



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.

International insolvency law is a set of regulations relating to insolvency cases or procedures that cannot be applied exclusively without considering international factors at any point in time. International insolvency is a scenario where the insolvency of a corporate entity or individual extends beyond the scope governed by the local regulations jurisdiction as it does not provide for foreign factors and the local law cannot be applied exclusively as a result.

2

Question 2.2 [maximum 5 marks]

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

Universality is the notion that there should one all-inclusive worldwide insolvency proceeding that considers all of the assets and liabilities of the insolvent estate. If such an all-inclusive insolvency proceeding is started, it should not be possible for any other action to be taken against the estate's assets. The jurisdiction where this all-inclusive worldwide insolvency proceeding should be started is at the centre of main interest of the estate. The administrator of the estate should have the authority to control and realize all assets of the estate worldwide and any and all such assets that are rightfully owned by the estate should be part of the estate for distributions. The claims of creditors globally should be treated on a pari-passu basis without preference to any particular country or state. Having only 1 proceeding and 1

administrator of the estate will result in cost savings and likely improved returns to creditors with such cost savings.

Territoriality is the concept that insolvency actions may be initiated at each local jurisdiction where the estate holds assets, but such actions are limited to the local jurisdiction and assets in that state. There could be multiple concurrent insolvency proceedings against the same entity in different jurisdiction. Creditors will be restricted to filing claims to the different administrators of the local estate where their contractual claims / entitlements are governed. This is to ensure the interest of the local creditors are protected before any assets are transferred to foreign jurisdictions. Local creditors may not have the ability to commence foreign insolvency actions against entities and may as a result not receive payments for sums owed to them. Territorialism may result in the estates being insolvent in one jurisdiction but solvent in another where assets of the estate is located and may cause administrative problems coordinating across jurisdictions.

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.

1. The introduction of the regional comparative survey of insolvency systems in the Middle East and North Africa (MENA) region in 2009 that is derived from World Bank's Principles for Effective Insolvency and Creditor Rights Systems (2005).
2. Bahrain and the Dubai International Financial Centre adopted the Model Law on Cross-Border Insolvency in 2018 and 2019 respectively.
3. Revisions to domestic insolvency laws in the last few years by Middle East states, including UAE, Saudi Arabia and Dubai from 2016 onwards. **Further detail is required.**

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

2

Marks awarded 9 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 objective of individual insolvency includes:

1. Protecting the individual from actions of their creditors;
2. Allowing the individual to start afresh after discharge;
3. Reducing claims against the estate by way of regular contributions from current and future income to the estate while making due consideration of personal circumstances.

The objective of corporation insolvency includes:

1. Preservation of business in parts or as a whole where possible;
2. To pursue directors or office holders for breach of fiduciary duties or any harm done to the corporation.

For both individual and corporations insolvency, the common objectives are to ensure equal and fair distribution, subject to priorities and security as governed by local jurisdictions and to find out the reasons for insolvency; making clawback provisions, voiding dispositions where assets have been improperly dealt with, sold or otherwise.

For individual insolvency, there are certain assets that are exempted from being included in the bankrupt estate for maintenance purposes. Corporate entities are dissolved subsequent to the winding up process completion while individuals are given a chance to start anew.

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.

There is not unified insolvency system or international court that deals with insolvency law in a cross-border context. Each system defines insolvency in their own way. As a general rule of thumb, insolvency is a scenario where the total liabilities of the estate is more than that of the total assets owned by the estate and not likely repayable in a certain period of time. However, the actual requirement in relation to the period of time and amount owed in excess of assets differs from state to state and makes it difficult to determine insolvency at a global level.

Cross-border insolvency cases deal with insolvency that requires different states to govern the various claims from creditors across the globe that are subject to different rules and regulations.

In addition to the differing laws of various states, there are also differences in priorities and security for each state for different creditors. If the estate is subject to claims in various jurisdictions, there will be conflicting laws in various jurisdiction which may be further complicated by the differing treatment of security / asset charges, right of set-off and other rules that allows certain creditors priorities over other creditors.

Insolvency actions can be initiated in many countries with different laws applied in each jurisdiction with little or no extraterritorial effects granted to foreign proceedings / foreign representatives. This poses a problem that one would face in a cross-border insolvency when trying to obtain cooperation and coordination from various jurisdictions.

To reduce the issues encountered in dealing with insolvency law in a cross-border context, there should be an aim to harmonize or standardization of insolvency law across jurisdictions.

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

4

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.

1. The Legislative Guide on Insolvency Law published by UNCITRAL in 2014 with the objective to be used as a reference by countries and regulators when reviewing or drafting new laws.
2. In the beginning of the 21st century, the World Bank also created the Principles for Effective Insolvency and Creditor / Debtor Regimes. These principles are integral in

scenarios where the International Monetary Fund (IMF) and the World Bank are providing loan to developing nations and may mandate a bankruptcy reform as a prerequisite.

3. The UNCITRAL Legislative Guide and the World Bank Principles form the principal guidelines for insolvency globally.

Having a standardized guideline for insolvency globally is a first step towards harmonisation. However, the impact is limited to the extent of the adoption rates. If the standards are not adopted uniformly and not to a large scale, there is likely impact on addressing international insolvency issues. With more countries adopting similar insolvency standards, it reduces the significance of an insolvency outside a local jurisdiction and the need for regulators or courts to work together on addressing international insolvency issues. This reduces costs of administration and allows for more efficient cross-border enforcements, which maximizes returns to creditors. Given the increasing globalized world, it is imperative for there to be a global standard dealing with insolvency and ensuring a fair and just administration of the affairs of the insolvent estate.

There is scope to elaborate further perhaps by considering political pressure, or foreign investor pressure.

4.5

Marks awarded 13.5 out of 15

QUESTION 4 (fact-based application-type question) [15 marks in total]

Nadir Pty Ltd (“Nadir”) is a company registered in Utopia. Originally it was incorporated in the neighbouring country of Erewhon before moving its registration and head office to Utopia one month ago. Apex Pty Ltd (“Apex”) is incorporated and has its head office in Erewhon. Apex and Nadir enter into a contract by exchange of emails between their head offices for Apex to supply goods to Nadir in Utopia. Nadir has failed to pay for the goods which have been delivered in accordance with the contract. Apex issues court proceedings against Nadir in Utopia for monies owing for the goods sold and delivered.

Meanwhile, Nadir also owes monies to creditors in Erewhon. One Erewhon creditor obtains a court winding-up order against Nadir in Erewhon and a liquidator is also appointed by that court.

If you require additional information to answer the questions that follow, briefly state what information it is you require and why it is relevant.

Question 4.1 [maximum 5 marks]

Assume the UNCITRAL Model Law on Cross-border Insolvency has been adopted by Utopia without modification, except as required to domesticate it. For example, the Cross-border Insolvency Act of Utopia names its local laws relating to insolvency and its competent court under the Act. The Erewhon liquidator’s investigations detect that Apex is suing Nadir in Utopia. The liquidator would like to stop Apex court action against Nadir in Utopia. Advise the Erewhon liquidator on the potential relevance of the Cross-border Insolvency Act of Utopia.

The adoption of UNCITRAL Model Law on Cross-border Insolvency by Utopia in its Cross-border Insolvency Act (“CIA”) of Utopia allows for foreign representatives, such as the Erewhon liquidator (“EL”), to apply to the Utopian Courts for recognition of the foreign proceeding in which EL has been appointed.

From the time of filing an application for recognition until the application to recognize EL in Utopia, EL may request the court to grant relief to protect the property of Nadir such as

requesting a stay of execution against Nadir's property in Utopia, subject to the local laws of Utopia.

Upon recognition of the foreign proceeding, the foreign representative EL may, provided the requirements of law of Utopia are met, intervene in any proceedings in which the debtor is a party. Given the recognition of EL in Utopia would mean effectively that Nadir is placed under liquidation in Utopia, subject to the provisions of Utopia's insolvency laws, it is likely all actions against Nadir in Utopia, would be stayed by virtue of the recognition of EL.

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.

The Utopia courts will need to consider if it is more expedient to appoint a local liquidator in Utopia to administer the affairs of Nadir or recognize the foreign representative (liquidator appointed in Erewhon).

(b) Apex had obtained a court order to wind-up Nadir in Utopia prior to the Erewhon winding-up order.

If a liquidator was already appointed in Utopia then all actions against Nadir in Utopia would be stayed and there is no need for the Erewhon liquidator to intervene.

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

.5

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?

Company is incorporated in Singapore.

1. Liquidators have a duty to take control all assets owned by the company. The ability of liquidators to do so for assets overseas is dependent on whether they as a foreign representative are recognized in a foreign state where the assets are at.

Liquidators may rely on the UNCITRAL Model Law on Cross-border insolvency to apply to a foreign court (assuming UNCITRAL Model Law on Cross-border insolvency is adopted) for recognition and accordingly the authority to realize the assets of the company in the foreign jurisdiction.

2. Pursuing directors in various states for potential breach of duties.
A director (foreign or domestic) of an insolvent company can be held liable for the company's debts in scenarios such as a breach of directors' duties such as fiduciary duties; wrongful trading and fraudulent trading.

The duties of the directors and relevant potential claims against directors are as set out in the Insolvency, Restructuring and Dissolution Act of Singapore (Act 40 of 2018).

3. There is already another insolvency representative appointed in another jurisdiction where assets are located.

The UNCITRAL Practice Guide provides guidelines that may be relied upon by the liquidator. In a scenario where there are different insolvency representatives in different states with similar responsibilities, an insolvency agreement may be drafted to guide the officeholders with a view to reduce costs and maximize returns.

4. There is another concurrent foreign proceeding against the company in another jurisdiction.

The Third Schedule of the Insolvency, Restructuring and Dissolution Act of Singapore (Act 40 of 2018) adopts the UNCITRAL Model Law on Cross-border Insolvency and provides for instances where foreign proceedings can be recognized in Singapore. One of the main philosophies of the UNCITRAL Model Law is cooperation and coordination. Courts and officeholders in various jurisdictions are required to communicate and cooperate to the best of their ability to ensure the estate is administered fairly and efficiently with a view to maximising benefits to creditors.

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.

5.5

**Marks awarded 9.5 out of 15
MARKS AWARDED 39/50**

*** End of Assessment ***