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 9 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 means the set of rules of one State which deals with the effects of foreign insolvency proceedings, the powers of foreign liquidators, the coordination of domestic insolvency proceedings with foreign proceedings concerning the same debtor or group of companies, the cooperation with foreign liquidators and insolvency courts as well as the inclusion of assets abroad into domestic insolvency proceedings.

2

Question 2.2 [maximum 5 marks]

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

The idea of the concept of universality is that there should be only one insolvency proceeding which deals with all debts and all the debtor's assets, irrespectively if these debts or assets are located in the State where the insolvency proceeding has been initiated or abroad.

The idea of the concept of territoriality is that every State is sovereign and, therefore, sovereign acts are reserved to domestic authorities. As a consequence, each State may initiates its separate insolvency proceedings concerning the assets of the debtor located within its territory.

It would be beneficial to elaborate, eg. note these theories involve two key aspects of private international law - recognition and effect as well as jurisdiction:
For example, with universalism, (1) the jurisdictional aspect requires all States to agree on the place for the one set of insolvency proceedings in respect of the debtor and, to be successful, (2) recognition and effect requires that other States recognise that one set insolvency proceedings 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) The United Arab Emirates reformed its domestic insolvency law in 2016 and 2019; **how so?**
2) Saudi Arabia reformed its domestic insolvency law in 2018; **in what way?**
3) Dubai reformed its domestic insolvency law in 2019. **More detail is required.**

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

1.5
Marks awarded 7 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 objective of insolvency for individuals is to protect them from the pressure of individual actions of the creditors and to enable the debtor to make a fresh start by granting a discharge at the end of the insolvency proceedings or by giving the debtor the chance to repay its debts in a manner which allows a certain living standard.
The objective of insolvency for corporations is either to liquidate the corporation and, under certain circumstances, to impose personal liability to responsible individuals or to rescue profitable parts of the business when possible.

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.

The different legal systems of the States involved in a cross-border insolvency case may pursue different interests. Difficulties may arise when a pro-creditor system clashes with a pro-debtor system or where States try to protect their (no recognition of foreign public claims) and their creditor's interests (pre-satisfaction of domestic creditors with priority claims).

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

3

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 have been taken various multilateral steps already in the 20th century to promote harmonisation of domestic insolvency laws. In the 21st century, the following main multilateral steps were taken in this regard.
In the European Union, the European Insolvency Regulation (EIR) (2000) and its recast (2015) were adopted. EIR applies in all member states except Denmark. Given that the EIR is directly applicable and comprehensive law, its impact on the harmonisation of the international insolvency laws of the EU member states is big. Furthermore, European Court of Justice is responsible for a harmonised application of the EIR.
All 17 OHADA (Organisation pour l'Harmonisation en Afrique due Droit des Affaires) member States adopted the UNCITRAL Model Law on Cross-border Insolvency upon the Council of Ministers passing the Uniform Act on Insolvency in 2015. The adoption of the UNCITRAL Model Law on Cross-border Insolvency by member States of OHADA will have a big impact not only on international insolvency issues between member States of OHADA but also with non-member States as the Model Law on Cross-border Insolvency should be applied to all

international insolvency issues of the enacting State. **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.**

In 2018, the UNICTRAL (United Nations Commission on International Trade Law) Model Law on Recognition and Enforcement of Insolvency-Related Judgments with Guide to Enactment (MLIJ) was published. In 2019, the UNICTRAL Model Law on Enterprise Group Insolvency with Guide to Enactment (MLEGI) was published. In view of the success of the UNICTRAL Model Law on Cross-border Insolvency, it is to be assumed that the MLIJ and MLEGI will also be of great influence in the future when States revise their international insolvency laws.

3.5
Marks awarded 10 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 order to stop the court action of Apex against Nadir in Utopia, the Erewhon liquidator may apply to the competent court of Utopia for recognition of the Erewhon insolvency proceedings pursuant to art. 15 of the UNCITRAL Model Law on Cross-border Insolvency (MLCI). Together with the application for recognition, the Erewhon liquidator may request the approval of provisional measures such as a stay of execution against Nadir's assets according to art. 19(1) MLCI. Upon recognition of the Erewhon insolvency proceedings by the competent court of Utopia, the court action against Nadir in Utopia should be stayed pursuant to art. 20(1)(a) MLCI.
A good understanding of the issues and the answer could be strengthened by more detail.

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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 there is no wind-up order against Nadir there is also no insolvency proceeding in Erewhon which could be recognised in Utopia. Therefore, it would not be possible to obtain a stay of the court action against Nadir based on the MLCI.
(b) If there was already an order to wind-up Nadir in Utopia it should not be necessary anymore to recognise the Erewhon winding-up order in order to stop the court action against Nadir in Utopia. The Utopia winding-up order should already have stopped the court action against Nadir in Utopia. In this scenario, the Erewhon liquidator may look to the MLCI for guidance regarding the coordination of the two insolvency proceedings under art. 28 et seq. MLCI.

The MLCBI is significant for it provisions on concurrent insolvency proceedings in 4.2. Article 29 should be considered.

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?

Switzerland is selected as the country for the company's incorporation.
The insolvency laws of Switzerland intend to include all assets irrespectively of their locations in the insolvency estate according to art. 197(1) Swiss Debt Enforcement and Bankruptcy Act (DEBA). In order to do so the following four key international insolvency issues have to be faced:

1. The Swiss Bankruptcy Office (authority which represents the bankruptcy estate) needs to be recognised in States where the corporate debtor's assets are located in order to liquidate and transfer the assets to the Swiss bankruptcy estate. There are no Swiss laws applying to this issue. There are some old treaties between some Swiss cantons and former German kingdoms which still apply and according to which the Swiss Bankruptcy Office is recognised as representative of the Swiss bankruptcy estate without the need for formal recognition proceedings.
2. The Swiss Bankruptcy Office will have to decide which creditors are admitted in the Swiss bankruptcy proceedings. According to art. 219 DEBA, all creditors which are private persons or private corporations irrespectively of their domicile are permitted as

creditors. Claims of foreign authorities based on public law (tax claims, etc.) are, however, not permitted in Switzerland unless there is (double tax) treaty saying otherwise.

3. If there are liability claims against the former directors of the corporate debtor the competent court and the applicable law for such liability claims needs to be determined. Pursuant to art. 155 lit. g Swiss Private International Law (PILA), Swiss law applies regarding liability claims against directors of a corporation registered in Switzerland. The directors may be sued at the court of their domicile or at the court of the domicile of the Swiss corporate debtor according to art. 151 PILA.
4. If there are insolvency proceedings initiated in other States the Swiss Bankruptcy Office needs to coordinate the Swiss bankruptcy proceedings with the foreign proceedings. The coordination of foreign insolvency proceedings with Swiss bankruptcy proceedings is regulated under art. 166 et seq. PILA.

6
Marks awarded 12 out of 15
MARKS AWARDED 38/50

*** End of Assessment ***