



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**.

Commented [DB1]: Please read and follow the instructions! I had to do this for you.

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 5 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 relates to the treatment of an insolvent company/individual where the laws of more than one jurisdiction come into effect. There is not one unified set of insolvency rules that applies globally, therefore there are a number of issues when a debtor has assets in more than one country or multiple international creditors. There have been a number of multilateral developments in recent years with an aim of harmonizing the complex issues surrounding international insolvency law.

More detail would have been beneficial.

1.5

Question 2.2 [maximum 5 marks]

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

One issue surrounding international insolvency law is that domestic systems differ in terms of pro-creditor or pro-debtor. Depending on which principle you view, universality or territoriality, the treatment of an insolvent debtor differs during insolvency proceedings.

Under universalism, only one insolvency proceeding can be brought against the insolvent debtor. This will be based in the State where the debtor's central interests are located.

Under territorialism, multiple insolvency proceedings can be opened against the debtor. If a debtor has an asset in multiple States, proceedings may be opened in all these States against the debtor.

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

3.5

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.

- A number of Middle Eastern countries have worked with the World Bank. The World Bank's Best Principles for Effective Insolvency and Creditor Rights Systems (2005) has been introduced to the Middle Eastern Region.
- States like the UAE and Saudi Arabia have changed their domestic insolvency laws in recent years in line with cross-border insolvency law progression. **Elaboration and further detail is needed.**
- Bahrain has adopted the Model Law on Cross-Border Insolvency in 2018.

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

2

Marks awarded 7 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.

In most cases, the objectives of insolvency for corporations is that of a corporate rescue. This is preferred to a liquidation as it is more beneficial for the economy/employees and a company has a higher value when operating as a going concern. This can be done formally through the courts or informally on an agreed basis with the relevant parties. Also, liable persons will be held responsible during insolvency proceedings against a company, for example, directors involved in fraudulent transactions.

The objectives of insolvency for individuals is to enable the debtor to discharge his/her debts (this can be dependent on whether the governing system is pro-debtor or pro creditor), to offer the debtor protection against creditors and to offer solutions to reduce indebtedness, for example, monetizing certain assets.

A similar objective of insolvency for both relates to the principle of pari passu in that similar creditors are paid on the basis of the claim they have against the insolvent debtor's assets.

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.

Cross-border insolvency issues have increased in recent years mainly due to globalization. State legal systems have evolved, international trade movement of goods and services has increased significantly, and most importantly from an insolvency perspective, individuals and corporations hold assets in a number of different States.

One issue is lack of co-ordination and co-operation between Courts of different jurisdictions. Without clarity between the Courts the following issues could arise:

- If the debtor operates in several different States, there could be multiple insolvency proceeding against him/her.
- If a debtor has multiple assets in different States, the practitioner will have to research to confirm which jurisdiction the asset falls under. Depending on the jurisdiction, the system could be pro-debtor or pro-creditor which may lead to contrasting Court rulings.
- The standard of insolvency practice and legal systems can differ drastically between countries. Initiatives like The World's Bank Principles for Effective Insolvency and Creditor/Debtor Regimes and the UNCITRAL Legislative Guide on Insolvency have been introduced to provide best practice standards worldwide.

Another issue is the difficulty in finding a universal insolvency language. Hakan Frikman points out that the term 'insolvency' has a number of different meanings at international level. Therefore, insolvency practitioners must be informed of any different meanings when dealing with different jurisdictions. Time periods can also differ, for example the length of time a creditor has to bring forward a claim once the insolvency is advertised.

Finally, states have different norms which can play a role in the insolvency proceedings. Debtors and creditors may be treated differently dependent on whether the State follows the principle of Universalism or Territorialism.

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 harmonization of domestic insolvency law has been a top priority in recent decades. The potential benefits of harmonizing insolvency laws are;

- Better understanding of insolvency law when dealing with multiple jurisdictions which will allow the insolvency practitioner to better protect the debtor.
- Reduce the need for courts to resolve cross-border issues.
- More efficient insolvency proceeding process.

Multilateral steps taken towards harmonization include:

- The development of the UNCITRAL Legislative Guide on Insolvency Law. This has been enhanced over the years and mainly relates to the to the key principles and objectives that any State should follow with regards to insolvency law.
- The European Union is moving towards harmonization of insolvency laws, which is evident with the publication of the 2010 Harmonization of the Insolvency Law at EU Level.
- There are multiple insolvency bodies such as the International Bar Association (IBA) and INSOL International who adopt similar insolvency strategies.
- The World Bank in the early 2000s published the Principles for Effective Insolvency and Creditor/Debtor Regimes which the IMF have adopted in bankruptcy reform cases.

Harmonizing domestic insolvency law can address some of the issues facing international insolvency law. For example, if countries are using a uniform approach together to insolvency law, this will overcome many of the issues previously discussed. An example of this is the Nordic Convention of Bankruptcy between Norway, Denmark, Finland, Iceland, and Sweden. However, if countries do not wish to co-operate and co-ordinate together, any harmonization efforts will be unsuccessful, and I believe this will be the case. Recent events such as the UK leaving the EU, the Covid-19 pandemic and conflicts/wars are examples of just how difficult it will be for harmonization of laws to come into effect.

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

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Marks awarded 12.5 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.

As Utopia have adopted the UNCITRAL Model Law on Cross-border Insolvency, the Erewhon liquidator should obtain a co-ordination agreement with Apex. This idea comes from the Maxwell Communications Corporation Plc case where the judges of two different states agreed that an insolvency agreement between two administrations "could resolve conflicts and facilitate the exchange of information." Under this agreement, both parties will be able to bring proceedings in an efficient manner.

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.

2

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.

No difference for both above as the court should allow for a concurrent proceeding under the UNCITRAL Model law once Erewhon brings forward their case.

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

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: United States

Facts:

- US have implemented a pro-debtor system with regards to insolvency in which they seek a discharge for debtors.
- The US is a federation and has a single, unified Bankruptcy code of 1978 which applies to all States.
- The US has a specialized bankruptcy court to decide insolvency proceedings unlike other States which have general courts.
- The US have adopted the UNCITRAL Model Law on Cross Border Insolvency.

Issues facing the insolvency representative:

- As the US is a pro-debtor system, the court and insolvency representative will follow a liberal approach towards a discharge of the debtor's debt. The insolvency representative will have to perform a means test to determine whether the debtor may file for liquidation or a repayment plan. The 1978 Bankruptcy Code will assist here, chapter 7 and 13 relief.
- As the US has adopted the UNCITRAL Model Law on Cross Border Insolvency, there could be concurrent proceedings against this debtor. The practitioner may have to co-operate and co-ordinate with other practitioners in other States if this issue arises.
- As the entity has assets in a number of different States, the practitioner will have to examine the legal documentation behind all the assets to confirm legal title of assets and jurisdiction. There could be different procedures to perform in relation to monetizing any of the assets based on the jurisdiction the asset is in.
- There are a number of creditors so the practitioner must consider this when paying creditors. Secured creditors will need to be identified during asset reviews. Depending on which US state you are in, the length of time to bring forward a creditor claim may also differ.

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.

Marks awarded 7.5 out of 15
MARKS AWARDED 32/50

* End of Assessment *