



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.

International insolvency law means the body of rules which govern a situation where an insolvency occurs that concerns multiple jurisdictions. This is supported by Fletcher, who considers that "'international insolvency'... should be considered as a situation... in which insolvency occurs in circumstances which in some way transcend the confines of a single legal system, so that a single set of domestic insolvency law provisions cannot be immediately and exclusively applied without regard to the issues raised by the foreign element of the case".

In many cases, that includes rules concerning the way domestic laws interact.

2

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 fundamentally opposed. Universality is the concept that cross-border insolvencies ought to be dealt with in one universal proceeding worldwide, where all assets of the debtor and their creditor base (wherever situated in the world) should be pooled and dealt with in a single collective pool. Conversely, territoriality favours placing limits on a debtor's asset and creditor base to those within the confines of the relevant jurisdiction. Therefore, territoriality can lend

itself to a vast number of separate sets of insolvency proceedings in different states, as opposed to one universal insolvency proceedings.

Territoriality is focused on local interests and local creditors. Proponents of territorialism recognise the difficulties that can apply on that approach (for example, the increased costs of multiple insolvency proceedings). However, they believe that these can be overcome by cooperation between office holders and their supervisory court as opposed to automatic cross-border recognition, which would be favoured by proponents of universality.

There are various sub-categories of universality and territoriality which are not as diametrically opposed and sit in between the two concepts, for example modified universalism which is the concept that has been most broadly adopted across the world.

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.

1. The UAE, Saudi Arabia and Dubai have each reformed their domestic insolvency legislation in 2016, 2017 and 2018 respectively; **Further detail is required.**
2. Bahrain and the Dubai International Financial Centre (DIFC) adopted the UNCITRAL Model Law on Cross-Border Insolvency in 2018 and 2019 respectively; and
3. A regional comparative review of the insolvency systems in the Middle East and North Africa was launched in 2009 as a joint initiative by a number of development and advisory bodies with the purpose of measuring those systems against the World Bank's Principles for Effective Insolvency and Creditor Rights Systems (2005) to indicate best practise.

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.

There are several overarching objectives which relate to both corporate and personal insolvencies. These stem from the historical roots of insolvency law, which established long-maintained principles that: insolvency should be a collective remedy with pari passu distributions among classes of creditors; assets of the debtor should come under the control of a third party; the affairs of the debtor should be investigated and transactions entered into to deprive or prefer certain creditors be unwound; and secured creditors' rights be dealt with fairly. These principles form the underlying objectives which apply to both insolvent debtors that are both corporates and individuals.

However, there are additional and different policy considerations applicable to personal and corporate insolvencies which give rise to differing objectives. In 2017, Sealy and Hooley summarised these additional objectives differences noting that:

1. In individual insolvencies, objectives include (i) protecting the debtor from harassment from his creditors and to allow him to make a fresh start; and (ii) reducing the indebtedness of the debtor to his creditors from present and future income in their bankruptcy estate, while at the same time ensuring personal circumstances are taken into account; whereas
2. In corporate insolvency, objectives include (i) rescuing the business (therefore hopefully maintaining greater value in the business by allowing it to be sold as a going concern and saving jobs) and (ii) calling in personal liabilities that have been given to guarantee a corporate debtors indebtedness.

There is scope to elaborate, for example with respect to exempt assets.

4

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.

Major difficulties may be encountered with differing cross-border insolvency regimes when a debtors assets and creditors span systems which fundamentally differ as to whether they are pro-creditor oriented or pro-debtor orientated. That in turn will impact the international instruments the state is likely to have adopted. Specific difficulties may arise if:

1. Insolvency proceedings are being conducted in a pro-debtor state which allows for automatic stays on claims being brought against the debtor, but there is no protection on action being taken in another state thereby risking their foreign assets being depleted and potentially allowing one creditor to be put in a better position than the other;
2. Where states do not have mirroring requirements for entering an insolvency process, or if appointed insolvency office holders are afforded different powers under the two regimes, it may be difficult for an office holder appointed one jurisdiction to obtain recognition or assistance from the courts in the other jurisdiction thereby restricting their ability to take possession of and realise assets within that jurisdiction; and
3. Office holder's objectives being appointed in different jurisdictions who are acting under differing duties and with differing objectives. In such cases there may be difficulties in ascertaining which assets of the debtor fall under which office holders' control and who any realisations are due to.

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 multilateral steps taken in the 21st century to promote harmonisation of domestic laws include:

1. The drafting of the EC Convention on Bankruptcy and Related Matters in 1970, which would have required contracting states to enact a 'Uniform Law' into domestic law thereby provided consistency in dealing with issues such as fraud against creditors and set off. While the potential impact was massive for members states, it was not adopted and therefore no impact felt.
2. The creation and publication of the UNCITRAL Model Law on Cross-Border Insolvency (MLCBI), which is designed to facilitate co-operation and co-ordination of insolvency proceedings across jurisdictions. The Model Law provides a clear framework for Member States to adopt into their domestic legislation. If adopted consistently, it would significantly assist in creating a uniform worldwide to allow creditors, debtors, and office holders to know have relative certainty as to how cross-border assets and debts will be dealt with on insolvency. However, the MLCBI is not compulsory, and states have been able to pick and choose which elements of it they wish to adopt to reflect whether they wish to be seen as pro-creditor or pro-debtor. That certainty is therefore not a given, which, in my opinion significantly limits the effectiveness of the MLCBI.

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.

3. Similarly, the 2004 publication of the Legislative Guide on Insolvency Law and the World Bank's Principles for Effective Insolvency and Creditor/ Debtor Regimes provides useful guidance and a watermark of what many will see as the appropriate standard and aims for cross-border insolvency, but its lack of direct effect limits its effectiveness.

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

3.5

Marks awarded 11 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.

This answer assumes that there are no multilateral arrangements in place which affect the insolvency regimes of both Erewhon and Utopia.

To prevent Apex pursuing the court action against Nadir in Utopia, the Erewhon liquidator is likely to require the cooperation, assistance and/or recognition of the Utopia courts by means of an order staying the Apex court action. This is because his appointment under a Erewhon court order will not (subject to any automatic reciprocity agreement between the states) be recognised by the Utopia Court.

The relevance of Cross-border Insolvency Act of Utopia (the **CBIA**) is that, as it adopted the UNCITRAL Model Law in full, it will contain provisions that facilitate the co-operation and co-ordination of concurrent proceedings between those states. These include provisions which will allow the Erewhon liquidator to apply to the Utopia court for orders to assist in carrying out his functions – for example, applying for a stay on the Apex court action.

However, the CBIA will not provide for automatic reciprocity. This means that, while the CBIA will provide the Utopia Court with the discretion to assist the Erewhon liquidator, it is not bound to do so. The considerations that the Utopia Court may take into consideration when determining whether to exercise its discretion is the extent to which the insolvency regime in Utopia is broadly consistent with the regime in Erewhon (for example, in relation to the collective pooling of Nadir's assets and the treatment of creditors).

The court will also have regard to the nature of Nadir's business and specifically, how its creditor base and assets are spread between Erewhon and Utopia. It appears that Utopia is in fact Nadir's principal country of operation (i.e. its centre of main interests) and therefore the court may consider it inappropriate to exercise its discretion to assist an Erewhon liquidator if Nadir appears to be demonstrably solvent in Utopia. Again, this goes to the Utopian court's discretion.

If both Utopia and Erewhon insolvency regimes provide for automatic stays on proceedings against companies in liquidation and their legislation is based on a nomination of the principle of universalism (which does not segregate a company's assets or creditor base based solely on territorial limits), it is more likely the Utopia Court would exercise its discretion and assist the Erewhon liquidator by granting a stay.

The MLCBI is significant for its provisions on recognition and relief in 4.1 and on concurrent insolvency proceedings in 4.2. Its provisions on cooperation and coordination are secondarily important as the liquidator is primarily seeking advice about staying court proceedings in Utopia.

2.5

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. Yes. As Nadir's principal trading and where its assets are held is Utopia, in exercising its discretion the Utopia court may consider that liquidation proceedings ought to be opened in that jurisdiction.
- b. Yes. The implementation of the Model Law and its advisory texts means the Utopia court is likely to encourage the two liquidators enter into a Protocol or Cross-border Insolvency Agreement.

Apply the MLCBI provisions on concurrent insolvency proceedings (see Article 29)

.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?

The company's country of incorporation and the location of its head office is England. England enacted the UNCITRAL Model Law on Cross Border Insolvency (the *Model Law*) with amendments, as set out in the Cross-Border Insolvency Regulations 2006.

Four key international insolvency issues facing the appointed office holder will be:

1. Problem: Not having standing to call individuals located outside of England and Wales in for examination).

Assistance: The office holder may be able to seek recognition from the competent court of any other jurisdiction which has implemented Article 4 of the Model Law.

2. Problem: An inability to take possession of tangible assets located outside of England and Wales.

Assistance: The office holder may rely on his authority under Article 5 of the Model Law to act outside of the jurisdiction. In countries that have also implemented the Model Law, that may be sufficient to allow them to take possession of the relevant actions without recourse to the local court.

3. Preventing creditor action against the company outside of the jurisdiction.

Assistance: The office holder may rely on his standing to make an application to a foreign court under Article 11 of the Model Law, in countries that have adopted it, to seek a stay of specific proceedings.

4. Problem: An additional office holder being appointed in respect of the company in a different jurisdiction, whose objectives are also to realise the company's assets.

Assistance: Articles 25 and 26 of Model Law provide for the approval or implementation by courts of agreements concerning the coordination of proceedings. These court sanctions agreement can govern the way office holders from separate jurisdictions interact, what roles and responsibilities they have and how assets in the insolvency process should be dealt with. These have been considered by the English Court in the cases of Maxwell Communications Corporation Plc [1991] and Nortel Networks.

7
Marks awarded 10 out of 15
MARKS AWARDED 38/50

*** End of Assessment ***