



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 9 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 refers to a body of rules concerning insolvency proceedings which transcend a single legal system of a particular jurisdiction devised to deal with insolvency issues on a cross border basis where different states have developed their own insolvency procedures.

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

1.5

Question 2.2 [maximum 5 marks]

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

The concept of universality is where only one main insolvency proceedings (initiated in a state where its interest is situated) is needed to cover all of the debtor's assets and debts worldwide without going through [spelling] other insolvency proceedings in several foreign jurisdictions to execute the recovery of the assets situated in the various foreign jurisdictions. Cost is argued to be cheaper to satisfy the interest of those involved in cross-border insolvency. The concept of Universality requires a high level of trust in the foreign legal system.

Meanwhile, the concept of territoriality is where several insolvency proceedings have to be initiated in every foreign jurisdiction where the debtor's assets are situated and execution is restricted to the assets located within the jurisdiction where the proceedings are commenced. There will be higher cost to be incurred to satisfy the interest of those involved in cross-border insolvency.

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.

- 1) Launching of the first regional, comparative survey of insolvency systems in the Middle East and North Africa in 2009 by Hawkamah Institute for Corporate Governance, the World Bank, the OECD and INSOL International to provide indicator of best practice.
- 2) Reform of domestic insolvency laws by several Middle East states such as UAE in 2016 and 2019, Saudi Arabia in 2018 and Dubai in 2019. **[Elaboration is needed to provide details of these reforms]**
- 3) Adoption of the Model Law on Cross Border Insolvency by Bahrain in 2018.

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

2.5

Marks awarded 7.5 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.

The objectives of insolvency for individuals is to protect the debtor from harassment by his creditors, enabling the creditors to reduce his indebtedness by making contributions from present and future income to the estate, which in the end will enable the debtor to make a fresh start. Meanwhile for corporations, the objectives of the insolvency is to preserve the business or viable parts of the company for the benefit of the creditors, while dissolving the company at the end of the process. It is also to ensure that parties who are abusing the concept of limited personal liabilities are held personally liable for their actions.

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.

3.5

Question 3.2 [maximum 5 marks]

Write a brief note on the difficulties that may be encountered when dealing with insolvency law in a cross-border context relating to pertinent differences in the relevant systems.

Differences in relevant systems can pose the following difficulties when dealing with insolvency law in the cross border context:

- i) Unnecessary capital losses – Different jurisdictions may not have incorporated rescue mechanism in their insolvency law. As such, creditors might not be able to extract maximum recovery under a rescue for assets which are located in a jurisdictions where rescue proceedings are not available and will have to rely on recovery based on liquidation basis.
- ii) Unpredictability of legal precedence governing the several issues arising from the insolvency – this will create a situation where the principles of equality between creditors cannot be met.
- iii) Reconciliation of various national approach to insolvency – This will create conflicts where creditors are seeking to recover assets in foreign jurisdiction will met with resistance from the jurisdiction where their approach is to protect the interest of the debtors instead of creditors.

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.

Some multilateral steps to promote harmonization of domestic insolvency law in the 21st century includes:

- The promotion of Legislative Guide on Insolvency law by UNCITRAL in 2004 to provide reference to national authorities and legislative bodies when preparing new laws and regulations or reviewing the adequacy of their current existing law.
- The issuance of guidelines on the regulation of insolvency entitled Principles for Effective Insolvency and Creditor / Debtor Regimes beginning the 2000s and revised throughout in 2005, 2011, 2015 and 2021 by World Bank.

In my opinion, these initiatives have gain significant impact in addressing international insolvency issues in that 49 countries out of 53 jurisdictions¹ have adopted the UNCITRAL model law on cross border insolvency and that developing countries are required by International Monetary Fund to reform their bankruptcy law as a condition for loan support.

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

4

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.

In view of the adoption of the UNCITRAL Model Law on Cross Border Insolvency by Utopia, the Liquidator may wish to apply to the Court in Utopia for recognition of foreign proceeding pursuant to Article 15 of the UNCITRAL Model Law on Cross Border Insolvency. Upon

¹ https://uncitral.un.org/en/texts/insolvency/modellaw/cross-border_insolvency/status

application for recognition of foreign proceeding, the Liquidator can also request that the Court of Utopia grants provisional relief including a stay of execution against Nadir's assets (where relief is urgently needed) pursuant to Article 19 of the UNCITRAL Model Law on Cross Border Insolvency.

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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.
No Difference
- (b) Apex had obtained a court order to wind-up Nadir in Utopia prior to the Erewhon winding-up order.
The answer in 4.1 will not apply as the company is already wound up in Utopia.

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

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Question 4.3 [maximum 8 marks]

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

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

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

Company A is incorporated in Malaysia and has subsidiaries / businesses in various countries. The key international insolvency issues facing the insolvency representative includes:

- 1) Recognition of judgement in foreign jurisdiction
The insolvency representative might require its home judgment to be recognised by foreign jurisdiction in order to obtain relief such as stay of proceedings against its assets in foreign land. Notwithstanding that Malaysia has yet to adopt the UNCITRAL Model Law, the insolvency representative can consider making an application to

foreign courts to recognize the insolvency court judgment obtained in Malaysia. For foreign jurisdiction that has adopted the UNCITRAL Model Law, the insolvency representative would need to establish that the formal insolvency proceedings awarded by the Malaysian Court meets the requirements of “Foreign Proceedings” as stated in UNCITRAL Model Law.

2) Territoriality approach by foreign state

Some foreign jurisdiction might take the territoriality approach in dealing with international insolvency claims. In this circumstances, the creditors in the foreign state will initiate winding-up proceedings against the Company based on the jurisdiction’s domestic insolvency law. The foreign liquidators will distribute the proceeds of the disposal of the assets to its home creditors before remitting the surplus back to the insolvency representative in Malaysia. The Malaysian insolvency representative would need to gain control of its foreign subsidiaries and run its business if the foreign subsidiaries is not insolvent to protect the value of the business and maximise recovery to the Malaysian creditors.

3) Low Standard of Insolvency Laws in Foreign Jurisdiction

Some jurisdiction might yet to reform or update their insolvency laws to provide for formal business rescue. Under this circumstances, the Malaysian insolvency representative might need to run informal scheme of arrangements with its foreign creditors parallel to its home insolvency proceedings.

4) Different approaches to insolvency by the foreign state

Different foreign state might emphasize on providing for the interest of the debtors to continue running its business as opposed to looking at the interest of the creditors in recovering their claims. This leads to the foreign states competing with the insolvency representatives for the assets of the debtors.

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.

4

**Marks awarded 9 out of 15
MARKS AWARDED 36.5/50**

*** End of Assessment ***