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 an international document containing rules over certain insolvency measures and proceedings. The rules cannot be completely enforced as relevant law until consideration has been given to any international parts of the matter.

It is a global set of insolvency rules, as whilst all jurisdiction have some insolvency procedure, there are different approaches within those states. It also become a factor where other, non-insolvency, legislation can become relevant, to dictate how those proceedings may relate to subsequent or concurrent insolvency proceedings.

2

Question 2.2 [maximum 5 marks]

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

Universality is defined as a single set of insolvency proceedings cover a debtor's entire estate (including assets and liabilities) internationally. Once those proceedings have commenced, no other proceedings can affect those or any other execution over the assets in the estate. The jurisdiction that is used becomes where the debtor's interests are located. This will provide the office holder with clear and necessary legislative tools to control and administer the estate. However, any international creditor can participate in the proceedings and all claims will be treated by the officeholder on an equal basis.

The concept requires significant amounts of trust in all international legal systems and difficult legal issues may need to be addressed. However, it has been criticised as potentially undermining other legislation and being potentially liable to being manipulated.

Territoriality on the other hand is the concept that separate insolvency proceedings can be commenced in each individual jurisdiction where assets are held by a debtor, but restrictions are applied depending upon the jurisdiction of the original proceedings. This would result in numerous concurrent proceedings against the debtor. The officeholder would become subject to a mandate, defined by the jurisdiction where the original proceedings were commenced. Creditors will undoubtedly suffer challenges in becoming involved in the foreign proceedings, which may result in them failing to be paid any dividend. Furthermore, it could result in a debtor being solvent and insolvent across different jurisdictions simultaneously. Also, it is usually a far more expensive process, given the different parties involved.

Rather than an outright concept being better, it is offended suggested that a modified versions of either concept would be the best outcome. In practice both concepts are generally used depending on the insolvency proceedings.

There is scope to elaborate with respect to recognition and effect in that for example, with universalism, recognition and effect requires that other States recognise that one set insolvency proceedings (that all agreed is the appropriate jurisdiction) and recognise it as having extraterritorial effect in their States.

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. Comparative survey of insolvency systems in Middle East and North Africa, known as the MENA region, which reviewed and combined the systems comparatively between those jurisdictions.
2. UNCITRAL model law has been adopted by Bahrain and Dubai in 2018 to follow uniformed international insolvency legislation.
3. UAE (in 2016 and 2019), Saudi Arabia (in 2018) and Dubai (in 2019), have all reformed their domestic insolvency legislation. This has helped to update them alongside other international jurisdictions to address international issues.

3

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.

For individuals, the objective of insolvency is to avoid the debtor being harassed by any creditors in the estate and to have a new start. The debtors may also be required to reduce indebtedness by making contributions from any current or future income/realisations to the insolvent estate, dependent upon the certain circumstances. Only individuals can have exempt or excluded assets from their estate, usually to maintain themselves and their dependents.

However, for corporations, the primary objective is to preserve any viable sections of the corporation, but not necessarily the whole corporation. On occasions where personal liability may have been taken advantage of, to reimpose that liability on those individuals.

For both individuals and corporations, the office holder must always ensure that distributions are made on a parri passu basis, as far as possible, except for any priority held by certain creditors. Secured assets and creditors must be dealt with accordingly and investigations into the individual or corporations affairs must be undertaken. Any improper conduct by the debtor should be pursued where there is a benefit to the estate, and any voidable dispositions should be reclaimed for the benefit of creditors.

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 law systems vary significantly between jurisdictions. Sometimes, there can be very basis differences, including different local legal cultures, simple human rights issues, approaches to labour issues, the rights to certain securities or the way the system as a whole works.

Furthermore, there is often different terminology between similar principles in different jurisdictions. Country specific legislation will also reflect different approaches in socioeconomic issues, resulting in it becoming difficult to identify a specific insolvency system to utilise.

Differences in dealing with security has frequently become cross border issue. This is due to floating charge creditors being recognised in the UK system; however, they are not commonplace in the US system at all.

Once cross border insolvency has commenced, it can become difficult to reconcile the approaches of those different jurisdictions. Distinctions are usually made between pro debtor and pro creditor jurisdictions, prioritising eithers needs, however in other jurisdictions, such as France, labour issues rights are prioritised.

Some jurisdictions also don't show a willingness to recognise foreign tax claims, to protect the interests of local creditors. There can also be significant variations between procedural law (private) and substantive law (public).

Furthermore, there is often also the issue of an officeholder obtain recognition before being able to commence proceedings or receive information in a foreign jurisdiction. This is often a time consuming and costly process, as the expense of the estate.

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.

Judicial Insolvency Network, United Nations Commissions on International Trade Law (Cross Border and Model Law), International Institute for the Unification of Private Law, International Lawyers Association, International Bar Association, International Insolvency Institute, American Law Institute, and INSOL International. **It's unclear exactly what multilateral steps are being referred to and why.**

In my opinion, each individual cross border insolvency agreement has had its own individual effect on harmonising domestic insolvency laws. Each agreement has sought to target either a different international market or region, or a specific area of the general insolvency law.

It has resulted in different jurisdictions becoming more empowered, where previously specific states may have had a greater influence. They particularly target legal issues, which arise from significant differences between those jurisdictions, which have been previously discussed.

It has also resulted in officeholders having a greater ability to create new strategies to resolve conflicts/issues for each individual case. Furthermore, where two proceedings are carried out in different jurisdictions against the same debtor, it harmonises the two proceedings to maximise the realisations of the assets a minimise the expenses to the estates. In my opinion, this has had a significant impact on addressing several international insolvency issues historically.

However, in my opinion, there have also been difficulties and reservations on how feasible certain multilateral steps are. It may not also be feasible to reach an agreement between different jurisdictions in view of historical issues. Furthermore, the continual additional layers of legislation and models to follow, only creates more uncertainty and costs to the estates. This reduces returns to creditors sometimes, and opens up the profession to further, and sometimes unnecessary, criticism. Also, some certain jurisdictions also fail to follow certain agreements and may experience conflicts between certain agreements, making it impossible to follow all multilateral steps, even with the best intentions.

There is scope to consider political pressure, foreign investor pressure and/or loan conditions.

2.5

Marks awarded 11 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 scenario, the relevance of the cross border insolvency act will be that the original incorporation in Erewhon will have no effect on the proceedings, as the debtor's interests have now changed to, and are located in, Utopia.

In order to become a party to the proceedings commenced by Nadir and to intervene, then the Liquidator of Nadir will need to seek recognition of his Liquidation Order in Utopia. It is not assumed that the Liquidation Order will automatically recognised. To do this, the Liquidator will need to apply to their local Court in Utopia to seek leave of the Court to be recognised in Utopia.

Once this leave has been granted, an application will need to be made in the Courts in Utopia for the Liquidation Order and the Liquidator to be recognised in that jurisdiction. Once the Court has recognised those proceedings, the recognition can be served on the parties in the Apex proceedings.

The Liquidator can then approach Apex and the Court to become a party to the litigation proceedings. If not accepted, the Liquidator may make an interlocutory application to intervene in those proceedings. If the Court finds in the Liquidators favour, they will be recognised as Liquidator of Nadir in Utopia and can participate in the proceedings, to attempt to stop the action against Nadir, provided that it is in the best interests of creditors.

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

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.

No, as the first Liquidation Order would take precedent given the cross border legislation.

Yes, as the local Liquidation Order would take precedent over the recognition of the foreign Liquidation Order.

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?

Country selected: British Virgin Islands

1. In the scenario, a claim has been identified against a Director, which is residing in Brazil. In order to serve the claim on the party. As Brazil is a member of UNCITRAL, the officeholder has the ability to obtain a letter rogatory from the Court in the BVI and serve it on the Brazilian Court. Once recognition has been sought in Brazil, the claim can be served via the Hague Convention, as Brazil and the BVI are both party to the convention. This will assist with compelling the Director to engage with the proceedings and obtaining a judgement in Brazil. Once judgement has been obtained, enforcement proceedings can be brought against the Director to realise assets for the benefit of the estate.

2. In this scenario, an asset has been identified in Italy, however no creditors exist in Italy. As Italy and the BVI are both members of UNIDROIT, then both jurisdictions will be guided and harmonised by the instrument, to mitigate costs to the estate. This will allow the BVI officeholder to take control of the asset and to enforce any proceedings if necessary. Italy will recognise the asset as being owned by a BVI officeholder and allow them to take the necessary action to realise the asset for the benefit of the creditors in the estate.

3. In this scenario, a claim has been received in respect of tax from the US. In the BVI, local tax claims are treated as an equal unsecured creditor on a pari passu basis, however foreign tax claims are not recognised to protect local creditors in the estate. As such, the claim received from the foreign tax jurisdiction should be rejected. In the event that the jurisdiction did recognise foreign tax claims and both jurisdictions were a party to UNCITRAL or ALI/III, then the tax claim may be accepted and treated as creditor accordingly.

4. In this scenario, the office holder has become aware of concurrent proceedings in US, due to assets being held in the US and creditors. Under the UNCITRAL Cross Border Model Law, a harmonised approach will be created between the two office holders, over the same debtor. An agreement would be reached between both office holders to exchange information and

resolve conflicts. The ultimate goal would be to maximise the going concern value and realisations of assets and also to mitigate overall expenses in the estates, to act in the best interests of creditors. Later extensions may be provided to the agreement to cover distributions or additional matters which the parties were not aware of.

7

Marks awarded 11 out of 15
MARKS AWARDED 38/50

*** End of Assessment ***