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**.

Commented [DB1]: You have not followed the instructions – I had to do this for you. I will let it slide for the first practice assessment, but in future your assessment will be returned unmarked if you do not follow the instructions.

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: 6 out of 10

QUESTION 2 (direct questions) [10 marks]

Question 2.1 [maximum 2 marks]

Explain what the term "international insolvency law" means.

[The international insolvency law may be described as the set of tools that comes to use when we approach an insolvency situation (which may be in form of proceeding) that has one or more foreign element that does not allow to be solved exclusively through local legal system.]

There is scope to elaborate

2

Question 2.2 [maximum 5 marks]

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

[Universality can be considered the ideal concept to apply when dealing an international insolvency case. This premise because it seeks for an unique proceeding covering all debtors, creditors, assets, debts, among others. So, in this case, all creditors would have the opportunity to attend an unique, central and only insolvency proceeding that would apply worldwide, regardless of the different foreign parts involved. On the other hand, the territoriality states that the insolvency proceedings shall be limited within each state. This means that it would require that a different and independent procedure would start in each state that has debtor's assets. While applying this principle, all the parts may encounter different types of problems when putting into practice its effects. These problems can be exemplified encountering various proceedings with its particular laws (which varies between states), problems while applying whatever it has determined in a foreign decision, problems for a

creditor to participate in a foreign procedure or even a contradiction in which a state has not declared insolvency of the company.]

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.

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.

[The United Arab Emirates has reformed its domestic insolvency law through the "Insolvency Law No. 19 of 2019 (Insolvency Law)", which has come to effect as of 30 November 2019.

The Kingdom of Saudi Arabia issued a new Bankruptcy Law in 2018 which has come to effect as of February 2018.

Kuwait issued Law No. 71 of 2020 concerning the insolvency law to change its old bankruptcy law framework.]

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

2.5

Marks awarded 8 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.

[An individual, regardless of their actions and decisions, is still a human being. It sounds obvious but when dealing in insolvency procedures, its important to make this distinction. A person cannot 'disappear' after a liquidation unlike a company can. For these types of reasons, its approach shall be different that if it were a company. Insolvency for individuals may seek for a fresh start. It also may take into account the personal situation of the individual to ensure that he/she can have a decent lifestyle and other particular laws that would seek to protect the individual.

On the other hand, corporations objectives while encountering insolvency may differ. The main goal of an insolvency procedure shall be the continuity of the company for all the benefits that its existence suggest: creates jobs, brings progress, it may generate cash to pay for its creditors, among others. However, if a company is not capable of continuing, it would need to be liquidated and it would cease to exist, unlike an individual. In this case, the company would not benefit from a special treatment because it's not an individual and does not need basic needs to be fulfil, regardless of the operating expenses while liquidating. There would not be a 'fresh start' for the company. In case of liquidation, the procedure shall seek to pay, the best as it can, all the creditors. But unfortunately it would be the end of the company.]

There is scope to elaborate for example regarding imposition of personal liability on the responsible persons in corporate insolvency

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.

[The first thing to take into account while dealing with insolvency law in cross-border context, is to determine if any of the states involved has a law or treaty that regulates the matter. Regardless of this first filter, the difficulties may appear. There would certainly be differences between aspects of domestic law (for example, how to deal with mortgage guarantees), the procedure that each involved state gives to insolvency, how a foreign decision may apply to a domestic state, the terms used in each state may vary its definition, and lots of effects that a given state may apply for an insolvency procedure that a foreign state may not apply.

It may also create difficulties the way that assets are treated, the rights of the creditors and foreign creditors. These differences may extend in dealing with solving which court has jurisdiction and even which law may apply to each situation.]

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.

[UNCITRAL Legislative Guide on Insolvency Law (2004) has being a great step forward to reach to harmonisation of the domestic insolvency law. Although not every country has adopted, it's a great start for reaching an ideal harmonisation given the fact that there are multiple states that has adopted.

Are there any other relevant multilateral steps?

In my opinion, it would be ideal that every state worldwide adopted a single insolvency law procedure. This would make easier to approach every international insolvency proceeding because every debtor and creditor would be sure of the rules that would apply to that procedure. Likewise, a harmonisation to this degree would avoid certain difficulties while applying different laws from different states and would certainly avoid the controversy that surges in regarding jurisdiction and binding of foreign decisions. Although it may be utopic this approach, states may, at least, reach to an agreement regarding the procedures of international insolvency law. Is recognized that, due to socio cultural matters, it's almost impossible a complete unification of laws, but the more coordination, the better.]

There is scope to elaborate on 'socio cultural matters' and consider political pressure, foreign investor pressure and/or loan conditions.

4

Marks awarded 12 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.

[Taking into account that Utopia has adopted the UNCITRAL Model Law on Cross-border Insolvency, this document mandates that Utopia's court cooperates with Erewhon's liquidator. Regardless that Erewhon has not adopted the MLCBI (or at least the case does not specifies it), Utopia did adopted it and it doesn't need reciprocity for its validity. So, in this case, my advice would be that the liquidator and the Utopian court coordinate to integrate into a single procedure all the debts and creditors that the debtor has into a single, unified insolvency procedure. This last statement taking into account that in Utopia hasn't started and insolvency procedure but it would be beneficial to integrate into a single procedure.]

There is some scope to elaborate, for example regarding recognition and the stay sought.

4

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 would depend on the regulation that Utopia has because we may encounter some difficulties regarding the recognition of the jurisdiction, court to commence the procedure and what law may apply to the case. In some states, regardless of the matter not being heard yet, the simple action of presenting the request for the procedure has some effects that may affect the course of the international insolvency matter. However, the UNCITRAL states that there shall be cooperation between the courts so it would also apply for the situation.

(b) The UNCITRAL would also apply because it would mandate that it needs to coordinate with the insolvency procedure that would start in Erewhon.]

It would be beneficial to elaborate with reference to article 29 of the 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?

[The country in which this company is located is Colombia. Colombia has an unified law for insolvency for companies, the Law 1116 of 2006. In this law, in its articles 85 and beyond, its described all the international insolvency procedure that needs to take into account while dealing with an international insolvency case.

The four international insolvency keys would be:

A. Place of interest (that it would be determined where the head of operation was.)
B. Branch offices (taking into account that there's being business in other states)
C. Assets location
D. Debtors in other states.

To deal with these matters, it would be necessary to determine the court that would rule (jurisdiction), the law that would apply and the enforcement on foreign jurisdictions.

It's important to note that Colombia has adopted the UNCITRAL Model Law on Cross-Border Insolvency (1997).

The domestic law, however, it's very clear while dealing with international insolvency procedures. The article 86 states that it would always apply the treaty that has being signed.

The place of interest would be Colombia (Art. 101 registered office) and therefore, it would be enforced by a Colombian court and under the Colombian laws. These laws accept the participation of foreign creditors, who would be acting with the same rights as a Colombian (Art. 94).

Regarding the branch offices and the assets location, in compliance with the domestic law and MLCBI, it would require cooperation between the foreign courts to integrate to the insolvency procedure all the assets that exists abroad.]

For another approach that is 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.

5

Marks awarded 10 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 36/50