



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.

Mark awarded 7 out of 10

QUESTION 2 (direct questions) [10 marks]

Question 2.1 [maximum 2 marks]

Explain what the term "international insolvency law" means.

Insolvency procedures where the debtor being that corporate or human persons have assets or liabilities in more than one country or state. There is no single insolvency legislation or law which spans globally collectively.

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

1

Question 2.2 [maximum 5 marks]

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

Universality is the concept in which one insolvency proceeding would be administered, and this would span the territories in which the assets and liabilities as well as trade of the business/person took place but would be dealt with under the provision of one law. The appointment of qualified person(s), being that an insolvency practitioner(s) or similar as qualified (as is relevant to the proceeding) would hold office. The law of the "main proceeding" would have a worldwide effect. **It would be beneficial to elaborate upon recognition and effect.**

Territoriality is the concept where independent insolvency proceedings are brought within the jurisdiction where the particular asset, liability or central trade occurred or was held. In this way several proceedings would be in place for one debtor. The basis of which is to protect the

'national interest' and assets within that region would be realised (in general terms) having priority to the creditor of same.

4.5

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.

UAE

- Federal Law by Decree No (9) of 2016 on Bankruptcy

Sets out different way a debtor may avoid bankruptcy, also deals with how to assets will be liquidated. Including out of court restructuring.

Law also sets out the role of "committee of Financial Restructuring" which, among other things deals with a centralised register, overseeing out of court procedures and also appointing office holders (Trustees).

- Federal Decree Law No (19) of 2019 on Insolvency

This insolvency law regime has central aspects of insolvency law in relation to comparable jurisdictions taking influence from English Insolvency Law.

Bahrain - adopted the Model Law on cross boarder insolvency in 2018

Dubai – International Financial Centre adopted the Model Law on cross boarder insolvency (UNCITRAL) in 2019

3

Marks awarded 8.5 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.

Individuals:

- Protection from harassment from creditors
- Enable a 'fresh start'
- Taking into consideration the personal circumstances when looking at contributions from future income into the estate

Corporations:

- Continuation / preservation of the business as a going concern
- To realise the highest possible return for the benefit of the creditors
- In certain cases where powers have been abused to hold these person(s) liable and recover for the benefit of the estate

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.

3

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.

Cross-boarder insolvencies will present the following differences in local legislation which may cause difficulties when dealing with such a case:

- Employment law – differing systems will have differing provisions in relation to employment contracts, pay, ranking of claims (preference) and state provide support
- Property Law – for example the right to ownership of property, and the laws surrounding possession procedures will affect how assets are recovered and the rights to sale an insolvency practitioner may have
- Retention of records – differing states will have regulations in relation to hold long companies or banks an require to hold records. This ay cause issues for an insolvency practitioner when investigating the activity of the business and potential recovery
- Ranking of creditor claims – differing states will have opposing regulations on debentures, charges, and preferential claims. In terms of the ‘waterfall’ of payments this will different state to state and will cause issues when trying to provide for a distribution when the company or individual has creditor and assets across many states.
- **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.

Meaning of domestic insolvency laws – The insolvency laws and legislation which are unique to each jurisdiction, these laws have been developed and amended to incorporate issues arising in relation to international insolvencies as trade has continued to grow across borders.

Three main key international insolvency issues are as follows:

- Choice of forum to exercise jurisdiction in the matter
- Recognition and effect accorded foreign proceedings in the same matter
- Choice of law to apply

World bank produced guidelines on the regulations of insolvency namely Principles of Effective Insolvency and Creditor and Debtor Regimes

Principle C15 states that the countries legal system should establish clear rules on jurisdiction, recognition of foreign judgments, cooperation among courts and choice of law.

Whilst in principles these guidelines deal with the three main issues as above the issue will still arise in some cases that the domestic law between the jurisdictions may differ.

For example, in relation to recognition of foreign judgments this may aid in matters where recognition is sought in order to realise a specific asset based in one jurisdiction where it is

clear the main interest lies in a separate jurisdiction, the streamlining of this process has been seen to reduce time and therefore costs in a liquidation procedure.

In terms of which jurisdiction the procedure should fall under, it may be clearly defined in the domestic law, however this will still give rise to conflicts when the two domestic legislations differ on their interpretation of where the procedure should take place. This is particularly an issue in countries where the basis of the laws are different, and where the legal systems may not be as developed. It also remains that there is no central court to hear such cases and rule should these conflict.

The European Parliament published a report on harmonisation of Insolvency Law at Eu level in 2010. This report was useful in highlighting the differences in the domestic laws of the jurisdictions falling under the EU providing a guide for those countries when looking to revise their domestic insolvency laws. This included issues such as a possible common test for insolvency and aspect pertaining to lodging of claims. When looking at a company or group insolvency that spans many jurisdictions the issue has historically arisen that if each jurisdiction was to be dealt with separately (territoriality) then it may be difficult to prove insolvency as the company may technically be solvent in some jurisdictions whereby the company had assets but no liabilities, and vice versa. This development in the legislations will aid in solving this problem and the process of an insolvency across jurisdictions when fall under this guidelines will be more effective.

UNICTRAL – Modern Law on Cross Boarder Insolvency

The four principles on which this legislation was built are:

- The 'access' principle – circumstances in which a foreign representative has rights of access to the court
- The 'recognition' principle – receiving court may make an order recognizing the foreign proceeding
- The 'relief' principle – pertains for interim relief (moratorium) to protect assets
- The 'cooperation and coordination principle' – places obligations on both courts and insolvency representatives in different states to communicate and cooperate to the maximum extent possible

Whilst the legislation did not seek to address domestic insolvency law, these principles do speak to the three main issues faced as referenced above are supported with legislation when they come into question. **Yes, 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.**

Any matters such as this will naturally take time to work towards a uniformed approach, having central recognised guidelines will assist in that process and also provide for case law references as the systems develop. This is however dependant on the acceptance of each jurisdiction and there interpretation of this in their domestic laws.

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

**3.5
Marks awarded 10 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.

Initial Consideration:

The UNCITRAL Model Law on Cross-border Insolvency in its principle is to facilitate cooperation and co-ordination of concurrent proceedings, it is recommended that this is considered in that it may not be best practice to simply try and stop the court action, but instead look to utilise this legislation to co-ordinated efforts between the two jurisdictions in order to achieve the best outcome for the liquidation estate – namely the winding up of Nadir.

That being said, the change in registered office being one month before the commencement of such action, would give rise to the centre of main interest to be challenged, which would recognise the main proceedings to take place would be under the jurisdiction of Erewhon, and that secondary proceedings may be necessary for Utopia, or an agreement between both jurisdictions as to how the assets and liabilities and therefore estate is managed.

Included in paragraph 126 of the UNCITRAL Model Law on Cross-Border Insolvency: The Judicial Perspective is the following:

(d) Movement of centre of main interests

126. A debtor's centre of main interests may move prior to commencement of insolvency proceedings, in some instances in close proximity to commencement and even between the time of the application for commencement and the actual commencement of those proceedings.

It may also be considered to utilise the relief available under the UNCITRAL Model Law on Cross-Border Insolvency in order to effect a stay on the court proceedings recently proposed by Apex and protect the assets which lie within the Utopia jurisdiction. There are three types of relief available under the UNCITRAL model, it must be noted that recognition will need to be sought of the foreign proceeding before such a stay may be placed.

Owing to the above factor in relation to the centre of main interest, this would further support the court in recognising the foreign insolvency proceedings and placing a stay for the Utopia Jurisdiction.

Having a stay placed would not necessarily prevent a future proceeding by Apex, but it will allow for a moratorium/ protecting of the estate whilst the matter of which law/jurisdiction the insolvency proceedings will be governed by can be determined.

The question requires candidates to apply the relevant MLCBI articles to the facts provided in more detail than that above. 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.

3.5

Question 4.2 [maximum 2 marks]

Would it make any difference to your answer in question 4.1 in the following two alternative scenarios to Apex suing for its debt?

- (a) Apex had filed proceedings to wind-up Nadir, but the matter had not yet been heard.
- (b) Apex had obtained a court order to wind-up Nadir in Utopia prior to the Erewhon winding-up order.
 - (a) The approach to the matter would not be different, however the liquidator should be advised of any transactions which may later be challenged as void disposition if the proceedings in Nadir were deemed to be the primary proceeding.
 - (b) Yes. The liquidator in the Erewhon jurisdiction would need to take a separate route in order to obtain control of the proceedings, it would still be recommended to challenge the appointing in Utopia based on the movement of the COMI. There would automatically have been a stay placed on the estate on the winding up which would have protected any assets from preferential payments to creditors.

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

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?

Country of Incorporation: UK

Four Key International Insolvency issues facing the IP:

- **Moratorium on creditor actions**

Having assets and liabilities in differing jurisdictions may mean that moratorium on creditor actions does not apply in the foreign jurisdictions which would cause issues for the appointment office holder when looking to recover assets, and protect the value in the estate. Differing jurisdictions may therefore not accept the moratorium and allow creditors within that jurisdiction to commence recover against the estate/creditor and diminish the return to the estate (in the UK in this example) and therefore prejudice the other creditors as distribution/recover may not be applies parri passu.

Domestic laws or international instruments to assist:

If the assets or liabilities lie within the USA, the insolvency practitioner may utilise Principles of Cooperation among the NAFTA Countries which were approved by the ALI Council and members in 2000. Specifically Topic B which pertained to matter such as s

- **Priorities and preferences**

Within the UK Insolvency law, is it clearly defined the 'waterfall' by which distributions are made, specially for this example giving rise to preference payment to employees wages for example. There have also been recent amends to this legislation in regards to HMRC/crown debts which are not paid above the general pool of unsecured creditors. The law in jurisdictions whereby the Company may have assets and/or liabilities may differ in this regard. This would bring about challenges when looking to make a distribution to creditors.

Domestic laws or international instruments to assist:

Global Insolvency Proceedings for a Global Market The Universalist System and the Choice of a Central Court - by Jay Lawrence Westbrook

- **Standing for (recognition of) the foreign representative**

In the UK (in this example) an Insolvency Practitioner has clear regulations by which they fall under in order to qualify for such position but also in regard to conduct and inspection/monitoring. This is not consistent throughout foreign jurisdictions as there are varying ways in which one could be eligible to hold office. It therefore, in this example, may cause issues for the IP when looking to realise assets in a foreign jurisdiction as the courts may not accept their qualifications. Equally the IP may not have standing to act on their powers which they would be entitled to within the UK (this example), for example in regards to taking possession of a bank account in a foreign jurisdiction, the bank may not recognise the authority of the IP and therefore not consent to release of funds or instruction from the office holder.

Domestic laws or international instruments to assist:

UNCITRAL MICBI Modern Law – in particular using guidance seeking co-operation and co-ordination in with a view to “ensuring that a single debtors insolvent estate be administered fairly and efficiently, with a view to maximise benefits to creditors”, having one practitioner whom is recognised in several jurisdictions will dramatically reduce the costs of several appointees and separate insolvency procedures which will increase the return to the creditors.

UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation (2009)

A. Article 27, paragraph (a): Appointment of a person or body to act at the direction of the court

- **Creditor participation**

There may be differing laws and regulations in regards to the rights of creditors across several jurisdictions. This may cause issues for the office holder when for example forming a committee of inspection, and regulating updates to such creditors. For example the insolvency rule 2016 in the UK allowed for decision by correspondence in relation to creditor approval procedures which may not be applicable in foreign jurisdictions, this will cause issues when matter arise that require creditor consent for example approval of remuneration.

Domestic laws or international instruments to assist:

Insolvency Rules England and Wales 2016

European Guidelines on communication and Cooperation (2007)

6
Marks awarded 10.5 out of 15
MARKS AWARDED 36/50

*** End of Assessment ***