INSOL INTERNATIONAL
FOUNDATION CERTIFICATE
IN INTERNATIONAL INSOLVENCY LAW

FORMATIVE ASSESSMENT: MODULE 1

INTRODUCTION TO INTERNATIONAL INSOLVENCY LAW

This is a **formative assessment** relating to **Module 1** and is designed to provide candidates on the Foundation Certificate course with some direction and guidance as to the form and content of assessments on the course as a whole. The submission of this assessment is **not compulsory** and the mark awarded will not count towards the final mark for Module 1 or the course as a whole. However, students are encouraged to submit this assessment as part of their orientation for the submission of the formal (summative) assessments for all the modules on the course.

The Marking Guide for this assessment will be made available on the Course Administration page of the course web pages after the submission date on 15 October 2021.

INSTRUCTIONS FOR COMPLETION AND SUBMISSION OF ASSESSMENT

Please read the following instructions very carefully before submitting / uploading your assessment on the Foundation Certificate web pages.

1. You must use this document for the answering of the assessment for this module. The answers to each question must be completed using this document with the answers populated under each question.

2. All assessments must be submitted electronically in MS Word format, using a standard A4 size page and a 11-point Arial font. This document has been set up with these parameters – **please do not change the document settings in any way**. **DO NOT** submit your assessment in PDF format as it will be returned to you unmarked.

3. No limit has been set for the length of your answers to the questions. However, please be guided by the mark allocation for each question. More often than not, one fact / statement will earn one mark (unless it is obvious from the question that this is not the case).

4. You must save this document using the following format: **[studentID.assessment1formative.]**. An example would be something along the following lines: 202122-514.assessment1formative. **Please also include the filename as a footer to each page of the assessment** (this has been pre-populated for you, merely replace the words "studentID" with the student number allocated to you). Do not include your name or any other identifying words in your file name. **Assessments that do not comply with this instruction will be returned to candidates unmarked**.

5. Before you will be allowed to upload / submit your assessment via the portal on the Foundation Certificate web pages, you will be required to confirm / certify that you are the person who completed the assessment and that the work submitted is your own, original work. Please see the part of the Course Handbook that deals with plagiarism and dishonesty in the submission of assessments. **Please note that copying and pasting from the Guidance Text into your answer is prohibited and constitutes plagiarism. You must write the answers to the questions in your own words**.

6. The final submission date for this assessment is **15 October 2021**. The assessment submission portal will close at **23:00 (11 pm) BST (GMT +1) on 15 October 2021**. No submissions can be made after the portal has closed and no further uploading of documents will be allowed, no matter the circumstances.

7. Prior to being populated with your answers, this assessment consists of **9 pages**.

ANSWER ALL THE QUESTIONS

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

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

Question 1.1

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

(a) This statement is true since all countries have implemented the UNCITRAL Model Law on Cross-Border Insolvency.

(b) This statement is untrue since there are huge differences in both the approach and insolvency legislation of various jurisdictions.

(c) This statement is true since all systems have at least the same general insolvency concepts.

(d) The statement is true since the historical roots of all insolvency systems are the same.

Question 1.2

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

(a) This statement is true since this Act introduced imprisonment of debt.

(b) This statement is untrue because it dealt with the distributions of the proceeds derived from the proceeds of selling the assets of the estate.

(c) This statement is true since it introduced the notion of discharge.

(d) This statement is true since it introduced fraudulent conveyances into English law.

Question 1.3

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

(a) This statement is true because UNCITRAL's model legislative guidelines apply automatically to all member States.

(b) This statement is true because all member States supported its automatic implementation in their respective jurisdictions.

(c) This statement is untrue because the Legislative Guide serves merely as soft law and contains best practice to be considered when countries revise their own insolvency legislation.

(d) This statement is untrue since the Legislative Guide is only available for use by developing countries when reforming their own insolvency laws.

Question 1.4

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

(a) This statement is true since business rescue is important for socio-economic reasons.

(b) This statement is true because liquidation is viewed as a medieval and outdated process.

(c) This statement is untrue since there is still a need for both liquidation and rescue procedures in insolvency systems.

(d) This statement is untrue since some systems have no formal rescue procedure.

Question 1.5

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

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

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

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

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

Question 1.6

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

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

(a) Public International Law.

(b) UNCITRAL Legislative Guide on Insolvency Law.

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

(d) Private International Law.

Question 1.7

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

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

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

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

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

Question 1.8

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

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

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

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

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

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

Question 1.9

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

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

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

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

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

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

Question 1.10

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

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

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

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

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

Mark 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" applies to insolvency proceedings in which there are international elements that make the laws of a single state insufficient to regulate the insolvency proceedings.

This may occur, for example, when the debtor has assets in more than one state, or when the debtor has creditors in different states.

Thus, international insolvency law is the set of rules that regulate such situations, in order to define how these insolvencies should be dealt with.

2

Question 2.2 [maximum 5 marks]

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

The concept of universalism is based on the idea that there should be a single insolvency proceeding governing all of the debtor's assets and debts. This means that if there is only one proceeding, it is not possible to initiate insolvency proceedings in other jurisdictions.

Jurisdictions that take this idea choose the state where the proceeding will be opened under the concept of "center of main interests". Universalism is supported because it is considered to allow more equity among creditors, as they are all governed by the same laws.

Territorialism is based on the idea that different insolvency proceedings can be opened in different states. Under this concept of territorialism it is important to apply the principles of cooperation.

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

4

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. United Arab Emirates amended its insolvency law in 2016 and 2019.
2. Saudi Arabia amended its insolvency law in 2018 and Dubai in 2019.
3. Dubai amended its insolvency law in 2019.

More detail would have improved the mark awarded for this sub-question. How were the laws amended?

2.5

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.

As indicated by Sealy and Hooley, the objectives of insolvency for individuals and companies are different for the following reasons.

For individuals, the objectives are to protect the debtor from creditor harassment; to enable the debtor to make a fresh start; to reduce indebtedness by making contributions of present and future income to the estate. In turn, the objectives of an insolvency process for companies are to preserve the company as a viable enterprise; and to impose sanctions on the administrators or shareholders when their powers have been abused.

This answer displays a satisfactory understanding of the issues. To improve your responses, ensure they are commensurate with the mark allocation – while Q 3.1 asks for a brief note, it is for 5 marks.

3.5

Question 3.2 [maximum 5 marks]

Write a brief note on the difficulties that may be encountered when dealing with insolvency law in a cross-border context relating to pertinent differences in the relevant systems.

Insolvency processes generate difficulties because different States have different internal and external laws and insolvency policies, both domestic and foreign, and difficulties arise because of differences in the different systems, namely:

1) In pro-creditor systems the granting of debt relief to debtors is limited. on the other hand, if they are pro-debtor States usually grant debt relief to debtors are more conservative.

2) Civil law systems are governed by written rules that vary less frequently. On the other hand, the common law system is usually considered more dynamic, as it is often updated by judicial decisions. Such decisions may fill legislative gaps.

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.

During the 21st century, some attempts have been made to harmonize national insolvency regimes. Among these attempts, since 2000, the World Bank has developed guidelines on insolvency regulation, through which it has implemented "Principles". **It would be beneficial to discuss other steps as well.**

These principles have been modified several times between 2005 and 2015. In the year 2021, a last revision of these principles was made, and certain important principles were included

such as: i) non-discrimination between foreign and domestic creditors; ii) representatives of foreigners to have access to the courts, among others.

These measures are of great importance with respect to i) the growth of the countries, ii) access to credit and iii) the value at which credits are offered.

This is because if banks, or creditors, consider that there are insolvency rules that are effective and that allow for the orderly execution of the debtor's assets or a good restructuring of its obligations, they will be able to grant loans more easily. Likewise, if these principles are complied with and the debt is well managed, credit can be granted at much lower and more accessible interest rates for debtors. This, in turn, allows the growth of emerging countries, since the more money that is in circulation, the more investment and regional activation of the economy increases.

4.5
Marks awarded 11.5 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.

Erewhon's liquidator should be aware that there is another insolvency proceeding being conducted against the same debtor in another jurisdiction (Utopia). In Utopia
is governed by the Cross Border Insolvency Act which allows the local court and the Utopia liquidator to cooperate and communicate with Erewhon.

This allows the Erewhon liquidator to request the Utopia liquidator to cooperate in the conduct of the insolvency proceedings being conducted in Erewhon. It will also allow him to request a more fluid communication between the Utopia and Erewhon courts conducting the insolvency proceedings.

In any case, the Erewhon liquidator must take into account that the Utopia Insolvency Law allows for two parallel insolvency proceedings. Therefore, both the Utopia and Erewhon insolvency proceedings may continue at the same time, under the principles of cooperation

and communication. This is all the more so since Utopia's insolvency law does not require reciprocity.

Finally, the liquidator should bear in mind that the exercise of the principles of reciprocity and cooperation maximize the value of the debtor's estate, harmonize procedures and facilitate a cross-border agreement between Erewhon and Utopia creditors. In this regard, there are successful precedents of international insolvencies, such as the case of Maxwell Communication Corporation plc, which based on the cooperation and communication between the different states in which the insolvency proceedings were being carried out, a successful restructuring agreement was reached.

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

3

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.

In the first case, I consider that there would be a difference. This is because, as the liquidation process has not yet begun on Nadir, it cannot be considered that there is a concurrent insolvency process with that of Erewhon. This situation would prevent the application of Utopia's insolvency law. And therefore, the only insolvency proceeding that would exist would be the one advanced in Erewhon.

In the second case, the only existing insolvency process would be the one in Utopia, until the one in Erewhon is initiated. Once the Erewhon process is initiated, it would be possible to request cooperation between the courts and/or liquidators.

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

.5

Question 4.3 [maximum 8 marks]

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

A court has ordered the commencement of an insolvency proceeding against a corporate debtor in the State of its incorporation and head office. The company has operated business in a number of States and has assets (real property or interest in land, other tangible assets 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?

1. What criteria should be used to determine the law? Colombia being a Civil Law country, which is governed by written laws, the Colombian insolvency law - Law 1116 - which is based on the UNICTRAL model, should be taken into account.

2. What are the most important effects of the initiation of an insolvency process in Colombia? In order to solve this question, Law 1116 and the decrees issued on the occasion of COVID 19 must be taken into account, which only establish: automatic stay, duties and limitaciones of th consumer debtor, executory contracts, discharge, etc.

3. Is the international insolvency process governed under the territoriality or universality criterion?:

Colombian insolvency law allows parallel agreements as main and non-main agreements. The main insolvency proceeding will be determined according to the main center of interests, so that insolvency proceedings originating in different States will be processed under the provisions of a single insolvency law.

In the turn, there is also the possibility of concurrent insolvency proceedings, in which the principles of cooperation and communication will prevail.

This also leads to the conclusion that Colombia has adopted the "Modified Universalism" model.

4. Does the jurisdiction where the other assets and operations are located have any application? Colombia ratified the Montevideo Convention of 1889, however it did not ratify the Montevideo Treaty on International Commercial Law of 1940. Therefore, it will be important to review in which countries the company has operated and where it has assets. In order to determine if any of these other countries are also part of the 1889 Convention. If so, Title VIII on bankruptcy should be applied.

For an approach more closely applied to the facts, see the 'Model' Answer for four key international insolvency issues raised by the facts and facing the insolvency representative in this scenario. Then apply the current Columbian laws on CBI to such issues.

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

*** End of Assessment ***