



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 8 out of 10

QUESTION 2 (direct questions) [10 marks]

Question 2.1 [maximum 2 marks]

Explain what the term “international insolvency law” means.

The body of global laws, rules and regulations that relates to insolvency and bankruptcy covering all of the debtor’s assets and debts worldwide. The procedures and proceedings that out to be carried out to ensure debt collection by creditors and/r possible restructuring or re-organisation of the debtor.

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.

Universality relates to one global and fixed set of rules and practice as it relates to cross-border insolvency. Territoriality differs from universality because Territoriality is solely based on laws and rules of insolvency proceedings being commenced within that territory or jurisdiction where the debtor owns assets and that State’s Law should only apply.

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

These theories involve two key aspects of private international law - recognition and effect as well as jurisdiction:

For example, with universalism, (1) the jurisdictional aspect requires all States to agree on the place for the one set of insolvency proceedings in respect of the debtor and, to be successful, (2) recognition and effect requires that other States recognise that one set insolvency proceedings 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.

Three most recent examples of developments in the Middle East region to reform domestic insolvency laws or to address international insolvency issues are:

Dubai in 2019 has one of the most developed insolvency laws in the Middle East Region. The Dubai International Financial Centre (the DIFC) is a financial free zone in the UAE and is one of the only free zones in the UAE to date that has the power to create its own legal and regulatory framework for all civil and commercial matters.

Accordingly, the DIFC has its own set of laws governing insolvency. In addition, the DIFC has established its own court system. The DIFC legal regime does not extend to outside the DIFC free zone area. The insolvency system is regarded as cost-effective, efficient and timely and balances the interests of the debtor and creditors.

The law applies to all companies and limited liability partnerships in the jurisdiction of the Dubai International Financial Centre. There are specific provisions¹⁹ which make the application of the insolvency law subject to other laws, rules and regulations which provide for the orderly winding up of companies that are licensed as authorised firms or as authorised market institutions.

In Saudi Arabia in 2018 reformed their domestic insolvency laws. The law requires the debtor to provide its financial records to the council with an account including details of all its assets and liabilities. On the commencement of liquidation proceedings, the court appoints an insolvency practitioner as trustee to take possession of the debtor's estate. The court may retain other experts such as valuers at the same time. The insolvency practitioner can decide which contracts to complete and many assign contracts to third parties and terminate an onerous contract. The commencement of proceedings prohibits the unauthorised disposition of the debtor's estate, and this precludes secured creditors from enforcing their security.

There are no formal provisions for the recognition of foreign insolvency proceedings or for the cooperation with courts of other jurisdictions. However, foreign representatives have access to the Saudi courts and the recognition of foreign proceedings may be facilitated. In such a case, a court judgement is required to enforce a foreign judgment.

The United Arab Emirates in 2016 and 2019 reformed their domestic insolvency laws. On the making of a bankruptcy declaration a bankruptcy judge, an inspector and a trustee in bankruptcy are all appointed. The bankruptcy trustee is able to continue to operate the debtor's business after the declaration of bankruptcy although the law makes no provision for the funding of any ongoing business. The trustee has the option to complete any uncompleted contractual obligations of the debtor or to terminate onerous contracts. The law sets out the bases of transactions capable of being avoided or set aside as preferences.

The extent to which the court system facilitates insolvency law and practice is capable of improvement—there are no specialist courts or courts that necessarily have any bankruptcy

experience. Judges are moved around the courts, and this precludes the development of experience or expertise. In practice, any legal provisions are enforced first, supplemented by Shari'ah law if required. There are no provisions for the regulation and supervision of insolvency practitioners and criteria regards their qualification.

3

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.

The objective of insolvency as it relates to a natural person differs against the objectives of corporations. Natural persons or individuals seek to protect themselves from being harassed by his creditors in order to start a fresh. The individual seeks to find ways to reduce his indebtedness by making contributions from present and future income.

Corporations on the other hand where there is the possibility to preserve any or part of the business structure where personal liability has been abused will seek to impose personal liability on the responsible persons.

There is some scope to elaborate

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.

The difficulties that may be encountered when dealing with insolvency law in a cross-border context relating to important difficulties in the relevant systems are:

1. There being no one global insolvency law system of global insolvency court to deal with cross-border insolvency. There is no shared or common definition of insolvency, rules, practice and procedure to deal with individuals and corporations with assets and liabilities across the world. There is no proper standing for the foreign representative.
2. Conflict of law issues. The differences in domestic laws and colonial past also play a part in the difficulty in resolving cross-border insolvency proceedings between states in respect of individuals and corporations.
3. Avoidance provision powers.
4. Priorities and preferences.
5. Discharges.

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 recent multilateral developments in the regulatory responses to international insolvency issues that have taken place in the 21st century to promote harmonisation of domestic insolvency laws is the UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation (2009). The main aim of which is in the absence of formal treaties or domestic legislation to address the problems arising from international insolvencies provide the best practice of guidance for insolvency practitioners globally.

Also, the adoption of the UNCITRAL Model Law of Cross-Border Insolvency which provides a framework for agreements to aid co-operation and communication in cross border insolvency.

Once adopted facilities co-ordination of concurrent proceedings. Communication between a local court and foreign court and/or the foreign representative.

The American Law Institute (ALI) international Insolvency Institute (III) developed various projects including the ALI'S Transnational Insolvency Project with the aim of providing a non-statutory basis for cooperation in international insolvency cases. In early 2021 ALI noted that the ALI-III Global Guidelines Applicable to Court-to-Court Communication in Cross-Border Cases played a critical role in restructuring airline groups with a protocol.

More relevant are UNCITRAL Legislative Guide on Insolvency Law (2004); World Bank Principles for Effective Insolvency and Creditor Rights Systems (2011); European Parliament report on Harmonisation of Insolvency Law at EU Level (2010).

2

Marks awarded 9 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.

The relevance of the Cross-border Insolvency Act of Utopia is that it is the Domestic binding law on natural persons and corporations of the Jurisdiction Therefore the Utopia Court and laws will apply in respect of the insolvency proceedings there.

However, the UNITRAL Model Law on Cross-border Insolvency is also adopted in Utopia which regulates insolvency of individuals and corporations between states that have adopted it. The UNITRAL Model Law indicates the important role of cooperation and co-ordination as a strategy to address international insolvency matters.

Since Utopia has adopted the UNITRAL Model Law and its provisions that facilitate co-operation and co-ordination of concurrent proceedings. Chapter IV of the UNITRAL Model Law provides for the direct communication between a local court and foreign court and its representative. Therefore, the liquidator cannot stop the proceedings already instituted in Utopia. However, the liquidator can have direct communication with the court in Utopia giving

them notice of the concurrent proceeding in Erewhon and thereby co-ordinating the concurrent proceedings.

Court approval of for the purposes of co-ordinating insolvency proceedings is encouraged by the UNITRAL Model Law Which would also assist the Liquidator in Erewhon to maximize the value of the estate of Nadir and harmonizing he proceeding to minimise expense, waste and jurisdictional conflict.

The MLCBI is significant for it 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.

2.5

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.

No, my answer would not have changed.

(b) Apex had obtained a court order to wind-up Nadir in Utopia prior to the Erewhon winding-up order.

Yes, my answer would change because I would no longer be a matter of concurrent proceedings being harmonized but a matter of enforcement of a foreign order.

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?

The Company is incorporated in the Turks and Caicos Islands. The Turks and Caicos Islands has a robust Insolvency Ordinance and Regulations to regulate insolvency proceedings.

Four key international issues that an insolvency practitioner would face are:

1. There being no one global insolvency law system of global insolvency court to deal with cross-border insolvency. There is no shared or common definition of insolvency, rules, practice and procedure to deal with the company's assets and liabilities across the various States. There is no proper standing for the foreign Insolvency Practitioner based in the Turks and Caicos Islands.

2. Conflict of law issues. The differences in domestic laws and the other State laws will be an issue that the Insolvency practitioner will have to deal with in respect of the Turks and Caicos' based company with assets and liabilities in other states with different laws.
3. Avoidance provision powers.
4. Priorities and preferences.
5. Discharges.

The Turks and Caicos domestic Insolvency Ordinance and its Regulations in addition to public international instruments such as the UNCIRAL Mode Law on Cross-Border Insolvency it Practice Guide would be some of the instruments that could apply to assist the insolvency practitioner to address the above referenced issues.

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.

3.5

Marks awarded 7 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 32/50