



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.

International insolvency law was defined by B Wessels in "International Insolvency Law" as a part of the law that "is commonly described in international literature as a body of rules concerning certain insolvency proceedings or measure, 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."

International Insolvency law is therefore a part of the law that is applicable where the circumstances of a particular insolvency occurs in such a way that a single legal system cannot be applied, as the insolvency crosses the borders of a specific jurisdiction and therefore the legal system of one or more foreign countries must be considered and applied. International insolvency is therefore also referred to as "cross-border insolvency". A cross-border insolvency will arise where a person or entity is for example sequestered or liquidated in its local court, but creditors and / or assets are located in one or more foreign jurisdictions.

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Question 2.2 [maximum 5 marks]

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

Universality (or universalism) entails that one insolvency proceeding should cover all the assets and liabilities of the debtor, irrespective the jurisdiction where the assets and liabilities are situated. Therefore, only one State should have jurisdiction, being the jurisdiction or State where the debtor's main interests are located.

In contrast, territorialism entails that insolvency proceedings may be commenced in every State / jurisdiction where the debtor's assets are situated, but the proceedings should be confined to the specific State where the proceedings are opened.

In terms of the principle of universality, there should be no possibility of opening other insolvency proceedings or other forms of executing against a debtor's assets, as opposed to territorialism, where there can be more than one insolvency proceeding running concurrently for a specific debtor.

When the principle of universality is applied, the officeholder should be able to access and control all assets across the jurisdictions and all creditors should be able to participate in the proceedings, with their claims being treated equally, irrespective of their jurisdiction, however when the principle of territorialism is applied, each officeholder may only deal with the assets and creditors in the specific jurisdiction and his mandate is therefore limited to his national borders. The national creditors' interest should be protected before any assets may be transferred to another jurisdiction.

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.

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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. The United Arab Emirates reformed their domestic insolvency laws by issuing and enacting Federal Decree Law no 9 of 2016 on Bankruptcy on 20 September 2016 to assist in the handling of corporate insolvencies and Federal Decree Law no 19 of 2019 on Insolvency on 29 August 2019 to assist with insolvencies for individuals.
2. Saudi Arabia approved a new Bankruptcy Law in February 2018, which reshaped restructuring and liquidation landscapes and established the administration procedures for restructuring and liquidation of companies. This Bankruptcy Law was followed by Implementing Regulations in September 2018.
3. The Dubai International Financial Centre (the "DIFC") enacted the new DIFC Insolvency Law, Law no. 1 of 2019, which incorporated the UNCITRAL Model Law on Cross-Border Insolvency in 2019

3

Marks awarded 9 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.

Objectives of insolvency for individuals:

1. Protection is afforded to a debtor from harassment by his creditors.
2. To enable the debtor to start fresh with a new estate.
3. To reduce a debtor's debt.

Objectives of insolvency for corporations:

1. To preserve and maintain the business, or viable portions thereof, where possible.
2. To hold responsible persons personally liable where they abused the business for personal gain.

Objectives of insolvency for both individuals and corporations:

1. To ensure that all unsecured creditors are treated equally, i.e. that they share equally in the proceeds of the debtors' assets in proportion to the debts due to the respective creditors (*pari passu* distribution), except where certain creditors have a priority / security for the claims.
2. To ensure that the debtor and other creditors are treated fairly by secured creditors.
3. To investigate the reasons for insolvency.
4. To set aside voidable and impeachable dispositions where an insolvent debtor improperly disposed of assets.

There is some scope to elaborate

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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.

In a cross-border context there is a risk of multiple insolvency proceedings against one debtor, which proceedings can compete or can be incompatible due to differences in the insolvency laws, policies and cross-border insolvency rules that are applicable.

It is difficult in a cross-border context to reconcile how various jurisdictions approach insolvency and specifically how the term "insolvency" is defined in various jurisdictions. In most instances, for example, "insolvency" will mean the value of the liabilities of a debtor exceeds the value of his assets, therefore factual insolvency. Insolvency can however also mean that the value of a debtor's assets may exceed the value of liabilities, but he is unable to pay his debts since he does not have the necessary cashflow to pay same, therefore commercial insolvency. Not only should the term "insolvency" be defined, but "insolvency proceedings" should also be properly defined, as various, and in most instances, differing systems are used worldwide to collect outstanding debts and to deal with non-payment of debts.

A further difficulty arises due to a conflict of laws across jurisdictions and differences in domestic norms, as different jurisdictions view the interests and priorities of creditors in recovering their claims differently. Some systems are pro-creditor, where other systems are pro-debtor. Therefore, where there are creditors across jurisdictions, a conflict of laws will arise, as each jurisdiction has other means of protecting their creditors' interest.

Cross-border insolvencies are further complicated because not only procedural law, but also substantive law, in private and public law, influences these procedures.

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

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.

To address issues and problems arising from cross-border insolvencies, various cross-border insolvency agreements have been adopted.

UNCITRAL Model Law on Cross-Border Insolvency ("MLCBI"), if adopted as drafted, mandates co-operation and communication between courts and representatives in different jurisdictions. In terms of Articles 25 and 26 of MLCBI Courts can approve or implement agreements concerning the coordination of cross-border insolvency proceedings.

The use of cross-border insolvency agreements is promoted by various institutions, including:

1. UNICTRAL in their Practice Guide on Cross-border Insolvency Agreements.
2. The ALI NAFTA Guidelines Applicable to Court-to Court Communication in Cross-Border Cases as published in 2000 by the American Law Institute ("ALI") and the International Insolvency Institute ("III").
3. The Global Guidelines Applicable to Court-to Court Communication in Cross-Border Cases as published in 2012 by ALI and III.
4. The Guideline for Communication and Cooperation between Courts in Cross-order Insolvency Matters as published in 2016 by the Judicial Insolvency Network ("JIN").

It is my submission that the abovementioned guidelines and protocols that make provision for cross-border insolvency agreements will promote harmonisation of domestic insolvency laws and certainly assist in addressing international insolvency issues, especially across the 23 countries that have adopted the UNCITRAL Model Law on Cross-Border Insolvencies. The impact, however, may be reduced, as various jurisdictions still adopt and implement different guidelines and protocols. Therefore, different procedures will for example have to be followed to have a liquidation or sequestration order and the appointment of liquidators or trustees recognised in foreign jurisdictions to enable them to collect assets in these foreign jurisdictions and to take collection steps against debtors of the estate. In certain jurisdictions for example, once the order and appointment has been recognised, secondary or separate insolvency proceedings will be initiated in the foreign jurisdiction and a foreign liquidator or trustee will be appointed, unless an application for recognition of the liquidation is launched without a separate liquidation process. In other jurisdictions, no secondary insolvency proceedings are initiated, and the domestic liquidator or trustee can undertake the collection proceedings. This complicates collection steps where various differing foreign legal systems are applicable.

While adoption of the MLCBI may harmonise various domestic insolvency laws in so far as they address international insolvency issues, the question addresses more broadly the harmonisation of domestic insolvency laws in general.

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.

To fully respond to this question, confirmation is required as to when the contract was entered into between Apex and Nadir - was it entered into prior to Nadir moving its head office to Utopia or after.

As the UNCITRAL Model Law on Cross-border Insolvency was adopted by Utopia without modification:

1. The liquidator will have to apply for recognition of the foreign winding-up order by the Courts in Utopia before he can take any steps to stop the court action against Nadir in Utopia.
2. The liquidator may, in his abovementioned application for recognition, request the Court in Utopia to grant provisional relief pending the adjudication of the application for recognition. Such provisional relief include staying the execution against the debtor's assets.
3. If the contract was entered into prior to Nadir moving its head office to Utopia, its head office was in Erewhon at the time of contracting and therefore Erewhon will be the State where Nadir had the centre of its main interests. If the foreign winding-up is therefore recognised in Utopia as a foreign main proceeding, the continuation of the court

proceedings issued by Apex will be stayed once the liquidator's application for recognition of the foreign winding-up is granted by the Utopian Courts.

4. If the contract was entered into after Nadir moved its head office to Utopia, its head office was in Utopia at the time of contracting and therefore Utopia will be the State where Nadir had the centre of its main interests. The foreign winding-up will therefore be recognised as a foreign non-main proceeding and the continuation of the court proceedings will not automatically be stayed. The liquidator may then, once the foreign winding-up is recognised by the Courts in Utopia, request the Utopian Court to grant any appropriate relief, including staying the continuation of individual actions or proceedings concerning the debtor's assets.
5. Once the foreign winding-up is recognised in Utopia, the liquidator may then, provided that the requirements of the law of Utopia are met, intervene in the proceedings brought by Apex.

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Question 4.2 [maximum 2 marks]

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

- (a) Apex had filed proceedings to wind-up Nadir, but the matter had not yet been heard.
 - (b) Apex had obtained a court order to wind-up Nadir in Utopia prior to the Erewhon winding-up order.
- (a) No
 - (b) Yes, provisions relating to concurrent proceedings will be applicable.

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

Reference to the MLCBI provisions on concurrent insolvency proceedings, Article 29, would be beneficial

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Question 4.3 [maximum 8 marks]

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

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

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

laws or international instruments apply to assist the insolvency representative address these four issues?

Company's country of incorporation: South Africa

As the company was incorporated in South Africa, but has assets, liabilities and directors across jurisdictions, the following key international insolvency issues will be faced:

1. In which jurisdiction may insolvency (or other) proceedings be opened?

In terms of the Companies Act, Act 61 of 1973, a South African Court shall have jurisdiction in legal proceedings within the area of the jurisdiction where the company has its registered head office, or where the company's main place of business is situated. Therefore, the South African Courts will have jurisdiction in legal proceedings against this company.

2. Recognition of the foreign insolvency proceedings and of a foreign representative.

Once a winding-up order is granted by the South African Courts and a South African Liquidator is appointed by the Master of the High Court in South Africa, the South African liquidator will have to launch an application for recognition of the South African winding-up order and his appointment in every foreign jurisdiction where the company holds any assets to enable him to collect these assets for the benefit of the general body of creditors. In most of the foreign jurisdictions the UNCITRAL Model Law on Cross-border Insolvency will assist in this procedure.

3. What country's law should be applied in respect of the various aspects of the case, for example the collection of debts of the company?

This will depend on the foreign jurisdiction where the assets or debtors are situated. In some foreign jurisdictions the liquidator will be able to collect the assets and debts by applying the South African law, however in other jurisdictions the law of that jurisdiction will have to be applied. In most of the foreign jurisdictions the UNCITRAL Model Law on Cross-border Insolvency will assist in this procedure.

4. Executory contracts

This will depend on the foreign jurisdiction where the contract was entered into. Most jurisdictions' insolvency systems allow the liquidator to deal with uncompleted contracts and the liquidator will be able to decide if he will abide by the contract or not. He will only abide if it is to the benefit of the estate and the general body of creditors. In most jurisdictions contracts of employment are suspended at the commencement of the liquidation and therefore the directors and employees residing in foreign jurisdictions will be suspended. A Liquidator may also agree to the continued employment of the employees or transfer the contracts of employment if the business is sold as a going concern. If neither of the abovementioned options are taken, the liquidator may terminate their employment. In most of the foreign jurisdictions the UNCITRAL Model Law on Cross-border Insolvency will assist in this procedure.

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.

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Marks awarded 11 out of 15

*** End of Assessment ***

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

TOTAL MARKS AWARDED 39.5/50