



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 8 out of 10

QUESTION 2 (direct questions) [10 marks]

Question 2.1 [maximum 2 marks]

Explain what the term "international insolvency law" means.

This term does not have a precise definition since there is not a single set of rules that apply on a global basis. Different States have different rules with most developed legal systems having a bankruptcy/insolvency system based on either common or civil law. Certain States adopt 'pro-creditor' stand points while others favour a 'pro-debtor' approach. In reality, "international insolvency law" concerns the co-operation, recognition and enforcement of insolvency proceedings between States with the aid of international treaties and conventions.

2

Question 2.2 [maximum 5 marks]

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

Universality is the concept of one set of insolvency proceedings governing the debtor and its assets, no matter where in the world those assets are located. One forum is chosen such as the State where the debtor has its main interests. The law of the State where the insolvency proceeding was commenced applies and has extraterritorial effect.

The concept of territoriality envisages multiple sets of insolvency proceedings in each State where the debtor has assets with the insolvency law of each State governing matters limited to the territory of that State's borders. Obviously, in contrast with universality, no extraterritorial

effect arises. Creditors pursue the debtor within the State concerned rather than having to engage in a foreign insolvency proceeding.

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.

In recent years the UAE (in 2016) reformed its laws in relation to companies providing for different ways to avoid bankruptcy cases and the liquidation of debtors' assets, including consensual out-of-court financial restructuring, composition procedures and financial restructuring. This was developed further in 2019 by federal decree in which a debtor can engage in a financial plan to deal with its debts.

Saudi Arabia in 2018 developed a bankruptcy law with the aim of allowing insolvent companies to unwind with greater ease and further, to assist in attracting foreign direct investment. The legislation allows for preventive measures, restructuring and settlement procedures.

Dubai in 2019 introduced a new debtor in possession bankruptcy regime. The law also incorporated the UNCITRAL Model Law on cross border insolvency proceedings with certain modifications.

3

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.

For individuals, the key objective is the rehabilitation of the debtor by providing them with a fresh start. In order to get to that point, the individual will usually enter an insolvency process wherein his/her indebtedness will be written down and arrangements made to discharge his/her creditors from the assets of the debtor's estate. The debtor's current and future earnings can be used to aid in the discharge of his/her creditors. With regard to corporations, the objective is normally to preserve the business and the employment associated with that business, but not necessarily the corporation. Another objective for the insolvency of corporations is the efficient use of economic resources – it is more efficient for a corporation to be wound up and dissolved rather than continue in existence, using up scarce capital which could be more economically deployed elsewhere in the economy.

This answer displays a satisfactory understanding of the issues. To improve your responses, ensure they are commensurate with the mark allocation – while Q 3.1 asks for a brief note, it is for 5 marks.

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.

Recognition and effect of insolvency proceedings opened in one State by the courts of another may be a difficulty. In addition, the recognition of the order commencing the insolvency proceeding and the recognition of the insolvency representative appointed on foot thereof can be a difficulty. Certain States may have adopted international conventions and treaties regarding the recognition of cross border insolvencies while others may not.

The insolvency laws of some States are more pro-creditor while others are more pro-debtor which may lead to a difference in how the same creditor would be treated in one jurisdiction as opposed to another. For example, in French law employees are afforded certain priorities.

Local law, as opposed to insolvency law, will also play a part. For example, the concept of a floating charge as security and providing preferential status to certain secured creditors is a peculiarity of both English and Irish law which are both common law systems. The concept of a floating charge does not exist in civil law systems.

Perhaps these difficulties are relatively easy to overcome with local legal advice in each of the jurisdictions concerned.

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.

Without question the European Insolvency Regulation (original and recast) has been the most successful in dealing with cross border difficulties when it comes to harmonisation of insolvency law across the EU member states. While the UK has left, the principle of recognition and co-operation imbedded with the EIR remains and the UK courts generally are open to assisting in cross border matters.

Equally, the UNCITRAL Model Law on Cross Border Insolvencies has shaped how States have developed and reformed their insolvency procedures. While not adopted by all States, its impact has been significant in the sphere of direct communication between local and foreign courts. This will aid recognition and enforcement. Coupled with the Model Law is the Practice Guide on Cross Border Insolvency Cooperation which together provide a framework for dealing with cross border issues.

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.

Similarly, the American Law Institute and the International Insolvency Institute adopted guidelines applicable to NAFTA countries on direct court to court communication again as an aid in dealing with issues as they arise in cross border cases.

There is scope to elaborate upon on how much impact these are likely to have in addressing international insolvency issues.

3

Marks awarded 11.5 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.

I would like to know what if any assets of Nadir are in Utopia in order to assess and determine whether concurrent proceedings would be advisable.

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 bring an application directly to the courts of Utopia for recognition of the Erewhon insolvency proceedings as foreign main proceedings and his/her appointment as insolvency representative as a foreign representative. By obtaining such recognition, the liquidator can obtain a stay on the Utopia debt collection proceedings and secure Nadir's Utopia assets for the benefit of all creditors (Article 21). The liquidator may wish to consider launching concurrent insolvency proceedings in Utopia pursuant to the presumption of insolvency based on the recognition of the foreign main proceeding (Article 31). Such concurrent proceedings will also assist in securing the assets.

4

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) No. The form of the proceedings, be they winding up or debt collection, does not matter.
 - (b) Yes. The Utopia insolvency proceedings would deal with any assets in Utopia.

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

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Question 4.3 [maximum 8 marks]

NB: This question is not related to Questions 4.1 and 4.2

A court has ordered the commencement of an insolvency proceeding against a corporate debtor in the State of its incorporation and head office. The company has operated business in a number of States and has assets (real property or interest in land, other tangible assets and intangible assets); creditors (including taxation / revenue authorities) and directors in several States.

Select a country for the company's incorporation and, based on the insolvency laws of the country you select and the brief facts provided, describe four key international insolvency issues facing the insolvency representative in this scenario. For each issue, what domestic laws or international instruments apply to assist the insolvency representative address these four issues?

The company is incorporated in Ireland.

Securing and protecting assets for the benefit of all creditors.

Recognition of the liquidator and in turn the main proceedings in other States. Whether concurrent proceedings are required. Whether the liquidator may call in aid international treaties and protocols.

Conflict of law issues.

Priorities of creditors and ranking in each State and co-ordinating claims procedures.

As Ireland is an EU member state, the EIR (recast) regulation applies and assists in such States that are also members of the EU and subject to the regulation. Article 7.1 states that generally the law applicable to insolvency proceedings is the state of the opening of the proceedings, in this case Ireland, which deals with conflict of law issues.

UNCITRAL Model Law on Cross Border Insolvencies assists when seeking to secure assets in other States and stay any proceedings taken by creditors in those States.

As a result of its historic ties with the UK, Ireland is entitled to avail of section 426 of the UK Insolvency Act 1986 which provides that the UK courts may give assistance to the courts of certain designated countries.

Provide detail on the relevant CBI laws to the issues you identify (for this 8 mark question).

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 38/50**

*** End of Assessment ***