



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.

[Wessels defines international insolvency law as a body of rules concerning certain insolvency proceedings or measures, which cannot be fully enforced, because the applicable law cannot be executed immediately and exclusively without consideration being given to the international aspect of a given case. Fletcher defines international insolvency law as "where single legal system cannot be immediately and exclusively applied without regard to the issues raised by the foreign element of the case"]

These are authoritative quotes. The answer would be improved if it also included information in your own words to indicate your personal understanding of the explanation also.

1.5

Question 2.2 [maximum 5 marks]

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

[

	Universalism	Territorialism
Commencement of proceedings	May only be commenced where the center of main debtor's interest is located	May commenced in every state where the assets of debtors are located
Concurrent Multiple proceeding	No	Yes
Effect of the proceeding	All worldwide creditors have opportunity in participating in the proceeding	Limited to local interest and local creditors within the domestic market
Recovery of assets	All the debtors' assets worldwide	limited and restricted to the property within the state where the proceeding commenced
Cost	Lower costs	Expensive

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.

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. A comparative survey of insolvency systems in the Middle East and North Africa (MENA) region was launched in 2009 as a joint initiative of the Hawkamah Institute for Corporate Governance, the World Bank, the OECD and INSOL International. It was based on the World Bank's Principles for Effective Insolvency and Creditor Rights
2. UAE has reformed its domestic insolvency laws in 2016 and 2019, Saudi Arabia in 2019 and Dubai in 2019
3. Bahrain adopted the Model Law on Cross-Border Insolvency in 2018 and Dubai International Financial Centre (DIFC) in 2019.
4. Dubai has on 30 May 2019 enacted a new DIFC Insolvency Law, Law No. 1 of 2019. The new Insolvency Law and Regulations introduces a new debtor in possession bankruptcy regime in line with best practice globally which will also place the DIFC at the forefront of complicated debt restructurings. The law also provides for a new administration process where there is evidence of mismanagement or misconduct. The law also enhances the rules governing winding up procedures; and incorporates the UNCITRAL Model Law on cross border insolvency proceedings with certain modifications for application in the Centre¹

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¹ <https://www.difc.ae/newsroom/news/dubai-international-financial-centre-enacts-new-insolvency-law/>

Marks awarded 8 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.

[Sealy and Hooley differentiate the objectives of insolvency between individuals and corporation as follows:

Individual: the objective is to protect the debtor from harassment by his creditors, to enable the debtor to make fresh start especially in less blameworthy cases (where insolvency has not been brought about by the actions or conduct of the debtor); to reduce indebtedness by making contributions from present and future income to the estate while at the same time taking his personal circumstances into consideration such as provision for excluded assets.

Corporation: the objective is where possible to preserve the business, or viable parts thereof – not necessarily the company; where personal liability has been abused, to impose personal liability on responsible persons]

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.

[Choice of forum - this difficulties took place due to different countries employing different insolvency proceedings or different test for opening insolvency proceedings. For example, if the case is brought before the courts in more than one jurisdiction while the case is being proceeded in the former court, the latter court will consider it can or will decide this case.

Choice of law – After the court has decide the forum, the court may than decide the choice of law. Normally, the choice of forum will dictate the choice of law. However, if the party make an agreement in the contract that which law they want to apply in order to resolve their disputes, the law will depend on their agreement.

Recognition and enforcement - different jurisdictions would have governed by different law and this may lead to issues relation to recognition of court decisions, foreign regulations, enforcement of foreign proceedings, recognition of claims of foreign creditors and recognition of foreign insolvency administrator at local jurisdiction.

Protection over local creditors – most of the local law or systems or practices favour of local creditors over foreign creditors. These may lead to unfair treatment of foreign creditors and distribution of assets. This treatment often refers as territorialism.]

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

3

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.

[In 2004 UNCITRAL Promulgated A Legislative Guide on Insolvency Law. It has been further expended by addressing in Part Three insolvency of enterprise group and Part Four Directors' obligations in the period approaching insolvency

In 2002, the World Bank produced guideline on the regulation of insolvency, entitled Principles for Effective insolvency and Creditor/ Debtor Regimes. The principles have been revised in 2005, 2011, 2015 and in April 2021. The UNCITRAL Legislative Guide together with the World Bank Principles form the international best practice standard for insolvency regimes.

In 2010, the European parliament published a report outlined differences between domestic insolvency law within the EU and identified a number of areas of insolvency law where harmonisation at EU level is believed to be worthwhile and achievable.

The multilateral steps have been taken to resolve the international insolvency matters and this may reduce the significance of an insolvency crossing a state boundary and the need for regulators or court to resolve the international insolvency issues. It also increase the transparency and therefore better understanding by the parties involved on the means and methods that are available to address the needs of commercial entities and of the remedies available to the creditors and other stakeholders of those entities. ^{2]}

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

4.5

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.

² Harmonization of insolvency law at EU level

https://www.eesc.europa.eu/sites/default/files/resources/docs/ipol-juri_nt2010419633_en.pdf

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.

[The Erewhon liquidator in order to stop Apex court action against Nadir in Utopia may take the following actions³

1. Make an application to the court in Utopia to recognise the foreign proceeding in Erewhon where the liquidator was appointed over Nadir.
2. Pending the decision on the application made to recognise the foreign proceeding, the liquidator also may apply for relief i.e. staying execution of debtor's assets in foreign country in order preserve the debtor's assets.]

The question requires candidates to apply the relevant MLCBI articles to the facts provided in more detail than that above. It is good you refer to some by footnote.

3.5

Question 4.2 [maximum 2 marks]

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

- (a) Apex had filed proceedings to wind-up Nadir, but the matter had not yet been heard.
- (b) Apex had obtained a court order to wind-up Nadir in Utopia prior to the Erewhon winding-up order.

[a. There will be no difference to answer in 4.1.

b. The Erewhon Liquidator may file an application in Utopia to determine the COMI and request for coordination and cooperation between the Court and the liquidators.]

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

.5

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

³ Article 15 and 19 of UNCITRAL Model Law on Cross-Border Insolvency

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 selected is Malaysia.

The potential issues which may face by the representative are as follow:

1. Recognition of Malaysia representative at foreign States
2. Recovery of assets in foreign States
3. Stay of court proceedings at foreign States
4. Recognition of foreign judgement

Malaysia is a country fall under common law and have not adopted the UNCITRAL Model Law on Cross-border Insolvency. However, Reciprocal Enforcement of Judgement Act 1958 ("REJA") allows enforcement of judgements from court of certain commonwealth countries. For issues related to other than the countries covered under REJA, may fall under common law principle. In the event if the proceedings are to be commenced in any other countries other than the above, the respective countries domestic laws will apply]

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 Malaysian laws on CBI to such issues.

3.5
Marks awarded 7.5 out of 15
MARKS AWARDED 35.5 /50

*** End of Assessment ***