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**.

Commented [DB1]: You entered your student ID incorrectly. Please be more careful – your student ID is 202122-348 not 248!

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.

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.

The term "international insolvency law", according to Wessels[1], refers to a body of rules concerning certain insolvency proceedings or measures, 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.

This is an authoritative quote. The answer would be improved if it also included information in your own words to indicate your personal understanding of the explanation also.

1.5

Question 2.2 [maximum 5 marks]

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

Universality or universalism is the concept that there should be a unitary principal insolvency proceeding in a debtor's "home" country, which collects, administers and distributes that debtor's assets worldwide and receives worldwide recognition.[2] This would usually entail one forum having jurisdiction, but is compatible with the existence of separate insolvency proceedings in jurisdictions where the debtor's assets happen

[1] B Wessels, *International Insolvency Law*, (Kluwer Law International, 2006)

[2] Gerard McCormack, *Universalism in Insolvency Proceedings and the Common Law*, (Oxford Journal of Legal Studies, 1 June 2012)

to be located, as long as these separate proceedings are mere mechanisms for the more convenient collection of assets, which are then remitted to the officeholder in the principal "home" proceedings.[34]
The opposing notion of Territoriality or territorialism is the concept that multiple insolvency proceedings should be used to cover a debtor's assets and debts worldwide and that each of those proceedings should have an exclusively national or territorial focus. The consequence of this concept is that each proceeding would only apply to assets within the particular jurisdiction and only "local" creditors within that jurisdiction would be entitled to prove in the proceedings.[5]

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.

In January 2020, the United Arab Emirates (UAE) brought an individual insolvency law, Law No.19 of 2019, into force. This new legislation has brought significant change to the UAE's domestic onshore insolvency legislation, as it has effectively decriminalised personal insolvency. [6]

In August 2018, Saudi Arabia brought into force its new Bankruptcy Laws which bears similarity to the USA Chapter 11 process and which provides better support for debtors who are seeking to restructure. [7]

In May 2018, Bahrain brought into force its new Reorganisation and Bankruptcy Law (Bahrain Law No.22/2018) to promote corporate rescue and reorganisation over liquidation processes. This law, like the Saudi Bankruptcy Laws of August 2018, borrows considerably from the USA Chapter 11 process.[8]

3
Marks awarded 9.5 out of 10

[3] *Foundation Certificate in International Insolvency Law Module 1 Guidance Text* (para 5.2.2-5.2.3)
[4] JL Westbrook, *Multinational Enterprises in General Default* (Chapter 15, The ALI Principles and The EU Insolvency Regulation (2002) 76 Am Bankr LJ1, 10-12)
[5] See generally, L LoPucki, *Cooperation in International Bankruptcy: A Post-Universalist Approach* ((1999) 84 Cornell L Rev 696) and see also JL Westbrook, *Theory and Pragmatism in Global Insolvencies: Choice of Law and Choice of Forum* ((1991) 65 Am Bankr LJ 457).
[6] https://www.charlesrussellspeechlys.com/en/news-and-insights/insights/corporate/2021/notable-changes-to-insolvency-legislation-in-the-gcc/
[7] [ibid]
[8] https://globalrestructuringreview.com/review/europe-middle-east-and-africa-restructuring-review/2020/article/recent-restructuring-developments-in-the-gulf-region

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.

Once an individual is insolvent, their main immediate objective is often to minimise the fallout and risk to their person. Such risks may manifest in the form of harassment or threats by creditors or the danger of being rendered destitute and unable to meet basic personal expenses required to survive, on account of assets being taken away. An individual who is insolvent is likely to be focused on finding a way to repay his debts, while still maintaining enough resources to maintain himself and any dependants, with the aim of obtaining a fresh start.[9][10]

The objective of insolvent corporations, on the other hand, will be to preserve any business for continuity if possible. This does not necessarily mean the insolvent entity itself. Another objective will be for the corporation to impose personal liability on any individuals at fault, for example, any directors whose mismanagement or other breach of duty may have contributed to the corporation's insolvency.[11]

4.5

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.

There is no global insolvency law in existence, nor is there a global centralised court to deal with cross-border insolvency. This presents a number of difficulties, starting with the definition of "insolvency", as a system may have its own statutory definition of "insolvency" that, while not entirely dissimilar to that of another system, may be sufficiently different so as to cause confusion in a cross-border context, where a variety of definitions and procedures exist to deal with non-payment of debts.[12]

Conflict of laws issues inevitably arise when dealing with cross-border insolvency, and there is a knock-on impact on creditor action, claims and cross-claims, creditor participation and the relevant rank they enjoy when it comes to distributions and discharge issues.

Further detail would be beneficial. For example, consideration of Westbrook's 9 key issues.
3.5

Question 3.3 [maximum 5 marks]

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[9] *Foundation Certificate in International Insolvency Law Module 1 Guidance Text* (para 4.2.2.1)

[10] Sealy and Hooley, In M A Clarke et al, *Commercial Law* (Oxford University Press, 2017), chap 28.
[11] [ibid 9 and 10].
[12] *Foundation Certificate in International Insolvency Law Module 1 Guidance Text* (para 5.3)

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.

The UNCITRAL Legislative Guide on Insolvency Law (2004)[13] was introduced to assist legislative pen-holders worldwide in drafting more harmonious insolvency laws and related provisions, whether from scratch or whether by way of update to their existing national laws. Adopting of the UNCITRAL Model Law on Cross-Border Insolvency was also recommended in the Guide, to further promote harmonisation.

The World Bank also produced guidelines, in the form of Principles for Effective Insolvency and Creditor/Debtor Regimes[14], which has recently been updated. These Principles, in conjunction with UNCITRAL's Guide, promote harmonisation of insolvency law, especially in developing nations who apply to the IMF and World Bank for loans.

The European Commission recently published a Final report on its Capital Markets Union plans.[15] The Final report sets out recommendations which aim, amongst other things, to promote harmonisation of insolvency law as it relates to the EU's capital markets.

Together, the above three actions represent tangible evidence of steps by major bodies to promote and sustain harmonisation of insolvency law internationally. In my view, the fact that the World Bank and IMF in particular are strongly promoting the UNCITRAL Guide and the Principles and even requiring the same to be incorporated to some extent in local legislation before making loans available to developing countries, means that harmonious insolvency legislation is being introduced and sustained in more and more jurisdictions, furthering the aim of achieving a global standard of insolvency law.

5
Marks awarded 13 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]

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[13] https://uncitral.un.org/en/texts/insolvency/legislativeguides/insolvency_law

[14] https://openknowledge.worldbank.org/bitstream/handle/10986/35506/Principles-for-Effective-Insolvency-and-Creditor-and-Debtor-Regimes.pdf?sequence=1&isAllowed=y

[15] https://ec.europa.eu/info/news/cmu-high-level-forum-final-report_en

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.

Nadir is a Utopia company. The liquidator has been appointed following a winding up proceeding brought in Erewhon, a foreign jurisdiction, which is also party to UNICITRAL Model Law on Cross-border Insolvency. **Where do the facts state that Erewhon has adopted the MLCBI? Would reciprocity be needed?** The Erewhon liquidation proceeding is therefore a foreign proceeding in a designated state. The Cross-border Insolvency Act of Utopia allows for recognition of a foreign "main" proceeding and further provides relief in the form of a stay of actions of individual creditors against the debtor, or a stay of enforcement proceedings concerning the assets of the debtor. **It would be beneficial to elaborate and address COMI / establishment further.**

The stay of the Utopia proceeding is mandatory and will either be automatic (in the sense that the stay will flow automatically from the recognition of the Erewhon liquidation) or the court in Utopia will be bound to issue an order staying the Utopia proceeding.

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 the matter had not yet been heard, and the liquidator has already been appointed in Erewhon, I would advise the liquidator to intervene in the Utopia winding-up application (if correspondence alerting counsel in the Utopia proceeding is not fruitful) to let the Utopia court know that a liquidator has already been appointed in another State.

(b) If Apex has obtained a court order to wind-up Nadir in Utopia prior to the Erewhon winding up order and a liquidator has meanwhile been appointed none the wiser in Erewhon, I would advise the Erewhon liquidator to first check whether a liquidator has been appointed in Utopia and if one has not been, apply for an order that would permit the Erewhon liquidator to act as if he were also a Utopia liquidator (i.e. a locally appointed liquidator).

It would be beneficial to 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?

The company is incorporated in the BVI. The most common insolvency proceeding in the BVI is court-led insolvent liquidation. Four key international insolvency issues facing a BVI liquidator are:

1. Recognition of the appointment of the BVI liquidator: if the BVI company has assets in multiple States, the question of whether each of those States has provisions which allow for recognition of the appointment is germane and can cause an issue (if such provisions are lacking). Fortunately, several jurisdictions are party to and have adopted UNCITRAL Model Law on Cross-border Insolvency, so more often than not, recognition is guaranteed.
2. Stay of other claims: if proceedings have been brought against the company in other States, the question of whether each of those States has provisions which allow for stay of those proceedings is germane and can also cause similar issues to 1 above. Again, several jurisdictions are party to and have adopted UNCITRAL Model Law on Cross-border Insolvency, so more often than not, a stay of other proceedings is automatic or mandatory.
3. Tracing and gaining control of foreign assets: the BVI Insolvency Act (the "Act") requires a BVI licenced insolvency practitioner to be appointed as liquidator over a BVI company[16]. This liquidator must be resident in the BVI. However, the Act permits a foreign insolvency practitioner to be jointly appointed, alongside the local liquidator. This is often done in practice, for example where a BVI company holds substantial assets located in the UK, a UK insolvency practitioner is jointly appointed as liquidator alongside the BVI liquidator. This has the advantage of having liquidators on the ground with the asset, in the same time zone, etc.
4. Informing worldwide creditors that the BVI company is in liquidation: An application to appoint a liquidator over a BVI company must be advertised not less than seven days after service of the application on the company and not less than seven days before the hearing of the application. This is intended to give the company's creditors notice of the proceeding.[17] Once the liquidator is appointed, another advertisement must be run by the liquidator announcing his appointment. In both cases, the advertisement must be run the in the BVI gazettes and also in any other foreign publication deemed necessary to bring to the attention of creditors.

This is a satisfactory response. 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.

6

Marks awarded 10.5 out of 15

Total Marks awarded: 40 out of 50

[16] S.159 (1) BVI Insolvency Act 2003; r.15 BVI Insolvency Rules
[17] S.165 BVI Insolvency Act 2003; r.13, 32 BVI Insolvency Rules

*** End of Assessment ***