



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**.

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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.

International Insolvency Law actually is an abstract term, there is no universal or uniform international law as such. International Insolvency law can be defined as a set of "hard laws" (treaties and conventions entered into between countries bilaterally and unilaterally) and "soft laws" (model code for cross border insolvencies, guide to regulations and enforcements during cross border insolvencies) that can be referred to by local courts of the country where insolvency proceedings of a corporation having assets/creditors/contracts/interests in various countries is under way (there could be multiple insolvency proceedings underway against the corporation).

Therefore the "International Insolvency laws" actually are a set of laws within the larger domain of Private International laws which try to harmonize the domestic laws wherein insolvency proceeding is undergoing in many countries, encourage coordination and cooperation among the local courts of various countries, sets up the framework for recognition of foreign insolvency representatives and orders of foreign courts, regulates choice of law and forum in case of cross border insolvencies.

2

Question 2.2 [maximum 5 marks]

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

Ideally the Concept of Universality means that when a corporate having assets in multiple countries goes insolvent then the Main (or primary) and Only Insolvency Proceeding is initiated in the "Main" country where the corporation has major assets located. (concept of COMI – country of major interest). No other secondary insolvency proceedings is initiated in any other country. Herein the creditors of all the countries and assets located in all the countries are dealt by the insolvency laws of the "main country". This kind of a system is actually a utopia and practically it is not possible to implement the concept of universality because (a) There will always be an apprehension of step brotherly treatment of the creditors foreign to the "main country" and apprehension of partiality towards creditors of "main" country always remain (b) Harmonization of domestic laws and system of law of all the countries with that of the main country is a big problem

Concept of Territoriality on the other hand (is diametrically opposite to the concept of Universalism) means that when a corporate having assets in multiple country goes insolvent then insolvency proceedings can be initiated in all the countries in which the assets of the company were located. Thus there will be multiple insolvency proceedings on the corporate in separate jurisdictions. The assets and creditors in each geography shall be handled as per the insolvency law and system of that geography. This system is (a) not cost effective, it is time consuming and the (b) outcome of the insolvency resolution is totally dependent on the cooperation and coordination among the local courts of each country (c) there can arise a situation that for a default of the corporation in just one country insolvency can be triggered.

Modified Universalism and Cooperative Territorialism are more acceptable versions of the concepts of Universalism and Territorialism

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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.

Middle East countries had a weak set of domestic insolvency laws, however the same is being improved. Dubai improved its domestic laws in 2019, UAE in 2016 & 2019, Saudi Arabia in 2017. Besides that there has been formation of a committee to implement the UNCITRAL MLCBI. **Further detail is needed.**

DIFC (Dubai International Finance Centre) has one of the best insolvency laws in Middle east. Kuwait is improving its insolvency laws, to almost bring them on par with chapter 11 bankruptcy laws of USA. Recent restructuring of Dubai World, Dry Docks World, GIH (Global Investment House) are 3 examples which reflects a screaming need to improve the domestic insolvency laws or address the international insolvency issues

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.

Corporation is a "legal person", it is an artificial person not a natural person and nor is it a living person. Therefore there is bound to be a huge difference in the objectives of insolvency resolution for individuals and corporations.

The prime objective of Insolvency of Corporate person is to (a) Rescue/Resolution of the Corporate for the benefit of Society and Financial System (b) In case the rescue/resolution is not possible then the same be liquidated/wind-up. The winding up is dissolution "death" of the corporate. In the entire insolvency process of a corporate the underlying ethics is value maximization for the stakeholders and salvaging the enterprises in order to save jobs, contracts and productive capital. Needless to mention that the entire assets of the corporate is considered part of the Insolvency Asset.

The Objective of Insolvency of an Individual is basically "Discharge". The idea is to save the individual from never ending harassment from its creditors and to provide him a way out via "Fresh Start". Since the Individual is not an artificial person like a corporate but a living human being, there is no way that the individual can be "dissolved" and "discharge" is the only outcome and objective. The entire assets of the individual are not made part of the insolvency estate as some of the assets necessary for survival of the individual are left out. The Individual is allowed to settle his liabilities arising out of debts and personal guarantees from his present assets and future income.

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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.

All Insolvency systems are not the same and there is bound to be difference in them, which may create difficulties in situation of a cross border insolvency. The primary difference arise due to Policy, Approach and Procedure of the insolvency systems and the rules pertaining to initiation of insolvency proceedings.

There could be policy matters like retrenchment of labours or upholding the supremacy of statutory dues which may be different in different insolvency systems. The treatment of directors for their actions before Insolvency initiation can be another sticky policy matter. These policy matters can create lot of delays and confusion in culmination of a cross border insolvency.

The difference in approach of insolvency , ie whether it is a Creditor in Control approach or a Debtor in Control approach is a major difficulty that is encountered in cross border insolvency cases

The process of handling insolvency is different in different systems. Issues of Moratoriums, Rescue mechanism, Liquidation process, voting & decision making by the creditors are issues which too cause lot of delay in culmination of cross border insolvency process.

The provisions of various insolvency systems about the eligibility and entitlement of the creditors to trigger an insolvency is also a major difference in various insolvency system

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.

The most important multilateral step taken in 21st Century is the drafting and issue of UNCITRAL Model Law on Cross Border Insolvency (MLCBI). These are guidelines to be included by signatory countries in their domestic insolvency law pertaining to cross border insolvency.

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.

The MLCBI guidelines are complemented by the UNCITRAL Legislative Guide on Insolvency Laws. These laws can be taken as reference by the countries while drafting their own insolvency laws. The Guide is divided into 4 parts, and addresses issues of group insolvency, the conduct and obligations of directors and also contains framework to effectively address the cross border insolvency.

Then there is the guidelines issued by the World Bank, known as "Effective Insolvency and Creditor/Debtor Regimes". These guidelines have been revised many times between 2005 – 2021 and many a times world bank and IMF insist upon these guidelines to be incorporated by the countries in their insolvency laws at time of being given financial assistance by world bank/IMF.

The European Union too has taken steps to promote harmonization of domestic insolvency laws. EIR (Recast) of 2015 is an effort in that direction.

These multilateral steps will go a long way in harmonization of the domestic insolvency laws and will surely have a great impact on the present state of international insolvency law issues. The fact that there is a growing realization in countries that not only the age of globalization and multinational business entities is an entrenched phenomenon of 20th century but the pace and geographical extent of finance and commerce increased tremendously by online medium, the creation of huge digital assets and exchange of services across the digital platforms and online media has ensured that going forward there are bound to be issues of international insolvency in almost all reasonable size of corporate insolvency proceedings, will surely motivate the countries to incorporate laws for cross border insolvency in its domestic laws. For fulfilling this objective there is no better source of law but the guidelines drafted under these multilateral steps.

We can safely say that these multilateral drafts and guidelines are the best practise in the insolvency domain as of date and certainly the most effective mechanism till date.

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

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.

I would advise the Erewhon liquidator to file a representation (directly or through the courts in Erewhon) to courts in Utopia (presenting the winding up order of Erewhon courts) invoking the principal of COMI (Centre of Main interest) in Cross Border Insolvency (as Nadir has registration and head-office at Erewhon) to :-

- a) Informing the Courts at Utopia about initiation of winding up at Erewhon and to recognise the same
- b) Plea the courts at Utopia to recognise the Erewhon Liquidator as liquidator of Nadir as a whole
- c) Seek moratorium on all insolvency/recovery actions being contemplated by Nadir Creditors and allow the Erewhon liquidator to issue public notice to seek claims from creditors and simultaneously take control of all the assets of Nadir at Utopia

However, before any advice can be given to Erewhon Liquidator, I would need the following information :-

- (i) What is the Policy and the Approach of the Utopia Domestic Insolvency laws. Is Utopia Insolvency law on the basis of "creditor in control" or "Debtor in control"?
- (ii) What is the waterfall mechanism for distribution of liquidation proceeds under the Utopian insolvency laws.
- (iii) Whether the Utopian Insolvency laws have a objective to protect certain stakeholders (labours etc, or Statutory Dues)

The above is important to ascertain if the insolvency systems is the same in both countries or not, as a dis-similar system will make the efforts to harmonize both systems a non-starter

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) There will be no change in my advise In case the Apex had filed proceedings against Nadir but matter has not been heard
 - b) My advise will change in case Apex has obtained a winding up order before Erewhon , as in that case there is a possibility that the Insolvency proceedings against Nadir at Utopia would be deemed to be primary insolvency proceedings and the one initiated at Erewhon would become secondary.

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?

Let us select INDIA as the country for company's incorporation. The Insolvency & Bankruptcy code -2016 (IBC) is the domestic insolvency law of India. The International Insolvency issue that the Insolvency Representative will face are:-

- 1) The first problem facing the insolvency representative would be get "Recognised" as insolvency representative in the foreign jurisdiction. The NCLT in India would have to request the courts in relevant jurisdiction to accept the insolvency initiation order and to recognise the insolvency representative. Section 234 & 235 of the IBC-2016 are enabling provisions wherein Government of India can enter into an agreement with any country to get enforced the IBC and also the adjudicating authorities in India can request the courts in foreign courts (with which GOI has signed the agreement) to recognise the insolvency proceedings and the insolvency professional and to assist in taking control of the assets of the company in that jurisdiction.

The International Instrument which can be used are (a) UNCITRAL Model Law on Cross Border Insolvency (MLCBI) and UNICTRAL Model Law on Recognition and Enforcement of Insolvency Related Judgements and Guide to Enactment.

- 2) Possible difference of approach of the Insolvency Laws- Creditor in Control Approach of Indian Insolvency Law- Indian Insolvency law are based on Creditor in control approach, there may be jurisdictions wherein the company is having assets and wherein the Debtor in Control Approach is applied. This may result in the Insolvency Representative not being able to take control of the assets of the company in that jurisdiction. Section 17 and 18 of the Insolvency & Bankruptcy Code-2016 (IBC) gives powers to the Insolvency Representative to take control of the corporate debtor. The international instruments to be used herein could be UNCITRAL MLCBI and
- 3) Problem of Cooperation & Coordination- The assets of the company in other countries could be exclusively mortgaged to financial creditors of those countries and the assets may not be Non-Performing in that jurisdiction , therefore the financial creditors will (a) not participate in the insolvency proceeding initiated in India (b) will not hand over the possession of the assets to the insolvency representative. Therefore the courts of foreign jurisdictions will have to cooperate and coordinate with the courts in India. Herein the international instrument which can be used is UNCITRAL Model Law on Secured Transaction (2016), JIN Guidelines
- 4) Problems regarding the waterfall mechanism of the creditors and the discharge of directors (after it is ascertained that there has been no criminality / deliberate financial malafide acts on their part before the initiation of Insolvency Proceedings. In IBC section 52 and 53 of the code deals with the waterfall mechanism , wherein section 43,45,49,50,66 of the code deals with the avoidance of preferential, undervalued, extortionate, fraudulent transactions entered into by the directors before commencement of the insolvency proceedings. Herein Private International law can be invoked.

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.

6
Marks awarded 10 out of 15
MARKS AWARDED 40/50

*** End of Assessment ***