to maintain their main residence and a certain standard of living, whilst realising additional assets and using contributions from future income to create an asset pool to be distributed to the individual's creditors on a pari passu basis.

The objectives of a corporate insolvency are to maximise the realisations of the debtor in order to pay the creditors in order of priority, with secured creditors ranking first and all unsecured creditors ranking pari passu, meaning that any assets available for the unsecured creditors will be distributed equally usually representing a p in the £ on a claim.

In certain jurisdictions, including the UK, the insolvency practitioner may have a duty to first explore the rescue of the company as a going concern, which in the vast majority of cases would represent the best outcome for all creditors.

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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.

There are very few domestic legal systems that are set up to deal with cross-border insolvency law. Added to this there is a huge variation in the development of domestic insolvency law between states, in many states the insolvency law is outdated and cannot be applied to modern day international trading.

The objective of insolvency law can generally be split into two categories, with France being a notable exception, either pro-creditor or pro-debtor. In a pro-creditor system the focus and benefit of the laws tends to be aimed at the rights of the creditor in the recovery of its claim. In a pro-debtor system the focus will be on the survival of the company and/or business.

In certain instances the domestic system may look to protect the rights and interests of the local creditors and may exclude certain foreign creditors from claiming in the proceedings, arguably therefore not applying the pari passu principle universally.

The US has negated this issue within its own borders by making insolvency law a federal law rather than state law. The EU has the EIR(2015) Recast which provides for automatic recognition of domestic law of the main proceedings across member states.

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.

[Type your answer here]

Take care to answer each sub-question.

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Marks awarded 8.5 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.

Note on Relevance of the Cross-border Insolvency Act of Utopia

Utopia as a state has adopted UNCITRAL Model Law on Cross-border Insolvency (MLCBI). It has not been stated whether or not Erewhon has also adopted the MLCBI, since this is not automatically reciprocated for the purposes of this advice I will assume that Erewhon has not adopted the MLCBI.

The Cross-border Insolvency Act (CBIA) of Utopia has adopted the UNCITRAL Model Law on Cross-border Insolvency (MLCBI) as part of Utopia’s domestic laws. The MLCBI as drafted by UNCITRAL does not require reciprocity so it does not matter whether Erewhon has adopted the MLCBI or not.

The liquidator appointed in Erewhon would like to stop any action initiated in Utopia by Apex, one way in which the liquidator could look to achieve this is by obtaining a stay on proceedings against the debtor. The information provided does not indicate that there is any treaty that both states are party to and therefore, assuming there is no such treaty in existence, there will be no automatic recognition of the proceedings in Utopia and no automatic cross border moratorium.

Given the assumptions above the Erewhon appointed liquidator would need to rely on Utopia’s adoption of the MLCBI to allow it to have any effect on proceedings in Utopia. The Erewhon

liquidation is likely to be a qualifying foreign proceeding and therefore the Erewhon liquidator can look to have its liquidation recognised in Utopia.

If the Erewhon liquidator can meet the specified requirements of the Utopian court, its proceeding will be recognised in that court. Proceedings can be recognised as main proceedings or non-main proceedings. In this situation, as Nadir Pty Ltd is incorporated and has its headquarters in Utopia it is likely that its COMI would be viewed to be in Utopia. As a result the Erewhon liquidation would be recognised as non-main proceedings.

Some thought should be given to the fact that Nadir Pty Ltd only changed its place of registration and head office one month ago to Utopia from Erewhon and therefore dependent on other pertinent matters, such as the location of trading, creditors and assets – it may be possible to argue that Erewhon should in fact be main proceedings and that Nadir Pty Ltd has recently attempt a COMI shift.

Assuming that the Erewhon liquidation is recognised as either main or non-main proceedings the liquidator could then apply to the Utopian court for a stay on any actions against the debtor, a moratorium, which if successful would stay the proceedings issued by Apex.

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.

In alternative (a), if Apex had filed proceedings to wind-up Nadir but the matter had not been heard, the Utopian court would still be in a position to recognise the Erewhon liquidation and grant a moratorium, which would stay the winding up proceedings filed by Apex.

In the alternative (b), if Apex had obtained a court order to wind up Nadir prior to the Erewhon winding up order there would be concurrent proceedings. The Utopian court would still be in a position to recognise the Erewhon liquidation; however, if we assume that Erewhon had not adopted the MLCBI, it would be much more difficult for the Utopian liquidator to be recognised in Erewhon as the MLCBI is not reciprocated.

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 corporate debtor is incorporated and has its head office in England. Within this insolvency there are four key international insolvency issues to be considered.

- Foreign assets
- Foreign government claims
- Foreign employees claims
- Directors conduct

By way of background the insolvency proceedings have commenced post the UK's exit from the European Union and therefore the European Insolvency Regulations (2015) Recast do not apply in this insolvency.

UNCITRAL MLCBI has been adopted by the United Kingdom; however, this tends to have more impact on foreign insolvencies looking to be recognised in the UK. The use of the MLCBI will be dependent on the states where company has operated and whether they have adopted it.

- Foreign Assets

The English insolvency practitioner needs to consider the state in which the asset(s) are located and consider the following:

- Have any proceedings been commenced in that state?
- Has the state adopted the MLCBI?
- What are the likely costs of recognition?

To deal with any asset in a foreign state the insolvency practitioner will need to consider whether it is possible for the English proceedings to be recognised in that state. Prior to its exit from the EU, the UK benefitted from automatic recognition in the EU member states. However, now unless the state has adopted MLCBI, which would provide a more straightforward route and less costs for recognition, the English insolvency practitioner would need to consider the local laws on recognition of each applicable state.

The cost and timeframe to recognition in the relevant states may result in concurrent proceedings being opened and/or the value of the assets diminishing.

- Foreign government claims

English public policy prevents the direct or indirect enforcement of foreign penal or revenue claims (*Government of India v Taylor*).

The English insolvency practitioner will need to consider any foreign government claims and whether they are inadmissible in the proceedings or whether any

international treaties are in place with the relevant states which circumvents the law in *Government of India v Taylor*.

- Foreign employees claims

Different states provide for different levels of protection for its employees. As this company has operated in several states it is likely to have employed workers under the states' domestic laws.

The ranking of employees' claims and any subrogated claims of a national protection fund can sit in differing positions in an insolvency waterfall depending on the law governing that insolvency.

The English insolvency practitioner will need to consider how foreign employees' claims will rank in the English proceedings – will they be given the same priority as domestic employees?

- Directors conduct

The directors of the company are directors of an English company and therefore their duties are determined by the Companies Act 2006.

The English insolvency practitioner can investigate the conduct of the directors of the company under CA06 and IA86 and bring claims under the same. If those claims are being brought against foreign directors thought will need to be given to an application to serve out of the jurisdiction and also the service requirements of the state in which they are resident.

6
Marks awarded 10 out of 15
MARKS AWARDED 33.5/50

*** End of Assessment ***