



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.

A body of rules that cannot be fully enforced without first giving consideration to the international aspects of a given case.

More detail would have improved the mark awarded for this sub-question.

1

Question 2.2 [maximum 5 marks]

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

Universality is the position that a cross borders insolvency should be managed under the laws of a single jurisdiction and a moratorium put in place to stop any proceedings or enforcement taking place in a separate jurisdiction. It is based on the principle that all of the assets of an insolvent entity are managed in one jurisdiction despite location and that all creditors would be subject to the local laws of this proceeding despite their location on pari-passu basis depending on their ranking in the hierarchy of claims i.e. unsecured rank together floating charge rank together etc..

Territoriality is the opposite position. Territoriality requires that insolvent entities operating in multiple jurisdictions have their proceedings commenced in each of these jurisdictions, with each jurisdiction managing the business, assets and affairs located in that jurisdiction only and creditors proving for claims within the jurisdiction that they belong and that in any other jurisdictions proceeding.

Both have merit, but are complete opposites in their approach, with most people favouring universality as it simplifies what can be a complex process if multiple proceedings are commenced.

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.

4

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.

MENA conducted a survey of its current insolvency systems initiative to introduce best practices in line with the World banks principles for Effective Insolvency and Creditor Rights Systems (2005).

Certain states have also begun to enact reforms in their local legislation such as the UAE, Saudi Arabia and Dubai during the 2010's. **Further detail is required.**

Bahrain and Dubai have also adapted the Model Law on Cross Border Insolvency in 2018 and 2019 respectively.

More detail would have improved the mark awarded for this sub-question.

2.5

Marks awarded 7.5 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.

Insolvency processes in respect of individuals are designed to protect the debtor from ongoing demands for payment for creditors as well as to provide a fresh start going forward whereby the debts are compromised and left with the bankrupt estate and do not carry forward with the individual. There are also attempts to reduce the indebtedness through contributions where possible by the debtor into the bankrupt estate but without being a severe burden to the bankrupt which would potentially exacerbate their ongoing financial situation.

Insolvency processes for corporations are designed with preservation, and in some jurisdictions rescue, as a first objective. Additionally, in an insolvency all assets are available for realisation to the estate for the benefit of the body of creditors. In personal insolvency this is not the case with certain assets being beyond the reach of the estate per legislation.

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.

Insolvency law is often complimented by other laws that manage in further detail issues that may arise in an insolvency proceeding, for example employment law where one country manages the termination of employees in an insolvency proceeding differently to that of another.

Other matters that may have differences in how they are dealt between jurisdictions could be retention of title matters and how debts are managed whereby set off rights may allow creditors to net off monies they owe to the debtor against their claim.

Security against companies may also differ between jurisdictions for example floating charges in the UK compared with the USA.

Additionally, there can be variations in terminology and definitions which may cause confusion between jurisdictions.

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.

There have been steps taken to introduce harmonisation of domestic insolvency laws. Those that have taken the form of hard laws have seen little success, however, those introduced as soft laws have seen far more success. In particular the Model Laws on Cross Border Insolvency set out by UNCITRAL have now been adopted by numerous jurisdictions.

Whilst these are having a positive impact on the management of insolvency proceedings across jurisdictions there still remains complexity when managing an insolvency proceedings not least because there are so many multilateral agreements that are already in place in various jurisdictions, adding an additional layer of difficulty as to which jurisdictions have which agreements implemented and when are these applicable.

For example the South Americas has 4 treaties that differ between which states have agreed to these, it also has states that have adopted UNCITRAL. In certain circumstances this could increase confusion as to which implemented set of laws takes precedence in each case.

For example an insolvency process with COMI in the country A, where main proceedings take place, and has secondary proceedings in country B and C. Country A shares treaties and the Model Laws with Country B but only shares the Model Laws with Country C would the treaty or the model law take precedence in dealing with proceedings.

While adoption of the MLCBI may harmonise various domestic insolvency laws in so far as they address international insolvency issues, the question addresses more broadly the harmonisation of domestic insolvency laws in general. See the 'model' answer on this sub-question.

2

Marks awarded 10.5 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 be able to use the cross-border insolvency act of Utopia to affect a recognition of the Erewhon proceeding in the Utopia jurisdiction. This would allow the Erewhon Liquidator to benefit from a moratorium against proceedings in Utopia from any creditors.

The recognition would also allow for the Erewhon Liquidator to manage the business, affairs and assets of the Company in Utopia without the requirement for a separate proceeding, this would benefit the estate creditors in Erewhon as any realisations in Utopia would be for the benefit of creditors in both jurisdictions and not just Utopia which now likely has the bulk of valuable realisable assets following the move of the head office.

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) As the matter had not yet been heard, a moratorium had not yet been affected by a winding up order, therefore, Nadir would still be exposed to the proceedings in Erewhon. No change.
 - b) As Apex obtained an order first it would be the main proceeding country. It may try to apply for recognition of the appointment in Erewhon if assets are located there, though this would be a more complex process as Erewhon has not signed up to a cross border insolvency model laws (this information was not included or excluded around Erewhon being signed up to cross border insolvency model laws so assumed they haven't).

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

1

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 headquartered and registered in the UK working in the oil and gas market with operations, assets and creditors in the US, Middle East and Scandanavia.

Several issues face the insolvency practitioner in gaining access to assets in these states as well as managing the claims arising from them.

Employees - Contract Governing law

The Company's main operations are the providing of Deepwater floating rigs for oil drilling. The Company's rigs fly under the flags of the Panama which usually governs the employment conditions of the crew. the employees have all been provided with employment contracts that are governed under UK law. The insolvency practitioner would like to manage the termination of the employees under Panama law based on the vessels flag as this would be favourable in terms of pay outs to be made/subrogated claims to be received in respect of employee entitlements to outstanding pay/holiday and redundancy and notice claims. The practitioner may need to seek the courts direction as to which law shall govern the management of these employees. The Model Laws would allow for the UK courts direction to be observed in Panama as both have adopted the legislation.

Creditors and managing claims

The UK legislation for the managing of claims allows for HMRC to be preferential in respect of taxes of for VAT and employee payroll deductibles. Given the significant arears of other jurisdictions Revenue services, they would like their similarly defined taxes to rank pari-passu with HMRC. The practitioner may need to seek court direction as to whether they should also rank in preference to unsecured creditors also. This would cause significantly reduced estate monies available for a distribution to non-preferential unsecured creditors so is a matter that would require proper direction. Any claims received could be made in foreign currency as UK insolvency laws already provide for a determination on exchange rate being at the bank of England rate as at the date of proceedings commencing.

Asset realisations in the US

The insolvency practitioner has identified a claim for fraud against one if its directors domiciled in the US in Texas. The Practitioner believes that the director has sufficient assets available to make a claim against him worthwhile.

The US allows for a chapter 15 recognition of the main proceedings of the UK in the US courts, this will ease the process of the UK practitioner bringing a claim in the courts. Unfortunately, the main asset identified by the UK practitioner is the directors property which in Texas is considered large enough to be a homestead and is therefore protected by Texas state law form being captured by any award the court gives to the practitioner for the benefit of the estate, It would also be protected in any bankruptcy proceeding based on the court award. The practitioner will therefore need to look at other assets that the director may have available to them. If insufficient assets are available this potential asset would need to be disregarded as it is commercially not viable. The US has adopted the model laws, as well as the chapter 15 recognition would aide the Insolvency practitioner in managing the above process.

Asset realisations in Scandinavia

The insolvency practitioner has asset available to it in Sweden and in Finland. The insolvency proceeding commenced prior to Brexit, the proceedings are therefore still subject to EU regulations on main proceedings allowing the UK practitioner to manage the property and realise it to the benefit of the estate without issue as all jurisdictions have adopted these regulations.

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.

5
Marks awarded 9.5 out of 15
MARKS AWARDED 34.5/50

*** End of Assessment ***