



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 9 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 may be defined broadly by a set of rules that apply to cross-border insolvency situations or proceedings but may not be applied successfully without considering the international aspects of each case.

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

1.5

Question 2.2 [maximum 5 marks]

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

The concepts of universality and territoriality are two approaches that addresses problems that may be faced in cross-border insolvency situations but are completely opposite to one another. Universality refers to the coordination of only one insolvency proceeding encompassing the debtor's assets and debts worldwide. In an ideal situation, the jurisdiction of only one State would be applicable and the chosen State could be where the centre of the debtor's main interest is located.

On the other hand, territoriality refers to dealing with the debtor's asset and debts in every State the debtor may have assets resulting in multiple insolvency proceedings happening concurrently. It is important to note that the proceedings and assets are

territorially limited and restricted to within the State. In this manner, the interest of local creditors take precedence before any surplus assets are sent abroad to be dealt with.

There is scope to elaborate with respect to recognition and effect in that for example, with universalism, recognition and effect requires that other States recognise that one set insolvency proceedings (that all agreed is the appropriate jurisdiction) and recognise it as having extraterritorial effect in their States.

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.

Over the last 5 years, the United Arab Emirates (UAE) and the Kingdom of South Arabia (KSA) have introduced a framework for formal insolvency processes that involve debtor-led processes to compromise claims with creditors, post-insolvency rehabilitation processes and liquidation. **Further details are needed.**

In 2018, KSA approved a bankruptcy law aimed to facilitate a healthy business environment for foreign and domestic investments which addresses general regulations, preventative actions, measures for financial restructuring and settlement procedures, amongst others.

In 2019, a new Dubai International Financial Centre (DIFC) Insolvency Law was announced which introduced a new debtor in possession bankruptcy regime. The law also enhances rules governing winding-up procedures and adopts the UNCITRAL Model Law on cross-border insolvency proceedings.

2.5

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.

While the main goal of any insolvency proceeding is to dispose of a debtor's assets to satisfy its debts, the objectives of insolvency for individuals and corporations have important differences as one is a natural person and the other a corporate entity.

For individual insolvency, there is the notion of exempt/excluded assets such as a house or motor vehicles to allow the individual to maintain themselves, which does not apply to insolvent corporations. The formal process of insolvency also protects insolvent individuals from harassment by their creditors. In cases of insolvent corporations, they are dissolved after its affairs are wound up which does not apply to insolvent individuals as individuals cannot be "dissolved". Instead, an insolvent individual can be discharged from their debt and allowed to continue without the pre-bankruptcy debt burden which will enable the individual to make a fresh start.

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.

Taking into consideration that companies are becoming more multinational and carrying out business in many foreign States, it is not impossible to envision that multiple insolvency proceedings could be taken against a debtor when that debtor becomes insolvent in States they are operating in. However, the lack of a single set of insolvency law leads to multiple proceedings in different States competing with each other. If these proceedings are incompatible in nature, this may become costly for the debtor to deal with ultimately leading to losses for the creditors.

Multiple proceedings also raise the question of how a cross-border insolvency should be approached. Factors such as priority, set-off, executory contracts, avoidable dispositions etc. are important to consider in any insolvency case. However, these approaches can vastly differ between States which again makes it difficult for an insolvency representative to administer his duties in a cross-border insolvency case.

This answer displays a satisfactory understanding of the issues. To improve your responses, ensure they are commensurate with the mark allocation – while Q 3.2 asks for a brief note, it is for 5 marks.

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.

One of the major issues concerning cross-border insolvency is the lack of a single set of insolvency law that governs these cases. The differences in approaches and policies makes it difficult for an insolvency representative to carry out his duties when considering the international aspect of any cross-border insolvency case.

In this regard, there have been many efforts to harmonise domestic insolvency law in order to provide convenience and predictability when tackling cross-border insolvency. In the early 2000s, the World Bank issued the "Principles for Effective Insolvency and Creditor/Debtor Regimes" while UNCITRAL introduced the "Legislative Guide on Insolvency Law" in 2004. Read together, these two guides form international best practice for insolvency regimes. In the European Union, a report was published on the "Harmonisation of Insolvency Law at EU Level" by the European Parliament identifying key areas where convergence of insolvency law would be beneficial to member States.

I believe the harmonisation of insolvency law across States can have a major impact in addressing insolvency issues as the predictability of harmonised domestic insolvency laws allow for the administration of insolvency cases to be dealt with ease. Harmonised domestic insolvency law will also allow for smoother cooperation between courts of different jurisdictions. However, a major issue concerning harmonisation is the implementation of a global insolvency law. States may find that a single set of insolvency law does not adequately take into account local political and cultural factors.

Regardless, the harmonisation of domestic insolvency law is a step in the right direction and beneficial in addressing international insolvency issues.

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

4.5

Marks awarded 13 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.

As the Cross-Border Insolvency Act has been adopted by Utopia, the Act mandates co-operation and direct communication between the local courts in Utopia and foreign courts. The Act also provides for assistance sought in the local State by any foreign court or foreign representative in connection with a foreign proceeding.

As the Erewhon liquidator would like to stop Apex’s court action against Nadir in Utopia, he will have to rely on the provisions of the Cross-Border Insolvency Act to do so. Under the Act, the liquidator is entitled to apply directly to the local courts in Utopia for recognition of the foreign proceeding in Erewhon wherein the liquidator has been appointed.

If the liquidator finds that Apex is acting urgently against Nadir in Utopia, he may request as a relief under the Act the staying of any execution against Nadir’s assets in Utopia pending the decision to recognize the foreign proceeding. Once the foreign proceeding has been recognised, one of the effects is that commencement or continuation of any action or proceeding against Nadir’s assets, rights, obligation or liabilities is stayed.

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 scenario (a), my answer would not be different. In scenario (b), my answer would be different as I would consider concurrent proceedings instead of recognition of foreign proceedings.

Elaboration and reference to article 29 would be beneficial.

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?

Chosen country for company's incorporation – Singapore

If a company incorporated in Singapore and operating in other States undergoes insolvency proceedings in its country of incorporation, one of the issues facing the insolvency representative is the recognition of the insolvency proceeding outside of Singapore. Without recognition, the insolvency representative may face issues in administering his duties in other States. Under common law, the Courts generally recognise insolvency proceedings of a foreign company in the State (although this does not necessarily mean the insolvency representative be allowed to enforce the judgement). The insolvency representative may also rely on UNCITRAL's Model Law on Cross-Border Insolvency ("Model Law") to apply for recognition of the judgement in other States that have adopted the Model Law.

As the company has operated business in a number of States outside its incorporation State, the issue of multiple of insolvency proceedings against the same debtor may arise. Considering that a State's enforcement of its jurisdiction ends with its national borders, the co-operation and communication between local and foreign courts play an important role in the recognition and enforcement of the insolvency proceeding. Apart from the Model Law, the insolvency representative may also rely on the "Guidelines for Communication and Cooperation between Courts in Cross-Border Insolvency Matters" ("JIN Guidelines") issued by the Judicial Insolvency Network that was adopted by Singapore in 2017. The JIN Guidelines address key aspects for communication and cooperation amongst courts, insolvency representatives and other parties involved in cross-border insolvency proceedings.

In cases where a debtor is insolvent outside the State of incorporation, foreign creditors may decide to take action against the company's assets in foreign States. The Singaporean insolvency representative will naturally want to protect the company's assets in order to maximize the value of the assets. In this case, he may wish to rely on the reliefs provided in the Model Law whereby the commencement or continuation of actions or proceedings against the debtor's assets is stayed upon recognition of the insolvency proceeding.

In the natural course of administering his duties, the insolvency representative may find that those involved in the affairs of the debtor reluctant to give up information or documents to him. An example of this, in *Re Gulf Pacific Shipping Limited (in creditors' voluntary liquidation)* [2016] SGHC 287, the liquidators had requested for bank statements of the company but the bank had requested the liquidators obtain a court order giving sanction to their appointment and request. In such cases, the insolvency representative may rely on the provisions of the Model Law where one of the reliefs granted upon recognition of a foreign proceeding is the "Providing for the examination of witnesses, the taking of evidence or the delivery of information concerning the debtor's assets, affairs, rights, obligations or liabilities."

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 39.5/50

*** End of Assessment ***