



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 2023.*

## 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 2023. The assessment submission portal will close at 23:00 (11 pm) BST (GMT +1) on 15 October 2023. No submissions can be made after the portal has closed and no further uploading of documents will be allowed, no matter the circumstances.**

- 7. Prior to being populated with your answers, this assessment consists of 10 pages.**

**ANSWER ALL THE QUESTIONS**

QUESTION 1 (multiple-choice questions) [10 marks in total]

**Questions 1.1. - 1.10. are multiple-choice questions designed to assess your ability to think critically about the subject. Please read each question carefully before reading the answer options. Be aware that some questions may seem to have more than one right answer, but you are to look for the one that makes the most sense and is the most correct. When you have a clear idea of the question, find your answer and **mark your selection on the answer sheet by highlighting the relevant paragraph in yellow.** Select only ONE answer. Candidates who select more than one answer will receive no mark for that specific question.**

Question 1.1

***It should be relatively easy to develop a single system to deal with cross-border insolvency since all jurisdictions have more or less the same local insolvency law rules.***

- (a) This statement is true since all countries have implemented the UNCITRAL Model Law on Cross-Border Insolvency.***
- (b) This statement is untrue since there are huge differences in both the approach and insolvency legislation of various jurisdictions.***
- (c) This statement is true since all systems have at least the same general insolvency concepts.***
- (d) The statement is true since the historical roots of all insolvency systems are the same.***

Question 1.2

***The Statute of Ann, 1705 was a very important piece of legislation for the development of English insolvency law.***

- (a) This statement is true since this Act introduced imprisonment of debt.***
- (b) This statement is untrue because it dealt with the distributions of the proceeds derived from the proceeds of selling the assets of the estate.***
- (c) This statement is true since it introduced the notion of discharge.***
- (d) This statement is true since it introduced fraudulent conveyances into English law.***

Question 1.3

***The purpose of the UNCITRAL Legislative Guide (2004) has direct application in all the member States of the UN.***

- (a) This statement is true because UNCITRAL's model legislative guidelines apply automatically to all member States.***
- (b) This statement is true because all member States supported its automatic implementation in their respective jurisdictions.***
- (c) This statement is untrue because the Legislative Guide serves merely as soft law and contains best practice to be considered when countries revise their own insolvency legislation.***
- (d) This statement is untrue since the Legislative Guide is only available for use by developing countries when reforming their own insolvency laws.***

Question 1.4

***Modern rescue proceedings have replaced liquidation as an insolvency procedure in most systems.***

- (a) This statement is true since business rescue is important for socio-economic reasons.***
- (b) This statement is true because liquidation is viewed as a medieval and outdated process.***
- (c) This statement is untrue since there is still a need for both liquidation and rescue procedures in insolvency systems.***
- (d) This statement is untrue since some systems have no formal rescue procedure.***

Question 1.5

***The principles and requirements for avoidable dispositions and executory contracts are the same in all jurisdictions - hence these do not pose problems in a cross-border insolvency matter.***

- (a) The statement is untrue, the requirements and principles do differ and pose problems in a cross-border case.***

**(b) This statement is untrue because the insolvency laws of the State where the original insolvency order is issued will apply to all the other States involved in the matter.**

**(c) This statement is untrue since avoidable dispositions and executory contracts do not pose any problems in a cross-border case.**

**(d) The statement is untrue since avoidable dispositions and executory contracts may be disregarded in a cross-border case.**

#### Question 1.6

**The domestic corporate insolvency statute of a country makes no mention of the possibility of a foreign element in a liquidation commenced locally. The country has ratified a regional treaty on insolvency proceedings that contain provisions on concurrent insolvency proceedings over the same debtor in a neighbouring treaty state.**

**In a local liquidation commenced under the domestic corporate insolvency statute, to what law can the local court refer in order to resolve an international law issue that has arisen because of concurrent insolvency proceedings in the neighbouring state?**

**(a) Public International Law.**

**(b) UNCITRAL Legislative Guide on Insolvency Law.**

**(c) World Bank Principles for Effective Insolvency and Creditor Rights Systems.**

**(d) Private International Law.**

#### Question 1.7

**Which one of the following documents mandates co-operation or communication between courts in concurrent insolvency proceedings on the same debtor, which are being conducted in different nation states?**

**(a) ALI / III Global Guidelines Applicable to Court-to-Court Communication in Cross-Border Cases (2012).**

**(b) EU Cross-Border Insolvency Court-to-Court Communications Guidelines (2014).**

**(c) UNCITRAL Model Law on Cross-border Insolvency (1997).**

**(d) JIN Guidelines for Communication and Cooperation between Courts in Cross-Border Insolvency Matters (2016).**

Question 1.8

**Latin and Middle America states have ratified various multilateral conventions and treaties that address international insolvency issues. While they promote unity of proceedings in the treaty states where a debtor has a single commercial domicile, they acknowledge the possibility of concurrent proceedings.**

**Which of the following conventions and treaties does not provide for judicial co-operation where there are surplus funds remaining in a proceeding in one treaty state and there are concurrent insolvency proceedings over the same debtor in another treaty state?**

**(a) Montevideo Treaty on International Commercial Law (1889).**

**(b) Montevideo Treaty on International Commercial Terrestrial Law (1940).**

**(c) Montevideo Treaty on International Procedural Law (1940).**

**(d) Havana Convention on Private International Law (1928).**

Question 1.9

**The Council Regulation on Insolvency Proceedings (European Insolvency Regulation) (2000), which applies in all European Union member states except Denmark, was reviewed after a decade's operation. An amended European Insolvency Regulation (EIR) Recast (2015) was adopted in 2015 and took effect in June 2017.**

**Which of the following aspects of international insolvency is not addressed in the EIR Recast?**

**(a) Proceedings to restructure a debtor that is facing the likelihood of insolvency.**

**(b) Definition of "centre of the debtor's main interests".**

**(c) A centralised insolvency register of insolvency proceedings opened in member states.**

**(d) Co-operation and co-ordination provisions applicable to corporate groups.**

Question 1.10

**An unsecured Creditor is owed monies by the Debtor for services it supplied locally. It has issued proceedings to recover the debt in the local Court. The Debtor has moved its registration and head office to the local country from its original place of incorporation in a foreign country. The Creditor is incorporated and has its head office in that foreign country. The contract to supply, which was created by exchange of emails sent between the head offices, denominates the debt in the currency of the foreign country. The Debtor is being wound-up in the foreign country and the foreign liquidator seeks recognition and a stay in the local Court proceedings. What aspect is an international insolvency issue?**

**(a) The local Court's jurisdiction over the Debtor.**

**(b) The standing of the foreign Creditor to sue for its debt in the local Court.**

**(c) The foreign liquidator's standing to request a stay of the local proceedings.**

**(d) The fact that the debt owed to the Creditor is in a foreign currency.**

Marks awarded: 7 out of 10

QUESTION 2 (direct questions) [10 marks]

Question 2.1 [maximum 2 marks]

**Explain what the term "international insolvency law" means.**

*A set of rules which apply to insolvency proceedings but cannot be enforced in full without consideration to the cross-border issues and other international aspects of the case.*

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

1

Question 2.2 [maximum 5 marks]

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

*A universalistic approach to cross-border insolvency allows for more than one proceeding, in different jurisdictions, to be managed by a singular set of insolvency*



*rules whereas the concept of territoriality depicts that an insolvency proceeding is governed by the rules of the jurisdiction where the insolvency proceeding has been opened.*

*Universality uses concepts such as where the debtor has its centre of main interest (COMI) to determine which proceeding will be the 'main proceeding' and regulate the matter. Whereas territoriality can lead to plurality of insolvency proceedings involving more than one state in the matter.*

*The development of 'modified' universalism has emerged in many states. This is because many jurisdictions have not adopted universality in full and lean towards territoriality. 'Modified' universalism is when the 'main proceeding' is supported by secondary proceedings in other jurisdictions allowing the different courts to co-operate with each other.*

*When assets are located in more than one jurisdiction, collaboration between the courts takes place to resolve cross-border insolvency issues however rules of the respective jurisdictions still apply. This collaboration leads to co-operative territorialism.*

*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.*

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.***

*A comparative survey of insolvency systems in the Middle East was launched in 2009. The purpose of the survey was to compare the respective insolvency systems against the World Bank's Principles for Effective Insolvency and Credit Rights Systems to indicate best practice that should be adopted when dealing with insolvency matters. what impact did this have on reforming domestic insolvency laws or addressing international insolvency issues in the Middle East?*

*In 2018, Saudi Arabia reformed its domestic insolvency laws by approving a new bankruptcy law aimed at attracting foreign direct investment. The new legislation include general regulations, preventive actions, measures for financial restructuring, and settlement procedures. The introduction of new domestic insolvency laws helped to better deal with corporate insolvencies as previously Saudi Arabia had no single bankruptcy law which set out procedures for businesses experiencing financial distress.*

*In 2018, Bahrain adopted the UNCITRAL Model Law on Cross-Border Insolvency enabling improvements in dealing with international insolvency matters.*

**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.**

*In some insolvency systems, for example Australia, the term insolvency is often used to describe the financial distress of corporations whereas when individuals experience an insolvent state the term bankruptcy is often used.*

*One key objective of the insolvency of individuals is to protect the insolvent debtor from harassment by their creditors. This is because the insolvency practitioner who is appointed must deal with creditors rather than the bankrupt individual having to deal with creditors directly. This links to a further objective of the insolvency which is to reduce the levels of debt due to creditors by making contributions into the insolvent estate from present and future income.*

*In addition to this, the insolvency of an individual enables them to make a fresh start, particularly when they are not the blame or when the insolvency is caused by the individual's actions i.e. through fraud.*

*Whereas, in a corporate insolvency one objective is to preserve the business in anyway possible, especially where it is in the public interest.*

*Insolvency practitioners also have the powers available to impose personal liability of responsible persons, such as directors, should they have committed any wrongdoing.*

*In both individual and corporate insolvencies, the general rule of pari passu i.e. all creditors rank equally (without consideration to priority claims) applies. This ensures that creditors are dealt with fairly and without prejudice. The insolvency practitioner is responsible for investigating reasons for failure in order to determine whether there are any specific responsible persons that caused the insolvency. This also includes reclaim voidable positions where assets were improperly dealt with to improve the outcome for creditors.*

*There is scope to elaborate, for example with respect exempt property*

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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.**

*One overarching issue in dealing with cross-border insolvency matters is finding a common insolvency language and terminology used. The term 'insolvency' generally refers to a situation where outstanding liabilities exceeds the value of assets however the inability to service short term debts, which causes issues with liquidity, can also be the reason that insolvency proceedings are commenced. This may result in insolvency proceedings not being recognised in a second jurisdiction or concurrent proceedings not being commenced due to the difference in definition of insolvency and on what basis proceedings are commenced.*

*In certain scenarios, laws of the different jurisdictions involved in an international insolvency may conflict. Therefore, this creates problems for insolvency practitioners to be able administer proceedings and carry out duties due to the conflict of law with a different jurisdiction. The conflict of law creates a lack of harmony in insolvency proceedings, for example security, set-off and netting arrangements may differ between jurisdictions and ultimately this may impact how creditors are treated. The conflict of laws creates a barrier to harmonisation in insolvency proceedings and is preventative when it comes to dealing with international insolvency issues.*

*The absence of an international insolvency law creates a certain level of uncertainty when dealing with cross-border insolvency matters as, in some scenarios, insolvency practitioners will be required to obtain recognition of insolvency proceedings in a foreign jurisdiction. This creates issues in dealing with cross-border insolvency matters if the recognition of insolvency proceedings is not obtained.*

*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 21<sup>st</sup> 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 2009, UNCITRAL commissioned a text titled 'Practice Guide on Cross-Border Insolvency Cooperation to promote harmonisation of domestic insolvency laws and provides information for practitioners and judges on practical aspects of cooperation and communication in cross-border insolvency cases. The text provides guidelines that can be used by courts when communication with other courts and this enables the harmonisation of domestic insolvency laws. UNCITRAL has also been enacted in multiple jurisdictions across the world and therefore its implementation is widespread and aids the development of a universal approach to international insolvency issues. As the framework is not prescriptive but rather illustrates how issues should be resolved, this promotes co-operative between courts and means that the framework can be tailored to meet the specific needs of each case and applicable law.*

*The Judicial Insolvency Network (JIN), which is a 'network of insolvency judges from across the world', provides a forum for judges from jurisdictions across the world to communicate and cooperate on cross-border insolvency matters. The network organises conferences where members attend and discuss guidelines to deal with cross border insolvency matters and promote cooperation. The objective of the network is to improve the efficiency and effectiveness of parallel proceedings in an international insolvency. Guidelines for Cooperation and Communication between Courts were developed by the JIN and have been adopted by courts in some member countries. The development of the JIN has meant that cooperation between courts has increased and therefore lead to harmonisation of domestic laws or at least taking steps in that direction. This is because the network has enabled initiatives to be developed such as the Guidelines and other projects to recognise foreign insolvency proceedings which otherwise may not have taken place.*

*Another mechanism introduced which has facilitated the development of global protocols are the ALI NAFTA Guidelines Applicable to Court-to-Court Communications in Cross-Border Cases which were published in 2001. The guidelines are largely based on examples from cross-border cases that involve insolvency protocols and are intending to be adapted as required to fit the specific circumstances of the case. This enables insolvency practitioners to apply the guidelines to the specific scenario in order to resolve international insolvency issues. However, the guidelines are not intended to alter the domestic insolvency laws of the different jurisdictions and therefore ultimately may not lead to harmonisation of the domestic insolvency laws in cross-border cases.*

Please see the model answer regarding relevant steps. There is scope to consider political pressure, foreign investor pressure and/or loan conditions.

3.5

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.***

***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.**

*As Nadir has moved its head office and registration to Utopia, it is now domiciled in Utopia however as majority of Nadir's trade took place in Erewhon this will be where the company's centre of main interests (COMI) is. The UNCITRAL Model Law on Cross-border Insolvency provides mechanisms to promote cooperation between courts in cross-border insolvencies along with fair and efficient administration of cross-border insolvencies. Therefore, concurrent proceedings can take place in Utopia and Erewhon whilst the respective courts of each jurisdiction communicate and cooperate to administer the proceedings.*

*Under the Cross-Border Insolvency Act of Utopia (the Act), the 'main proceeding' is where the COMI is and therefore the proceedings in Erewhon will be considered the main proceedings in the case of Nadir. As per the Act, upon recognition of the Erewhon proceeding as foreign main proceeding commencement of legal action against the debtor is stayed. Therefore, the court action in Utopia will be stayed as a moratorium is commenced upon the appointment of liquidators in Erewhon.*

*The question requires candidates to apply the relevant MLCBI articles to the facts provided in more detail than that above.*

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) If Apex had filed proceedings to wind-up Nadir, the centre of main interests (COMI) would still be considered as Erewhon and therefore would have no impact on which jurisdiction is the 'main proceeding'. Therefore, concurrent proceedings can take place in Utopia and Erewhon whilst the respective courts of each jurisdiction communicate and cooperate to administer the proceedings. Any*

*further proceedings commenced, e.g. in Utopia, will be 'secondary' or 'ancillary' proceedings. Therefore, the Erewhon liquidator may not need to stop the court action in Utopia as the two liquidators and courts can communicate and cooperate to deal with cross-border issues.*

*As the Model Law has been adopted in Utopia, then any decisions made by the court on cross-border matters will refer to the Model Law and apply the framework. The Model Law provides for co-operation and co-ordination of concurrent proceedings and as Utopia has adopted the Model Law without modification then co-operation and direct communication of the courts of Erewhon and Utopia is authorised. A protocol or agreement can be put in place between the courts of Utopia and Erewhon to facilitate the concurrent proceedings without adversely impacting the position of respective creditors.*

*(b) The timing of the winding-up order has no impact on where the COMI is determined to be. Therefore, the centre of main interests (COMI) would still be considered as Erewhon and therefore would have no impact on which jurisdiction is the 'main proceeding'.*

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

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?***

***Chosen country of incorporation: England***

Issue 1

***One issue which would be encountered with the company having assets in other states is that the insolvency proceedings commenced in England may not be***

*recognised in the states where the assets are located. Therefore, resulting in an inability for the liquidators to exercise their powers to realise the assets and improve the position for creditors.*

*Judges from England are members of the Judicial Insolvency Network and therefore are able to apply the Guidelines for Communication and Cooperation between Courts so that the insolvency practitioner can seek direction from the English courts to exercise their powers in other states where the company has assets located.*

#### Issue 2

*The company also has creditors in other states and therefore the creditors may be ranked differently between the jurisdictions and therefore the distribution waterfall may differ. The company owes monies to the revenue authorities in other states. In the UK, tax owed to the revenue in an insolvency rank in priority to unsecured creditors however the ranking may differ in other jurisdictions.*

*The domestic insolvency laws need to be harmonised. This can involve different states agreeing a uniform approach to choice of law. An example of this is UNCITRAL Legislative Guide on Insolvency Law which includes recommendations of the applicable law to apply in insolvency proceedings. As the proceeding has been commenced in England then the domestic insolvency laws of England and Wales will apply.*

#### Issue 3

*As the company appears to have separate branches in other jurisdictions, there is a question as to whether separate proceedings should be commenced in the alternative jurisdictions. This is a territorialism approach and would address the local interests and creditors.*

*The UNCITRAL Model Law on Cross-Border Insolvency will facilitate co-operation and coordination of concurrent proceedings by authorising direct communication between English courts and foreign courts and the development of agreements between courts to coordinate proceedings.*

#### Issue 4

*Depending on the jurisdictions where the assets are located, there may be various national approaches to insolvency. The insolvency system in England is pro-creditor whereas some insolvency systems of other jurisdictions is pro debtor. Some other systems also place emphasis on protecting local creditors rather than recognising overseas creditors.*

*Again, the domestic insolvency laws need to be harmonised. The UNCITRAL Legislative Guide on Insolvency Law includes recommendations of the applicable law to apply in insolvency proceedings.*

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 10 out of 15

**\* End of Assessment \***

**TOTAL MARKS 35.5/50**

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