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.

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.

International insolvency law is a framework of regulations regarding insolvency proceedings, procedures and policies; however, the rules contained therein cannot necessarily be readily or easily enforced due to considerations that need to be made of the local laws and international aspect of the matter.

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

1.5

Question 2.2 [maximum 5 marks]

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

Universality is just that: the concept that there should be a 'universal' insolvency proceeding that would incorporate all of the assets and liabilities of the subject debtor worldwide. Under this principle, no additional insolvency proceedings (or consequences of such) can be brought about over the assets or against the liabilities from outside of the governing/chosen state. In this approach, it would make sense for the governing state to be where the majority of the debtor's interest are held, i.e. the principle place of business and that the office holder of that jurisdiction has the same powers worldwide. Similarly, all participating creditors should also have the same rights, no matter where they are located.

Territoriality is the opposite concept to universality in that it argues the principle that any number of insolvency proceedings can be commenced concurrently in any state or jurisdiction where the debtor holds assets or has incurred liabilities. This, however, restricts where creditors may file their claims and may lead to challenges being faced as a 'foreign creditor'. It would seem that perhaps this principle may benefit larger, more influential creditors due to the resources available to them and could in fact, hinder smaller trade creditors. It goes without saying that multiple concurrent insolvency proceedings would prove costly and may in fact, not benefit creditors at all. Different insolvency laws may also cause conflict.

It should be noted that neither total universality or total territoriality are generally approaches that are adopted by States; rather modified approaches with the pros and cons of each forming a basis and often elements of both being seen in insolvency proceedings.

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.

Dubai **[Law No. 1 of 2019 commenced 13 June 2019]** and Bahrain **[Bankruptcy Law No. 22 (2018)]** have both, in recent years, implemented a Model Law on Cross-Border Insolvency in efforts to reform their insolvency laws. In addition, a number of territories in the Middle East have adopted the UNCITRAL Legislative Guide to Insolvency Law to reform domestic insolvency laws.

In the Middle East more generally, a comparative survey of insolvency systems was conducted based on the Principles of the Effective Insolvency and Creditor Rights System of the World Bank, which was used to implement a 'Best Practice' framework for international insolvency and was an initiative supported by INSOL.

Cross border insolvencies of the Middle East have been widely regulated and monitored by the World Bank prior to these initiatives.

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

2.5

Marks awarded 9 out of 10

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

Question 3.1 [maximum 5 marks]

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

The key difference between the ultimate objective of insolvency for individuals and corporations is your ultimate outcome/goal. In corporate insolvency, you seek to have the company/corporate wound up and dissolved, thereby striking it from the register once its affairs are in order. An individual cannot be 'dissolved' after bankruptcy.

In bankruptcy/individual insolvency, the effects and limitations of the commencement of proceedings are against the debtor as an individual and their individual rights are affected, as well as their ability to seek, for example, credit. Conversely, commencement of a corporate liquidation will only affect the rights and limitations against the officers of the company and does not necessarily affect them personally, unless their conduct is questioned, or they have provided personal guarantees.

In terms of international insolvency, some systems do not necessarily have procedures in place for individuals and when they do, it may only cover sole traders. Generally speaking, international insolvency law for corporate entities is a more in-depth framework.

In the insolvency of an individual, certain assets can be considered exempt such as a wedding band, for example, which would remain vested in the debtor; where as there are no provisions for exempt assets in corporate insolvency. That being said, it is still important to ensure all assets of the corporate entity do form part of the 'estate' and do not vest in a related entity, for example. Corporate insolvency is also more likely to feature executory contracts, for example if the company has employees.

Personal insolvencies also tend to be more structured in terms of time periods, however, these do vary from jurisdiction to jurisdiction. The duration of corporate insolvency is effected by a wider range of factors, including but not limited to rescue efforts and committees.

As a more high level overview of the objections of individual and corporate insolvency:

In the cases of individuals, the 'automatic stay' brought on by the commencement then protects the individual from their creditors and enable the individual to draw a line under that particular circumstance and move on. Repayment plans can be used to lessen the burden and personal circumstances are often taken into consideration.

In the cases of corporate entities, rescue plans are considered to either rescue the business as a whole or extract and preserve the viable or valuable parts of the business. Unlike with a bankrupt, whose affairs are his/her own, a company can be segregated in this sense. The 'automatic stay' equally protects the company from their creditors but, given the powers of the directors cease upon appointment and the liquidator 'takes over', it is unlikely a creditor of a company would harass a director individually in the same way an individual may be at risk of that.

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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.

The key point which can be made to summarise the answer to this question was stated by P R Wood in Principles of International Insolvency: “there is no single set of insolvency rules that apply on a global basis”. It, therefore, goes without saying that the main difficulty one will encounter when dealing with cross border insolvencies is the considerations that need to be made in respect of not only the State under which you are appointed but also, the jurisdiction to which your proceedings are connected and where its assets and liabilities are held.

Quite often, insolvency proceedings from one jurisdiction are not automatically recognised in another State and thereby one must apply to Court in that State for the proceedings to be recognised in order to give the office holder recognition and power in that State. Often, domestic legal systems do not have the provision for enforcement outside of its jurisdiction, meaning recognition applications are unavoidable. This recognition is often problematic to obtain and can, therefore, cause delays for the office holder in the administration of the estate.

Often, it is not only insolvency law that needs to be taken into account but in fact, the whole legal system of each State and how this will affect the action required to be taken. Policies and procedures will also vary from state to state and, if different from the State under which you are appointed, may give cause for additional guidance and advice to be obtained to seek clarification as to how to proceed.

There are numerous and ever evolving pieces of guidance, best practice frameworks and legislations that are seeking to assist in dealing with cross border insolvency issues. Particularly now, with the developments of the modern world, assets and liabilities are stretching across borders and creditors are often global, which can lead to the risk of creditor action being taken across multiple jurisdictions which leads to many international insolvency law difficulties. Logistical risks are also presented in the sense that, technically speaking, assets can be moved faster than people and often, faster than recognition can be sought. The risks of a cross border insolvency are therefore much higher generally than a domestic insolvency.

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

4

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.

There has been an introduction of various treaties or policies that have been drafted by certain groups of Member States, in conjunction with one another, to address issues that have been faced with international insolvency in efforts to promote the harmonisation of domestic insolvency laws, such as UNCITRAL, which was produced by member states of the United Nations.

In addition, professional and regulatory bodies also release frameworks and guidance to find resolutions to such issues, examples being the creator of this particular qualification, INSOL International together with the legal professionals who form part of the International BAR Association.

Both on a global scale as highlighted in point 1 of this answer and within the profession itself, as highlighted in point 2; both seek to promote the harmonisation of domestic insolvency laws

Ultimately, I think it will always be the case that the differences in legal systems, insolvency systems and insolvent procedures generally across different territories will cause problems, complications and increased costs in respect of insolvency proceedings. Whilst I appreciate progress is absolutely made, and will continue to be made, it will frankly always fall back on the preferences of the 'bigger players', as it does with many laws and policies across the globe. Insolvency is often faced with grey area issues and seldom is an issue 'black or white' so to speak, therefore these inevitable differences of opinions from State to State will always lead to fundamental differences in legal systems coming into play.

Unfortunately, these guidelines, frameworks and policies that are prepared, such as the UNCITRAL Legislative Guide or the Model Bankruptcy Code can actually only be used as just that; guidance. National authorities use them as a reference point to adapt, mould or refine their laws and regulations but therefore, the resulting harmonisation my actually be limited with international insolvency law still being, whilst based on the same principles, quite diverse, making it ever challenging territory.

Please see the model answer for further issues to have been addressed.

4

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]

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.

In this case, the liquidation would be under the application of Erewhon law to matters of procedures and substance, although Utopia law will be applicable to relevant aspects of the administration, including the claim of Apex against the company in Utopia, under the UNCITRAL Model Law on Cross-Border Insolvency.

The purpose of the UNCITRAL Model Law on Cross-Border Insolvency is to be used as a instrument intended to help with the resolution of conflicts, to facilitate the exchange of information between states and to try and keep proceedings running as smoothly as possible, thereby minimising unnecessary costs being incurred by the estate.

In order to pursue the proceedings in Utopia, the Court has to be satisfied that there is sufficient connection with Erewhon and recognition must be sought on that basis. A number of states allow for recognition and cooperation in foreign insolvency proceedings through provision for recognition and enforcement.

The Liquidator should consider that the UNICITRAL Model Law on Cross-Border Insolvency allows for the proceedings in the two jurisdictions to be open at the same time and allows the local court and foreign court to work together, concurrently. This may increase costs and cause unwanted disputes, however, both are factors that will need to be taken into consideration.

Detailed application of the articles relevant for the recognition and relief, including on COMI/establishment and on foreign main / non-main proceedings) was required for this fact-based application-type question. Consideration of a stay was warranted.

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. No change **Why?**
b. In the case of B, UNCITRAL Model Law on Cross-Border Insolvency is not applicable.

The MLCBI is significant for it provisions on concurrent insolvency proceedings in 4.2 (see Article 29).

0

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?

Bootle's Inc is a company incorporated in the British Virgin Islands, with it's head office in Tortola, British Virgin Islands. However, the Company operates in the UK, USA, Dubai and Australia and has both assets and liabilities in each jurisdiction.

A Liquidator is appointed over Bootles Inc. by Order of the Eastern Supreme Caribbean Court in the British Virgin Islands. The first and most urgent international insolvency issue faced by

the Liquidator is to trace and secure the assets in the overseas territories. The Liquidator can use the International BAR network to engage legal representatives in each jurisdiction to ensure assets are promptly secured.

Would adoption of the MLCBI or application of a comprehensive treaty / instrument such as the EIR (Recast) be helpful?

In addition, Bootle's Inc held property in Canary Wharf in London, which was subject to a lease and development agreement with Gem Limited. In this case, the Liquidator in the British Virgin Islands sought approve from the BVI Financial Services Commission to have an overseas foreign joint appointee and held the appointment with an IP in the UK. This allowed the Liquidators to have the powers in the UK to properly disclaim the lease and realise the property.

Next issue faced is that of foreign overseas creditors. International advertisement is a regulatory requirement in each territory where the Company had business dealings. This allows for all international creditors to submit their claims.

From the creditors perspective, the World Bank's principle C15 ensures that there is no discrimination between foreign and domestic creditors, and all are treated fairly per the Order of Priority framework in the BVI Insolvency Act.

In respect of the USA assets, the Liquidator can seek Chapter 15 proceedings. Chapter 15 and the Model Law upon which it is based is used to provide mechanisms for the dealing of debtors, assets, claims and proceedings in more than one country. Chapter 15 proceedings allows for the cooperation of USA Courts and will allow the Liquidator of Bootle Inc to seek the realisation of any American assets and deal with any USA claimants against the company.

This is a satisfactory response that raises some key issues. 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 9 out of 15
MARKS AWARDED 38/50

*** End of Assessment ***