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 web pages for Module 1 as well as the Course Administration page for this course after the submission date of 15 October 2022.

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: 202223-336.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 2022**. The assessment submission portal will close at **23:00 (11 pm) BST (GMT +1) on 15 October 2022**. 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 **10 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: 8 out of 10

QUESTION 2 (direct questions) [10 marks]

Question 2.1 [maximum 2 marks]

Explain what the term "international insolvency law" means.

International insolvency law encompasses the legal themes associated with balance sheet and cash flow insolvencies on a micro jurisdictional local scale with cross-border jurisdictional concepts. An individual / corporation may be undergoing restructuring and / or insolvency proceedings in one country, but also have assets and creditors in other countries. Put differently, international insolvency law attempts to manage distressed debtor scenarios in an organized fashion and with relative predictability, despite having to do so across international borders and jurisdictions. It is important to note that international insolvency law cannot be consistently enforced due to different legal frameworks and self-serving microeconomic priorities of individual legal ecosystems.

2

Question 2.2 [maximum 5 marks]

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

Universality is akin to unrealistic utopia within the insolvency universe. It emphasises a uniform legal framework and proceedings that would theoretically be enforceable in all international jurisdictions associated with a given debtor. All creditors from all corners of the globe would be able to participate in an organized fashion and sans any home field advantage they may otherwise be privy to in their own microeconomic jurisdictions. Conversely, territoriality is the other extreme of the gamut – it focuses on legal implications and insolvency case management within

specific jurisdictions and territories. Said approach allows for as many concurrent proceedings as there are jurisdictions impacting a particular debtor. Territorialism focuses on protecting local interests above all, with any other implications outside that jurisdiction / territory being much lower on the totem pole of priority.

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.

In 2009, a survey of Middle Eastern and North African systems was initiated via collaboration of Hawkamah Institute for Corporate Governance, the World Bank, the Organisation for Economic Cooperation & Development and the International Association of Restructuring, Insolvency and Bankruptcy Professionals. Said survey was directly derived from World Bank's Principles For Effective Insolvency and Creditor Rights Systems of 2005. **what impact did this have on reforming domestic insolvency laws or addressing international insolvency Issues in the Middle East?**

Subsequently, United Arab Emirates has reformed its insolvency laws in 2016 and 2019.

More detail would be beneficial.

Bahrain's 30 May 2018 (Bahrain Law No. 22 / 2018) Model Law on Cross-border Insolvency has been compared to the United States' Chapter 11 corporate bankruptcy model in that it focuses on (or even favours) reorganization vis-à-vis liquidation. It allows for DIP (debtor-in-possession) financing of super priority nature to encourage lending that will allow the corporation to continue operating as an ongoing concern (to maximize the bankruptcy estate's value for creditors), ordains the appointment of a bankruptcy trustee and provides for a debt collection moratorium. It is also meant to encourage communication and cooperation with other bankruptcy jurisdictions / foreign courts.

1.5

Marks awarded: 7.5 out of 10

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

Question 3.1 [maximum 5 marks]

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

Insolvency in the context of an individual is typically focused on providing a fresh start for that debtor. While different jurisdictions may vary as to whether they are pro-debtor (debt discharge is relatively easy and quick to obtain, with most if not all debts being extinguished) or pro-creditor (discharge may take a long time or even not at all, some or most debts will need to be repaid in an organised fashion), it usually has a micro outlook – one human being and her / his / their creditors.

Corporate insolvency often considers broader policy and political implications such as employment contracts, retirement plans and the effect of a possible closure of the business on the community. As such, there are many more variables at play and the scenario may snowball into much more than a simple balance sheet reshuffle.

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

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.

Lack of predictability of law application in foreign jurisdictions immediately springs to mind. Furthermore, there is the matter of territoriality (i.e., protecting one's own debtor) – a court in a foreign jurisdiction may not look very kindly at legal insolvency proceedings halfway around the world that may result in losses for local "homecourt" creditors and / or employees; simply put, said court may refuse to recognise and enforce such "unfriendly" proceedings as a matter of local public policy considerations.

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

2.5

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.

United Nations Committee on International Trade Law adopted the Model Law On Cross-Border Insolvency on 30 May 1997. The law is meant to provide a streamlined legal

framework in insolvency matters among countries that have chosen to adopt it. Major elements of the law pertain to court access across jurisdictions, recognition of qualified insolvent proceedings from foreign jurisdictions, various relief considerations (for example, stay of collection proceedings in accordance with laws applicable in a foreign jurisdiction), as well as general cooperation and coordination amongst various counterparties spanning various (in this context foreign) jurisdictions.

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.

What is your opinion on how much impact these are likely to have in addressing international insolvency issues?

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

2.5
Marks awarded 8 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.

The Model Law's adoption in Utopia presumably allows for the recognition of a qualified legal proceeding from a foreign (in this instance in Erewhon) jurisdiction. On the presumption that local Utopian domestication procedural steps have been completed by the Erewhon liquidator, the liquidator should be able to attain (or at least legally pursue the attainment of) recognition of her / his / their Erewhon liquidation proceeding as the main proceeding that consistently (in terms of legal procedures and enforcement) spans both jurisdictions.

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) The presumption remains that the Erewhon liquidator wishes to derail /stop any legal proceedings that solely benefit Apex as the creditor. If Apex's motion to wind-up Nadir is yet to be heard, the Erewhon receiver should legally intervene as an interested third party in that legal case and pursue an assignment to become a legal macroeconomic receiver for the global management of Nadir's insolvency / restructuring scenario.

b) the Model Law adoption sword cuts both ways; the receiver / liquidator presumably appointed in Utopia would trump any actions undertaken by the Erewhon liquidator, as the Utopian proceedings should be fully recognised in Erewhon. That answer assumed that the Model Law was adopted in BOTH Utopia and Erewhon. If it was adopted ONLY in Utopia but not Erewhon, we would have a case of competing concurrent cases in two jurisdictions and all bets are off.

Apply article 29 MLCBI

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?

Let us assume that United States is the country of the company's incorporation.

The initial focus will likely be administrative /priority claims of the company (which in the United States involve tax revenue authorities, trustee / liquidator fees, employment payroll obligations and payment of worker retirement benefits). US Bankruptcy Code Title 11 § 503.

Secondly, the ability to maintain the company as a going concern (to presumably preserve as much value as possible for creditors) will be directly related to the continued financing of the debtor's (the company's) current operations. To that end, a DIP (debtor-in-possession) financing lifeline will likely be sought. Oftentimes, it will be provided by the current secured creditors who are already familiar with the debtor's operations and may seek to further strengthen their position within the bankruptcy estate capital stack. US Bankruptcy Code Title 11 § 364.

Thirdly, given that the scenario merely specified a commencement of an insolvency proceeding of a corporate debtor, one may derive that said proceeding is of a Chapter 15 nature. Chapter 15 was introduced in the United States in 2005 as an adoption of UNCITRAL's Model Law on Cross-Border Insolvency and as such strives to be a true global case management mechanism of international insolvency (as far as the recognition and case management in US courts goes). US Bankruptcy Code 11 U.S.C. § 1501

As a fourth consideration, a Chapter 11 reorganization proceeding may fail, be it due to the debtor's plan not being realistic or be it due to an overwhelming opposition of creditors who may prefer a liquidation. To that end, a conversion from a Chapter 11 reorganization to a Chapter 7 liquidation may be invoked via 11 U.S. Code § 1112.
There is scope to elaborate upon the relevant facts and apply the law to same.

6

Marks awarded 12 out of 15

*** End of Assessment ***

A good paper that correctly identifies many of the issues raised and satisfactorily substantiates several answers.

TOTAL MARKS AWARDED 35.5/50