



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: 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 may be referred as a branch of law that deals with the resolution of insolvency issues typically involving entities/businesses with assets, loans or interest across foreign jurisdictions. This plays a crucial role especially when the local laws do not provide for the international elements and encourages cooperation and coordination among the different jurisdictions.

2

Question 2.2 [maximum 5 marks]

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

Universality emphasizes on a centralised approach to cross-border insolvency cases by having a single main insolvency proceeding in the home jurisdiction where the debtor's main assets/interests are in and be used to direct the administration of debtor's assets. The creditors, both local and foreign, would collectively have the same opportunity to be part of the proceedings for claims. The aim is to reduce the likelihood of fragmentation and various conflicting insolvency proceedings across the borders.

Territoriality is about insolvency proceedings being commenced in the local jurisdictions where the assets/interests of the debtor are in. Potential conflicts of interest and social considerations among the stakeholders may arise adding on to the challenges from different legal systems and can be costly in terms of the resources and time for resolutions.

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.

- 1. UAE introduced a new bankruptcy law being in effective in 2019 to enhance the UAE's insolvency framework that allow debtors to better address financial distress and restructuring.**
- 2. Saudi Arabia introduced bankruptcy law in 2018 aiming on local insolvency matters which is known as Saudi Bankruptcy Law. This provides mechanisms for financially distressed companies to restructure the debts and attempt to continue viable operations.**
- 3. There is Guld Cooperation Council Insolvency Reforms which was initiated by the GCC member states. The reforms target to harmonize insolvency laws across region, facilitating cross border insolvency proceedings and promote consistent approach.**

3

Marks awarded 8.5 out of 10

QUESTION 3 (essay-type questions) [15 marks in total]

Question 3.1 [maximum 5 marks]

Write a brief note on the differences regarding the objectives of insolvency for individuals and corporations.

	Personal Insolvency	Corporate Insolvency
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Type	For natural person	For corporate entity
Liabilities and implications	The matter concerns with the personal rights and obligations of an individual debtor	The matter concerns with the fiduciary duties and liabilities of the management (i.e. board of directors)
Complexity of considerations	The considerations are more likely to be simpler in comparison to a corporate insolvency.	Corporate matters tend to involve social considerations such as the labour law, employment contracts and the economical dependence
Exit Option	The end target for the individual debtor is to eventually obtain personal discharge.	If the business is viable, the main objective tend to be corporate rescue mechanism to revive/rehabilitate. Otherwise the other option would be to wind up to prioritize on disposing the assets and repaying to the creditors.
Creditor workouts	Certain jurisdictions have setup a centre to help the individuals with formal repayment plans.	A practitioner tends to be involved with the debtor or the affected creditors on a solution according to the formal insolvency procedures.

There are additional relevant issues such as prevention of harassment, fresh start, and exempt property.

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 legal systems, rules, procedures and principles regarding the insolvency are unique for every country. The differences may lead to confusion and uncertainty.

Complexity in determining which country's legal system holds jurisdiction over cross-border insolvency matter. Claims from different countries may compete and result in

legal hearings on deciding where the proceedings should be held. These tend to be time-consuming and adding to legal costs

There is also the recognition concern. An insolvency order issued by a court in one country may not be recognised in another jurisdiction. The consistent framework for recognition and enforcement would help this and making the process more efficient.

The qualifications and responsibilities of insolvency practitioners may differ from each other in every jurisdiction. This may result in disagreements on the appointment and duties of practitioners in cross-border proceedings.

Regulatory reporting obligations and requirements may differ among the countries. This complicates the sharing of information and increase compliance cost.

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.

One of the apparent ones was UNCITRAL which has come up with various framework, guidance and recommendations such as:

- **UNCITRAL Model Law on Cross-Border Insolvency in 1997 on recognition and enforcement of foreign insolvency proceedings;**
- **UNCITRAL Legislative Guide on Insolvency Law in 2005 on modernizing States' domestic insolvency laws by promoting best practices;**
- **UNCITRAL Work on Enterprise Group Insolvency exploring the challenges in a cross-border context.**

The impact shows itself when UNCITRAL was originally composed of 29 States and expanded to 70 members in 2022 from assisting to build the foundation and understanding of the subject, challenges and promoting discussions and concessions. These would help streamline and enforce a more efficient process which in turns reducing the legal cost and time for the affected stakeholders to finally gain assurance and a more fair and reasonable judgements/outcomes.

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. See the 'model' answer on this sub-question.

3.5

Marks awarded 10.5 out of 15

QUESTION 4 (fact-based application-type question) [15 marks in total]

Nadir Pty Ltd (Nadir) is a company registered in Utopia. Originally it was incorporated in the neighbouring country of Erewhon before moving its registration and head office to Utopia one month ago. Apex Pty Ltd (Apex) is incorporated and has its head office in Erewhon. Apex and Nadir enter into a contract by exchange of emails between their head offices for Apex to supply goods to Nadir in Utopia. Nadir has failed to pay for the goods which have been delivered in accordance with the contract. Apex issues court proceedings against Nadir in Utopia for monies owing for the goods sold and delivered.

Meanwhile, Nadir also owes monies to creditors in Erewhon. One Erewhon creditor obtains a court winding-up order against Nadir in Erewhon and a liquidator is also appointed by that court.

If you require additional information to answer the questions that follow, briefly state what information it is you require and why it is relevant.

Question 4.1 [maximum 5 marks]

Assume the UNCITRAL Model Law on Cross-border Insolvency has been adopted by Utopia without modification, except as required to domesticate it. For example, the Cross-border Insolvency Act of Utopia names its local laws relating to insolvency and its competent court under the Act. The Erewhon liquidator's investigations detect that Apex is suing Nadir in Utopia. The liquidator would like to stop Apex court action against Nadir in Utopia. Advise the Erewhon liquidator on the potential relevance of the Cross-border Insolvency Act of Utopia.

As the Act of Utopia adopted the UNCITRAL Model Law, the Utopian court may recognise the Erewhon liquidator's appointment and actions.

The Act may grant the Utopian court the authority to issue a stay or discontinuation order for local proceedings that may affect the rights or interests of a foreign insolvency representative. Erewhon liquidator may request the Utopian court to issue a stay order to halt Apex's court action against Nadir in Utopia as it could interfere with the collection and distribution of assets.

The Act encourages cooperation and communication between courts and insolvency representatives in different countries. The Erewhon liquidator can use the framework to engage with the Utopian court and Utopian insolvency representative by initiating contact and clearly state the objectives and concerns to the Apex court action. Then request the Utopian court to consider issuing a stay or discontinuation order to temporarily halt the Utopian proceedings and facilitate the coordination of actions between jurisdictions in

addition to providing any necessary documentation or evidence to support the request.

The MLCBI is significant for its 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.

Utopian court may also decide the extent to which the cross-border insolvency act of Utopia can be applied to address the Erewhon liquidator's concerns regarding the Apex court action in Utopia.

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) The Erewhon liquidator can consider taking active initiatives to engage with the Utopian court and the Utopian insolvency representative to address concerns about the ongoing parallel winding-up proceedings. The Erewhon liquidator also can request a stay or discontinuation order to prevent any further progress in the Utopian proceedings until the Utopian court has considered the cross-border insolvency implications.

(b) The Erewhon liquidator may face challenges in stopping or reversing the Utopian winding-up order, particularly if the Utopian court has already granted it. However, the Erewhon liquidator may also continue to take initiatives on coordinating with the Utopian insolvency representative and the Utopian court to ensure that the interests of Erewhon creditors are taken into account, especially in the distribution of assets and any subsequent actions.

The MLCBI is significant for its provisions on concurrent insolvency proceedings in 4.2. See article 29.

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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?

In the case of Malaysia, the key international insolvency issues are as follow:

1. Multiple proceedings with recognition and coordination

The company operating in various states would potentially face insolvency proceedings in those jurisdictions. Coordination of these proceedings and recognition of the insolvency proceedings in Malaysia being recognised in other states are crucial.

Unfortunately Malaysia may not have the specific laws, the practice commonly takes the case references from jurisdictions with similar law development such as Singapore. International frameworks such as UNCITRAL Model Law on Cross-Border Insolvency may also be considered for cooperation and recognition of foreign insolvency proceedings.

2. Treatment of international creditors including taxation/revenue Authorities:

Various stakeholders such as above from different countries may have claims against the debtor. Challenge lays in determining the treatment of these creditors and managing complex cross-border tax claims.

Malaysia has Double Taxation Agreements with various countries and these may help address cross-border taxation matters. As for the treatment of creditors, Companies Act 2016 and Winding Up Rules 1972 address the matter including preferential payments, floating charges, power to compromise of make arrangement with creditors and proof and ranking of claims etc.

3. Protecting and realizing international assets:

There is challenge in trying to maximize the realization of assets while complying with local laws and international obligations.

For managing and realizing assets, the Companies Act 2016 and Winding Up Rules 1972 contains provisions & procedures including appointment of liquidators, investigation and recovery of assets and liquidation and

distribution of assets. International treaties and conventions (such as the Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters) may be relevant for recognizing and enforcing judgments related to international assets.

4. Directors and creditors across multiple states:

Coordinating with and addressing the concerns of these stakeholders across borders can be a complex task.

The Companies Act 2016 consists of the duties and liabilities of directors. For coordination with directors and creditors in other states, the UNCITRAL Model Law and principles of comity may guide interactions and proceedings.

8

Marks awarded 12 out of 15

* End of Assessment *

TOTAL MARKS 39/50

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