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.

[While there is no standardized or universally recognized definition of the term, the term "international insolvency law" generally means the rules of law that should apply when (1) an insolvency occurs (2) which cannot be immediately and exclusively resolved by the application of a single set of the domestic insolvency rules of a jurisdiction.]

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, which is also known as universalism, means that, in case of insolvency, there should only be one set of insolvency proceedings governing all aspects of the insolvency of the debtor. In cross-border insolvency contexts, the principle of universality requires that no ancillary or concurrent proceedings should be commenced at all whenever an insolvency proceeding (which is referred to hereinbelow as "home proceedings") has already been commenced against the debtor in any one of the jurisdictions (which is referred to hereinbelow as "home jurisdiction"). Notwithstanding the presence of any cross-border element, creditors should follow the insolvency law of the home jurisdiction and any orders made by the court in the home proceeding.

In contrast, territoriality, also known as territorialism, means that more than one insolvency proceedings may be commenced in each jurisdiction where the debtor holds assets. As

such, contrary to the principle of universality, the doctrine of territoriality allows (and possibly encourages) the commencement of multiple insolvency proceedings against the same debtor in various jurisdictions. As such, in each of the local insolvency proceedings, the local courts may apply its local law and make orders to address the claims and/or protect the interest of local creditors as they see fit. That said, it may give rise to inconsistencies in the decisions of the insolvency courts (e.g. where a debtor has only been declared bankrupt in one jurisdiction but not the others), which may give rise to complicated legal issues.]

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 2018, Bahrain adopted UNCITRAL Model Law on Cross-Border Insolvency (1997).

In 2019, Dubai International Financial Centre adopted UNCITRAL Model Law on Cross-Border Insolvency (1997).

In 2019, Abu Dhabi Global Markets revised its insolvency law to provide for, among other things, a process of rehabilitation of debtors that is similar to the Chapter 11 procedures in the United States.]

3

Marks awarded 8.5 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.

[Insofar as corporations are concerned, insolvency of corporations generally brings the corporation to the end of its life. While it is also preferrable to save the corporations by (formal or informal) "corporate rescue" processes, the key purposes of such "corporate rescue" processes may be to maximize the returns to the creditors of the corporation. In other words, rehabilitation may not be the key purpose in the winding-up process of corporations. It follows that more jurisdictions adopt a "pro-creditor" approach in corporate insolvency contexts.

In contrast, in case of individuals, rehabilitation has been generally recognized as a key principle in individual bankruptcy cases in many jurisdictions in the modern world. Unlike the case of corporations, the insolvency of individuals does not mean the end of their life. It is therefore important to consider the bankrupts' need for rehabilitation. For instance, some jurisdictions crave out part of the insolvent individuals' assets to be "exempt" or "excluded" assets in order to allow those individuals to maintain their (and their dependents') lives and possibly allow them to have a fresh start. Hence, more jurisdictions maintain a "pro-debtor" attitude towards individual insolvency cases (than in corporate insolvency cases).]

There is scope to elaborate

4.5

Question 3.2 [maximum 5 marks]

Write a brief note on the difficulties that may be encountered when dealing with insolvency law in a cross-border context relating to pertinent differences in the relevant systems.

[First of all, the differences in the substantive insolvency law may give rise to difficulties in cross-border contexts. For instance, the rules on (1) moratorium and (2) voidable transactions may have a bearing on how foreign creditors should proceed to recover their debts when the debtor corporation is nearly insolvent or after it has been wound up. Also, differences in distribution and priority rules among different jurisdictions would also affect the entitlements of creditors in insolvency. An obvious example is the concept of "floating charges", which may not be generally known in civil law jurisdictions.

Second, whether the law of a given jurisdiction has provided for cross-insolvency matters would undoubtedly also generate problems in cross-border context. For instance, if a corporation has assets in a jurisdiction that did not ratify any treaty or convention, it may be more difficult for insolvency practitioners to take control of those assets and administer the insolvent estate of the corporation accordingly.

Third, the differences in the substantive law (other than insolvency law) of different jurisdictions may also be relevant. In particular, contract law and business law would no doubt affect the entitlements of the creditors and even the basis of their debts (when validity of the underlying transaction is being challenged). Meanwhile, corporation law would also affect the duties and liabilities of directors and officers of an insolvent company. In the premises, differences in the said substantive law would affect how insolvency practitioners administer the estate of the corporations (or bankrupt individuals) in different jurisdiction.

Last but not least, the procedural law would affect the time and costs associated with the administration of the estate in multiple jurisdictions (including recognition of the liquidators and how they may commence proceedings in different jurisdictions for, e.g., asset recovery purposes.]

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.

[In 2005, UNCITRAL issued the Legislative Guide on Insolvency Law, which serve as a reference to legislatures in different jurisdictions in their drafting and reviewing process of their local insolvency law. Similarly, in 2001, the World Bank also developed the Principles for Effective Insolvency and Creditor/Debtor Regimes for similar purposes. These two documents together reflect best international practice in insolvency regulations which facilitate legislative reforms by jurisdictions around the world towards the same direction and thus play a central role in promoting harmonisation of domestic insolvency laws. For completeness, it is also noted that the UNCITRAL has issued many other texts on insolvency in the 21st century including the UNCITRAL Model Law on Recognition and Enforcement and Insolvency-Related Judgments with Guide to Enactment (2018) and the UNCITRAL Model Law on Enterprise Group Insolvency with Guide to Enactment (2019).

In my opinion, these texts are to a large extent effective in addressing international insolvency issues. This is because those texts provide for a "common language" for legislatives and judiciaries around the world in addressing cross-border insolvency issues. First, they assist developing countries in establishing their own insolvency regulations whose standards are close to those of the developed countries. Secondly, while there would always remain differences in the insolvency system among different jurisdictions, the said multilateral steps facilitate both understanding and comparison of insolvency rules in different jurisdictions. On a related note, UNIDROIT has discussed a feasibility study in 2020 for harmonisation of rules in the context of insolvency of banks.

That said, the said multilateral steps do have their limitations in resolving international insolvency issues. For instance, it is not mandatory for any jurisdiction to follow the Legislative Guide and the World Bank Principles. Also, progress and effectiveness of legislative efforts in different jurisdictions would depend on numerous factors including the efficiency of legislatures in different jurisdictions and many other socio-political issues.]

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

4.5
Marks awarded 13 out of 15

QUESTION 4 (fact-based application-type question) [15 marks in total]

Nadir Pty Ltd (Nadir) is a company registered in Utopia. Originally it was incorporated in the neighbouring country of Erewhon before moving its registration and head office to Utopia one month ago. Apex Pty Ltd (Apex) is incorporated and has its head office in Erewhon. Apex and Nadir enter into a contract by exchange of emails between their head offices for Apex to supply goods to Nadir in Utopia. Nadir has failed to pay for the goods which have been delivered in accordance with the contract. Apex issues court proceedings against Nadir in Utopia for monies owing for the goods sold and delivered.

Meanwhile, Nadir also owes monies to creditors in Erewhon. One Erewhon creditor obtains a court winding-up order against Nadir in Erewhon and a liquidator is also appointed by that court.

If you require additional information to answer the questions that follow, briefly state what information it is you require and why it is relevant.

Question 4.1 [maximum 5 marks]

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.

[As a starting point, the Erewhon liquidator should seek to communicate with the Court in Utopia and seek recognition of (1) the insolvency proceedings in Erewhon and (2) their appointment in Utopia.

Since the UNCITRAL Model Law on Cross-border Insolvency has been adopted by Utopia, the Cross-border Insolvency Act of Utopia should contain provisions allowing the Erewhon Court and the Court in Utopia to communicate and co-operate to the maximum possible

extent. The Model Law should also mandate the Court in Utopia to co-operate with the Erewhon liquidator as far as possible.

The MLCBI is significant for it provisions on recognition and relief in 4.1. Its provisions on cooperation and coordination are secondarily important as the liquidator is primarily seeking advice about staying court proceedings in Utopia.

Once the insolvency proceedings in Erewhon have been recognized as the "main" proceeding, such recognition may trigger an automatic stay of proceedings against Nadir in Utopia, which should cover Apex's ongoing court action against Nadir in Utopia.

As such, the application of the Cross-border Insolvency Act of Utopia may allow the Erewhon liquidator would like to stop Apex court action against Nadir in Utopia in a speedy matter.]

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.

[(a) it should not make a difference to my answer above since the insolvency proceedings in Erewhon would still be recognized as the "main" proceeding.

(b) It may make a difference to my answer above since the insolvency proceedings in Utopia may take precedence over the insolvency proceedings in Erewhon. In such case, it may be for the liquidator appointed by the Court in Utopia (but not the Erewhon liquidator) to consider how to deal with Apex's court action in Utopia (e.g. whether to seek a stay of the same).]

Refer to Article 29 on concurrent insolvency proceedings, under which the local proceedings in Utopia maintain pre-eminence over the foreign proceedings in Erewhon.

1

Question 4.3 [maximum 8 marks]

NB: This question is not related to Questions 4.1 and 4.2

A court has ordered the commencement of an insolvency proceeding against a corporate debtor in the State of its incorporation and head office. The company has operated business in a number of States and has assets (real property or interest in land, other tangible assets and intangible assets); creditors (including taxation / revenue authorities) and directors in several States.

Select a country for the company's incorporation and, based on the insolvency laws of the country you select and the brief facts provided, describe four key international insolvency issues facing the insolvency representative in this scenario. For each issue, what domestic laws or international instruments apply to assist the insolvency representative address these four issues?

[It is assumed that the company was incorporated in Hong Kong SAR, China, which has not adopted the UNCITRAL Model Law on Cross-border Insolvency.

First, in relation to recognition of foreign insolvency proceedings, the domestic insolvency legislation of Hong Kong does not provide for express provisions on whether and how the Hong Kong court would recognize foreign insolvency proceedings. Although the Hong Kong Court has taken a pragmatic approach and relied on common law principles to recognize foreign insolvency proceedings, an issue may arise if concurrent insolvency proceedings have commenced in other jurisdictions, which may give rise to uncertainty in, e.g., how the insolvency representative may obtain control of and administer the assets of the company around the world.

Second, in relation to cooperation with other courts in concurrent insolvency proceedings, Hong Kong did not adopt the UNCITRAL Model Law on Cross-border Insolvency. That said, Hong Kong has adopted the JIN guidelines. As such, if concurrent proceedings have been commenced in jurisdictions that also adopted JIN guidelines, the insolvency representative may rely on JIN guidelines to facilitate cooperation and communication between the Hong Kong Court and such foreign court(s).

Third, in relation to corporate rescue issues, the Hong Kong law lacks a statutory corporate rescue regime (except for the use of schemes of arrangement). As such, if the company intends to proceed with corporate rescue procedures with creditors in different jurisdictions, the insolvency representative in Hong Kong need to resort to informal corporate rescue tools given the lack of statutory corporate rescue regime in Hong Kong.

Lastly, in respect of actions against directors in foreign states, the Hong Kong legislation allow the insolvency representative to bring legal proceedings in Hong Kong against foreign entities after seeking permission from the Hong Kong court and showing that the intended foreign defendant has a sufficient connection with Hong Kong. As such, if the insolvency representative intends to bring, e.g., asset recovery action against the former directors of the company outside Hong Kong, the insolvency representative may rely on Hong Kong civil procedures to do so.]

This is a good response. For an approach more closely applied to the facts, see the 'Model' Answer for four key international insolvency issues raised by the facts and facing the insolvency representative in this scenario.

6

Marks 10.5 out of 15

* End of Assessment *

A very good paper that generally addresses the questions asked and substantiates its answers.

TOTAL MARKS AWARDED 40/50