



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 web pages for Module 1 as well as the Course Administration page for this course after the submission date of 15 October 2022.

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: 202223-336.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 2022**. The assessment submission portal will close at **23:00 (11 pm) BST (GMT +1) on 15 October 2022**. 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 **10 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 7 out of 10

QUESTION 2 (direct questions) [10 marks]

Question 2.1 [maximum 2 marks]

Explain what the term "international insolvency law" means.

[

1. It is the part of the law with regards to certain insolvency proceedings or measures, that cannot be fully enforced, because the applicable law is unable to be executed immediately and exclusively, without considering the international aspect of a given case.
2. It is also known as cross-border insolvency.
3. It is a situation in which an insolvency occurs, and certain aspect or issues of the case involve insolvency law in another jurisdiction.
4. It is that part of law that regulates the treatment of financially distressed debtors where such debtors have assets or creditors in more than one country.]

2

Question 2.2 [maximum 5 marks]

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

[Universality is based on the principal that there should be only one single insolvency proceedings covering all the debtor's assets and debt worldwide and that only one forum should have jurisdiction. Hence any cross-border insolvencies are administered pursuant to a single global insolvency regime, and all of the debtor's assets are distributed by a single insolvency office holder, regardless where the assets or claimants are located.]

Territoriality is based on the principal that insolvency proceedings may be commenced in every State / jurisdiction where the debtor holds assets, hence it is possible to have multiple insolvency proceedings taking place concurrently for the same debtor. Therefore, the debtor may be declared insolvent in one State but not in another. Each country exercises its own domestic insolvency laws in relation to all the debtor's property and all the creditors located within its jurisdiction. This approach does not recognise any extraterritorial dimension to insolvency law.

Under Universality concept, all the debtor's assets should be included in the single insolvency proceedings and the officeholder should be given the tools to control and obtain all the assets.

Under Territoriality concept, since there may be multiple insolvency proceedings taking place in several jurisdictions where the debtor's assets are held, the officeholders are confined to the national borders of the State where the insolvency proceedings are taking place.

Under Universality concept, all creditors worldwide should have the chance to take part in the proceedings with all claims being treated on an equal basis.

Under Territoriality concept, there are restriction for creditors to file their claims in another jurisdiction. Territoriality concept gives priority to local creditors i.e. protect national interest, before any assets are transmitted to another jurisdiction. Not all creditors' claims are being treated on equal basis.]

These theories also involve recognition and effect (as well as jurisdiction) in that for example, with universalism, recognition and effect requires that other States recognise that one set insolvency proceedings (that all agreed is the appropriate jurisdiction) and recognise it as having extraterritorial effect in their States.

4

Question 2.3 [maximum 3 marks]

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

[The three recent examples of developments in the Middle East region are:

- (1) Launching of the first regional, comparative survey of insolvency systems in the Middle East and North Africa (MENA) region in 2009 as a joint initiative of the Hawkamah Institute for Corporate Governance, the World Bank, the OECD and INSOL International; **what impact did this have on reforming domestic insolvency laws or addressing international insolvency Issues in the Middle East?**
- (2) A number of Middle East States reformed its domestic insolvency laws between 2016 and 2019; and **More detail would have improved the mark awarded for this sub-question.**
- (3) Bahrain adopted the Model Law on Cross-Borden Insolvency in 2018.]

2

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 are to protect the debtor from harassment by his creditors (getting rid of pressure), enabling him to make a fresh start and to reduce his indebtedness by making contributions from his present and future income to the estate, while considering his personal circumstances. Individual does not dissolve like a corporate. Individual can be discharged at the end of its bankruptcy.]

Whereas the objective of insolvency for corporations are to preserve the business or viable part of the business (try to stay alive), where possible. Maximising value for creditors. Where there is abuse of personal liability, to impose personal liability on responsible persons. When there is no way for the business to be preserved or restructured, then it will be wound up and eventually dissolved.]

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.

[Generally, the legal systems of different countries around the world have either an English Common law or Civil law-orientated foundation. Even countries that adopted the same system may have certain aspects of insolvency law that are different, which are affected by local legal culture, basic rights and the way in which a system deals with the related matters such as security rights or the approach to labour issues. Approached towards socio-economic issues will also be reflected in aspects of the country-specific laws. There is no single set of insolvency or bankruptcy rules that applies globally. Approaches and policies differ. Substantive and procedural rules differ. Terminology will also differ.]

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.

[Both "Hard Law" and "Soft Law" have been used to promote harmonisation of domestic insolvency laws. States like European Union have drafted treaties or conventions (example of hard law) to address international insolvencies within their geographical region. Inter-governmental bodies such as UNICITRAL have been active in promoting soft law responses to international insolvency issues. Multilateral commercial or professional bodies eg. IBA and INSOL International have worked on a range of proposed solutions, such as UNCITRAL Legislative Guide on Insolvency Law in year 2004.

World Bank also produced guidelines on the regulation of insolvency, entitled Principles for Effective Insolvency and Creditors / Debtor Regimes in the early 2000s and revised in 2005, 2011, 2015 and in April 2021. Together, these 2 guidelines formed the international best practice standard for insolvency regimes (the Insolvency Standard).

I am of the view that all these guidelines are very helpful in bringing awareness to all States and provide best practice/guide for all to consider or adopt in their law reform exercise. In view that it is becoming more common for organisations to have cross border business transactions, it is inevitable to discuss international insolvency issues. It is necessary to have more regulated and standardised insolvency law or policy in place to reduce risk and uncertainty for cross border business dealings. Hence, these moves to harmonise domestic insolvency laws can reduce the significance of an insolvency crossing a State boundary and the need for regulators or courts to resolve international insolvency issues.]

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

4.5

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.

[Since Utopia has adopted UNCITRAL Model Law on Cross-border Insolvency, the court in Utopia is mandate to have co-operation and direct communication with the court in Erewhon or its representatives eg. the liquidator appointed by Erewhon court.

Under the Protocols or Cross-border Insolvency Agreements, the two administrations could resolve conflicts and facilitate the exchange of information to maximise the value of the estate and harmonize the proceedings to minimise expense, waste and jurisdictional conflict.

I would suggest that the liquidators to obtain or request for the following documents:

- (1) A copy of the contract signed between Apex and Nadir together with unpaid invoices of sale issued by Apex to Nadir - to determine at the point of contracting and sale whether Nadir is still a company registered in Erewhon. If Nadir was in fact still based in Erewhon, the case should be a local Erewhon matter. Apex (a Erewhon company) can submit its proof of debts/claims to the liquidator appointed by Erewhon court and stay/discontinue its court proceedings against Nadir in Utopia.
- (2) A copy of Nadir's registration in Utopia - to determine at the date when winding-up order issued by Erewhon court, whether Nadir was still a Erewhon company. If the winding-up petition application or winding-up order was issued more than one month ago then in fact, Nadir was still a Erewhon company because Nadir only relocated to Utopia one month ago. The matter should be a Erewhon case. Again, Apex should submit its proof of debts to the liquidator. Here, I am assuming that Apex's court proceedings only started after Nadir had relocated to Utopia.
- (3) A copy of Apex's court application for winding-up against Nadir to determine whether Erewhon's winding-up order was issued before Apex's court application or after. If Apex's application is after Nadir is being wound up, a leave of court/permission is required to initiate any legal proceedings against 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.) The question requires candidates to apply the relevant MLCBI articles to the facts provided.

3

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.

[In scenario (a), if Apex's case had not been heard, it should stay/stop its proceedings since a winding-up order had already been issued against Nadir. This is in line with the spirit under the UNCITRAL Model Law on Cross-border Insolvency to maximise the value of the estate and harmonize the proceedings to minimise expense, waste and jurisdictional conflict. A leave of court is also required to initiate any legal proceedings against Nadir which had already been placed under liquidation.

In scenario (b), if Apex had obtained a winding-up order in Utopia before the issuance of Erewhon's winding-up order, then the 2 liquidators should also have co-operation and direct communication with each other to resolve conflicts and facilitate the exchange of information to maximise the value of the estate and harmonize the proceedings to minimise expense, waste and jurisdictional conflict.]

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

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?

[I select England for the company's incorporation.

Therefore, in this scenario, the English court has ordered the commencement of insolvency proceeding against a corporate debtor and appointed a English insolvency representative. The four key international insolvency issues facing the English insolvency representative are:

1. Standing for (recognition of) the English insolvency representative;
2. Moratorium on creditor actions;
3. Creditor participation; and

4. Co-ordinated claims procedures.

Issue (1). This raised a problem connected with another legal system or State since the debtor operated beyond England borders and there may be multiple insolvency proceedings commenced in more than one State and hence more than one insolvency representatives. The English insolvency representative can apply UNCITRAL Model Law on Cross-borden Insolvency to co-operate with foreign courts or foreign representatives with the view to ensuing that a single debtor's insolvent estate is administered fairly and efficiently, with the objective of maximising benefits to creditors.

Issue (2). The English insolvency representative can apply Universalism which stated that there should be only one insolvency proceeding covering all the debtor's assets worldwide. Hence, once the proceedings are opened, no other proceedings ought to be possible nor any other forms of execution of the debtor's assets. All other creditors' actions should be withdrawn/stay.

Issue (3). Under Universalism, all creditors worldwide should have the opportunity of participating in the proceedings with all claims being treated on an equal basis.

Issue (4). The English insolvency representative can adopt Lord Hoffmann's order in the House of Lords decision in McGrath v Riddell's case and apply the principle of modified universalism which stated that "the English courts should, so far as is consistent with justice and UK public policy, co-operate with the courts in the country of the principal liquidation to ensure that all the company's assets are distributed to its creditors under a single system of distribution". In applying this law, it means all the claims worldwide should be co-ordinated and distributed in a single system.]

For an approach more 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. Then apply the current English laws on CBI to such issues.

5

Marks awarded 9 out of 15

*** End of Assessment ***

A good paper that correctly identifies many of the issues raised and satisfactorily substantiates several answers.

TOTAL MARKS AWARDED 35.5/50