



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.

It should be noted that there are multiple sets of insolvency laws and rules in force across the world, and not a single set takes global precedent. To this end, Wessels describes international insolvency law as the area of the law that "is commonly described in international literature as a body of rules concerning certain insolvency proceedings or measures, which cannot be fully enforced, because the applicable law cannot be executed immediately and exclusively without consideration being given to the international aspect of a given case."

International organisations (such as UNCITRAL and the World Bank ("the WB")) – alongside courts, legislatures, and scholars – continue to attempt to develop solutions and statutory dispensations as regards how insolvency issues are dealt with on a transnational level, in an effort to combat some of the regular issues faced. It is worth pointing out that "soft law" options have proved to be more successful than the use of "hard law" solutions.

2

Question 2.2 [maximum 5 marks]

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

The concept of universality in cross-border insolvency suggests that there should be a single insolvency proceeding in which all of a debtor's worldwide assets and liabilities would be covered (under the provisions of a single law, e.g. in the jurisdiction of the debtor's centre of

main interest), whereas territoriality is an approach based on insolvency proceedings being commenced in every jurisdiction in which a debtor holds assets.

The universality approach would result in the law of the “main proceedings” taking precedent and having a worldwide effect, thus allowing said law to regulate the insolvency. Some consider the universalism approach to be better suited to cross-border matters (than that of the territorialism approach) as it gives all creditors the opportunity to participate in the proceedings, with all of their respective claims being dealt with equally, under a single set of laws. In addition, the costs associated with the universalism approach are arguably lower to the estate.

Given that territoriality is an approach based on insolvency proceedings being commenced in every jurisdiction in which a debtor holds assets, multiple insolvency laws can be at play, which in turn can cause significant differences in both the approach and legislation. In addition, it is argued that this approach is more costly.

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.

5

Question 2.3 [maximum 3 marks]

Describe **three** recent examples of developments in the Middle East region to reform domestic insolvency laws or to address international insolvency Issues.

As regards international insolvency law, the Model Law on Cross-Border Insolvency was adopted by Bahrain and the Dubai International Financial Centre in 2018 and 2019, respectively.

In addition, the domestic insolvency laws of the United Arab Emirates (“UAE”) were reformed in both 2016 and 2019, as were those of Saudi Arabia and Dubai, in 2018 and 2019, respectively. **Elaboration would be beneficial.**

Finally, in 2009, a joint initiative was launched by the Hawkamah Institute for Corporate Governance, INSOL International, the Organisation for Economic Co-operation and Development (OCED), and the WB, in which a comparative survey of insolvency systems in the Middle East and North Africa region was undertaken. This was based on the WB’s Principles for Effective Insolvency and Creditor Rights Systems (2005) as an indicator of best practice. Whilst there are no international insolvency instruments to regulate insolvencies across borders in the Middle East; Bahrain, Kuwait, Oman, Qatar, Saudi Arabia, and the UAE have worked alongside the WB for circa forty years.

3

Marks awarded 10 out of 10

QUESTION 3 (essay-type questions) [15 marks in total]**Question 3.1 [maximum 5 marks]**

Write a brief note on the differences regarding the objectives of insolvency for individuals and corporations.

The objectives of insolvency for corporations and individuals, as noted by Sealy and Hooley in M A Clarke et al, Commercial Law (Oxford University Press, 2017), chapter 28, are as follows:

Corporations

There are two types of corporate insolvency proceedings – those that are “terminal”, and those that aim to “rescue” a business. In terms of corporations, insolvency proceedings can be used as a way to: preserve a business or viable elements of the same (e.g. an Administration under UK legislation, whereby the appointed Administrator pursues the first objective of Administration under Paragraph 3 of Schedule B1 to the Insolvency Act 1986, of “rescuing the company as a going concern”) and to pursue any persons responsible for a company entering into antecedent/voidable transactions/dispositions, by imposing personal liability on the perpetrators/individuals involved (i.e. piercing the corporate veil in owner managed entities).

Individuals

In terms of individuals, insolvency proceedings are used as a way; of protecting a debtor from harassment by its creditors; to enable a debtor to “draw a line in the sand” and make a fresh start; to reduce a debtor’s indebtedness by way of making (financial) contributions to the insolvent estate from income (both present and future), whilst simultaneously considering said debtor’s personal circumstances.

Objectives in both corporate and personal insolvencies

Additional objectives that apply in both corporate and personal insolvencies relate to: investigating the reasons for failure, reclaiming antecedent/voidable transactions/dispositions in situations where a debtor has dealt with assets in an improper manner, ensuring that secured creditors are dealt with as appropriate, and ensuring that distributions are dealt with on a pari passu basis (save for creditors who hold security).

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.

First and foremost, a global insolvency law system does not exist, nor does a global court in which cross-border insolvencies could be dealt with or handled. As a result, there are huge differences in both the approach and insolvency legislation of various jurisdictions in cross-border situations.

In 2.2, I explained that the concept of universality in cross-border insolvency suggests that there should be a single insolvency proceeding in which all of a debtor’s worldwide assets and liabilities would be covered under the provisions of a single law. One of the difficulties encountered in dealing with an insolvency law in a cross-border context relates to establishing

the above-mentioned single state in which insolvency proceedings would exclusively be opened. As a result, those who don't agree with the concept of universalism state that it can be open to manipulation and create uncertainty in the domestic markets.

Given that territoriality is an approach based on insolvency proceedings being commenced in every jurisdiction in which a debtor holds assets, multiple insolvency laws can be at play. This approach results in difficulties being encountered when attempting to reconcile the various approaches to insolvency in differing jurisdictions – especially if the jurisdictions in question are materially opposed insofar as the interests the proceedings provide for, i.e. if one jurisdiction has a pro-creditor system, whereas the other is built on a pro-debtor system.

In addition to the above, conflict-of-law issues can arise in cross-border insolvencies, and the jurisdictions involved may have differing views on; creditor actions(/moratoriums), discharges, and priorities and preferences, amongst other things.

Furthermore, issues may be encountered as a result of there no being co-ordinated claims procedures.

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.

Whilst the Organisation pour L'Harmonisation en Afrique du Droit des Affaires ("OHADA") was established in Sub-Saharan Africa in the 20th century, taking effect in 1995, in 2015, all 17 OHADA member states (Benin, Burkina Faso, Cameroon, Central African Republic, Chad, Comoros, Congo, Democratic Republic of Congo, Equatorial Guinea, Gabon, Guinea, Guinea-Bissau, Ivory Coast, Mali, Niger, Senegal, and Togo) adopted the UNCITRAL Model Law on Cross-Border Insolvency, following the Council of Ministers passing the Uniform Act on Insolvency.

In addition to the above, developments have been made in the Middle East. As touched upon in 2.3, the Model Law on Cross-Border Insolvency was adopted by Bahrain and the Dubai International Financial Centre in 2018 and 2019, respectively, and the domestic insolvency laws of the UAE were reformed in both 2016 and 2019, as were those of Saudi Arabia and Dubai, in 2018 and 2019. Such developments evidence the Middle East's attempts to promote the harmonisation of domestic insolvency laws.

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.

More recently, in April 2021, the WB's Principles for Effective Insolvency and Creditor/Debtor Regimes ("the Principles") were revised. It is considered that the Principles, together with the UNCITRAL Legislative Guide form the international best practice standard for insolvency regimes.

Many of the problems faced in cross-border insolvencies are as a direct result of the fundamental differences between the laws of the differing jurisdictions and subsequently, the

distinctions in their respective legal systems. To this end, whilst I appreciate it is unlikely that we will ever be in a position whereby a global insolvency law system exists or there is a global court in which cross-border insolvencies could be handled, I believe that harmonisation of domestic insolvency laws should continue to be pursued. I hope that harmonisation will enable us to gain further clarity on pertinent issues such as in which jurisdictions proceedings ought to be opened. I also hope that harmonisation will go some way to reduce conflict-of-law issues surrounding; creditor actions(/moratoriums), discharges, and priorities and preferences etc.

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

4

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.

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.

Dear Liquidator

I note that Utopia has adopted the UNCITRAL Model Law on Cross-Border Insolvency (“MLCBI”). One of the key principles of the MLCBI is co-operation and co-ordination, meaning Utopia’s court is obliged to communicate and co-operate with you, as the appointed Liquidator/insolvency representative, in an effort to ensure that Nadir’s estate is dealt with in an efficient and fair manner, in order to maximise benefits to its creditors.

It would be useful to know if the MLCBI has been adopted by Nadir.

The MLCBI is significant for its provisions on recognition and relief in 4.1. Its provisions on cooperation and coordination are secondarily important as the liquidator is primarily seeking advice about staying court proceedings in Utopia. Please refer to the model answer.

1.5

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) No, it would not have made any difference.
 - (b) Yes, it would have made a difference.

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

.5

Question 4.3 [maximum 8 marks]

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

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

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

If the company had been incorporated in the United Kingdom, the following key international issues would face the insolvency representative:

Creditors in several States and the risk of concurrent insolvency proceedings. The UK has adopted the UNCITRAL Model Law on Cross-Border Insolvency ("MLCBI"). As noted above, one of the key principles of the MLCBI is co-operation and co-ordination, in an effort to ensure that Nadir's estate is dealt with in an efficient and fair manner, in order to maximise benefits to its creditors.

In the event that concurrent insolvency proceedings occur, the UK insolvency representative may not have title to the company's assets held in other States, or may have to instruct legal representatives in the States in question in an effort to determine the best course of recovery action. It is unlikely that recovery actions/protocols will be the same in the UK as they are in the other jurisdictions and the UK insolvency representative would need to ensure that it abides by the laws and rules of the relevant State when taking such action.

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.

3

**Marks awarded 5 out of 15
MARKS AWARDED 34.5/50**

*** End of Assessment ***