



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**.

Commented [DB1]: You have highlighted this in green, and yet you have not complied with the instruction. This is the only way of identifying you once the assessments has been downloaded. I will let this slide for the practice assessment, but any further submissions that do not adhere to the instructions, will be returned unmarked.

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 10 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 is that part of the law that is applicable when insolvency has issues to be resolved that go beyond the contours of a single legal system. In such cases, the domestic insolvency law is not enough to deal with the issues raised by foreign elements of the case.

There is scope to elaborate

1.5

Question 2.2 [maximum 5 marks]

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

Universality and territoriality are both theories used to solve problems associated with crossborder insolvency.

By the theory of universalism we would necessarily have a single procedure involving the assets and debts of the same debtor worldwide. In that case, only one State will have jurisdiction. The adherents of this theory argue that all the debtor's assets should be included in the insolvency proceeding, which have to provide opportunity for all the creditors to participate on equal terms.

In turn the principle of territorialism is diametrically opposed the principle of universalism. These theories are also characterized by recognition and effect. This is because, in universalism, it is necessary for other States to recognize that an insolvency procedure was opened and the extraterritorial effect.

So, territorialism means that insolvency proceedings may be commenced in every jurisdiction where the debtor holds assets.

By the principle of territorialism, insolvency proceedings are restricted to the territorial limits of the State where they were filed. It protects local creditors and local interests.

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.

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.

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UAE in 2016, Saudi Arabia in 2018 and Dubai in 2019 have reformed their domestic insolvency laws.

Bahrain adopted de Model Law on Cross-Border Insolvency in 2018 as did the Dubai International Financial Centre in 2019.

Other example of development in the Middle East was the first regional, comparative survey of insolvency systems in the Middle East and North Africa (MENA) region, that was launched 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?**

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

2

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.

Individuals want to protect themselves from creditors' harassment. When filing for insolvency, individuals intend to rehabilitate themselves, especially in case where insolvency was not caused by their actions. The debtor intends to reduce the indebtedness by making contributions from present and future income to the estate. When a company files for insolvency, the objective is to preserve the business or its viable parts, not necessarily the company, and where personal liability has been abused, to impose personal liability on responsible parts.

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.

Insolvency proceedings may possibly be opened concurrently in more than one State, and each State shall apply its own laws, granting no, or very limited extraterritorial effect, to foreign proceedings.

Other aspect is that the standard of insolvency laws in many countries is relatively low, and many laws are outdated.

Another difficulty is to reconcile the various national approaches to insolvency.

The last one, the very concept of insolvency adopted by each State, regardless of whether it is a momentary inability or not to pay the debt.

Further detail would be beneficial. For example, consideration of Westbrook's 9 key issues.

2.5

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.

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 American Law Institute (ALI) and the International Insolvency Institute (III) published the ALI NAFTA Guidelines Applicable to Court-to-Court Communication in Cross-Border Cases.

It was finalised in 2001 and was made to be adapted and modified as required to fit the circumstances of individual cases. The goal was to provide a non-statutory basis for cooperation in international insolvency cases involving two or more of the North American Free Trade Agreement (NAFTA) States.

Subsequently, ALI and III together came up with a project which resulted in a report entitled Transnational Insolvency: Global Principles for Cooperation in International Insolvency Cases

(2012). The goal of this project was the application of the ALI NAFTA Principles worldwide. The Judicial Insolvency Network (JIN) brings together judges from different countries, with the aim of providing judicial leadership thought, developing best practices, and facilitating communication and cooperation amongst courts in insolvency matters.

UNCITRAL also hosted a Congress in 2017 addressing a broad range of areas on which UNCITRAL has worked and included papers on potential topics for future consideration. After that Congress, in July 2019, the Commission approved an additional section for Part Four of

UNCITRAL Legislative Guide on Insolvency Law, addressing the obligations of directors of enterprise group companies in the period approaching insolvency.

Other modernization projects were also proposed and approved within UNCITRAL and by other institutions and associations, like the International Institute for Unification of Private Law

(UNIDROIT), International Lawyers Association (UIA), International Bar Association (IBA), International Insolvency Institutes (III), and INSOL International which have the goal to encourage and develop the co-operation and co-ordination in cross border insolvency cases. This multilateral steps are very important to deal with insolvency proceedings that involve two different States or multiple States. In circumstances where there are concurrent insolvency administrations for the same debtor, which may often itself be part of a complex multinational enterprise, the co-ordination of administrations is necessary. So treaties and conventions adopted or signed by the States involved have become very important, when local law doesn't help. Where Model Law on Cross-Border Insolvency has been adopted, the development of multilateral steps is easier, because the State recognizes the importance of co-operation and co-ordination.

On the other hand, institutions focused on the study, the production of documents, and the development of projects capable of subsidizing and guiding law suits involving cross-border insolvency are extremely important for the development of interaction between independent nations, when the process involves more than one jurisdiction.

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

4

Marks awarded 9.5 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.

One of the mechanisms brought by the UNCITRAL Model Law on Cross-border insolvency is the provision that, as a result of the recognition of a foreign main proceeding, the commencement or continuation of any individual actions or proceedings involving debtor's assets, rights, liability or obligations will be suspended. In this context, the right to transfer and dispose of any assets of the debtor shall also be suspended.

So the liquidator can file for his recognition as a foreign representative in Erewhon. After this, he may do the application for recognition of foreign proceedings in Utopia.

There is some scope to elaborate

4.5

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.

In letter a, the answer doesn't change.

In letter b, the answer changes because Utopia is the State where the debtor has the centre of its main interest. So the liquidator from Erewhon shall be recognized only as a foreign non-main proceeding, and as such would not have the prerogative to suspend the procedure.

In this case, article 29 of the MLCBI is important, as it addresses the coordination of an insolvency proceeding in a State and a foreign proceeding, determining that "(ii) If the foreign proceeding is recognized in this State as a foreign main proceeding, article 20 does not apply; (b) When proceedings in that State commence after the recognition, or after the application for recognition has been filed, of the foreign case, (i) Any measure in force under article 19 or 21 shall be reviewed by the court and will be modified or terminated if inconsistent with the proceeding in that State; and ii) If the foreign proceeding is a foreign main proceeding, the suspension and suspension referred to in paragraph 1 of article 20 shall be modified or terminated pursuant to paragraph 20(2) if they are incompatible with the proceedings in that State; (c) In granting, extending or modifying the guardianship granted to a representative of a foreign secondary proceeding, the court must be satisfied that that guardianship refers to assets which, according to the law of that State, must be administered abroad in the main proceedings or concerns the information required in that process."

2

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?

The country to be analyzed will be Brazil.

Transnational insolvency was incorporated into the Brazilian legal system only in 2020 (Law No. 14,112/2020), based on the Uncitral Model Law.

Brazil has adopted the mixed system of transnational insolvency: there is a main procedure at the debtor's headquarters and secondary procedures in countries where there are assets to be affected.

First question: The jurisdiction in transnational insolvency follows the rule used by art. 3 of Law 11.101/05, that is, the competent court will be that of the debtor's main establishment in Brazil for recognition of the foreign process and also for cooperation with the authority.

Second question: Brazilian law says that foreign creditors have the same rights granted to national creditors in insolvency proceedings.

Third question: Foreign tax and social security claims, as well as pecuniary penalties for violating criminal or administrative laws, including tax fines owed to foreign States, will not be considered in judicial reorganization proceedings and will be classified as subordinated claims in proceedings bankruptcy, regardless of their classification in the countries in which they were incorporated. The credit of the foreign representative will be equivalent to that of the judicial administrator in cases in which he is entitled to remuneration, except when it is the debtor himself or his representative.

Fourth question: if there is recognition of a foreign process, measures may be required to preserve the assets and interests of those involved, which will be assessed by the court, whether the foreign process is the main or accessory. And here, it is worth mentioning that the only difference between the main and accessory foreign proceedings is how much it will be necessary to control the debtor's assets, whether in full or in part, respectively. The Brazilian judge will carry out necessary measures to protect the debtor's assets and in the interest of creditors, even if these assets are in other countries.

In order to achieve these objectives, there must be effective cooperation between the courts, and between these and other representatives. According to the reformed law, communication can take place between them directly, without the need to issue letters rogatory, direct assistance procedure or other formalities. Cooperation and agile communication between the bodies is essential, especially when it is necessary to decide on urgent issues and implement them immediately to avoid the loss of the debtor's assets and to protect the interests of creditors.

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.

5.5

Marks awarded 12 out of 15

*** End of Assessment ***

A very good paper that generally addresses the questions asked and substantiates its answers.

TOTAL MARKS AWARDED 39/50