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]: Please follow the instructions! Once the formal assessments start being submitted, I will return your assessments unmarked if you do not comply with 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 8 out of 10

QUESTION 2 (direct questions) [10 marks]

Question 2.1 [maximum 2 marks]

Explain what the term "international insolvency law" means.

The part of the law that constitutes a group of rules relating to insolvency proceedings that are not wholly enforceable because they are constrained by international and cross-borders factors.

There is scope to elaborate

1

Question 2.2 [maximum 5 marks]

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

Universality is the concept that a single insolvency proceeding should apply to all of the assets and debts of a debtor in all States (to the exclusion of all other insolvency proceedings and methods of handling said assets); territoriality is incompatible with universality because it theorises that it should be possible for an insolvency proceeding to be commenced, in respect of a debtor, in each State in which the debtor owns assets.

Universality requires that only one State will have jurisdiction in relation to a debtor insolvency - ideally that State would be where the relevant debtor has its centre of main interests. By contrast, from a territorial perspective multiple States will have jurisdiction in relation to a debtor insolvency (that is, each one where the debtor has assets) and each State's insolvency process in respect of a debtor will only relate to that part of the debtor's assets located in that State.

Also, note, these theories involve two key aspects of private international law - recognition and effect as well as jurisdiction:
For example, with universalism, (1) the jurisdictional aspect requires all States to agree on the place for the one set of insolvency proceedings in respect of the debtor and, to be successful, (2) recognition and effect requires that other States recognise that one set insolvency proceedings and recognise it as having extraterritorial effect in their States.

3.5

Question 2.3 [maximum 3 marks]

Describe **three** recent examples of developments in the Middle East region to reform domestic insolvency laws or to address international insolvency Issues.

Although there are no international insolvency instruments governing cross-border insolvencies amongst Middle East countries, various States in the region have co-operated to review similarities and differences between those States' insolvency regimes pursuant to a comparative survey commenced in 2009, with support from the Hawkamah Institute for Corporate Governance, the World Bank, the OECD and INSOL International (in particular contrasting with the World Bank's Principles for Effective Insolvency and Creditor Rights Systems (2005). **what impact did this have on reforming domestic insolvency laws or addressing international insolvency Issues in the Middle East?**

Separately, various jurisdictions have conducted reforms of their domestic insolvency laws (namely the UAE, Saudi Arabia, and Dubai) within the past seven years and each of Bahrain and Dubai have adopted the Model Law on Cross-Border Insolvency within the past five years.

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

2

Marks awarded 6.5 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.

The purpose of individual insolvencies are to balance the needs of the debtor with the position of their creditors. Individual insolvencies consist of creating a protective environment for the debtor - that is, an environment in which they are not harried by their creditors and in which they should (eventually, at least) be in a position to resume their life unencumbered by insolvency. This is especially the case where the debtor is adjudged to be less 'at fault' for their insolvency. Individual insolvency processes typically cater for the relevant individual to reduce the amounts owing to their creditors by making payments out of the present and future income and assets of the individual.

By contrast, the purpose of corporate insolvencies tend to be (in order of priority): first, to rescue the business or any elements of it that are viable on an on-going basis; secondly, to distribute the assets of the company to its creditors fairly (normally in a prescribed order of priority); and, thirdly, to bring to an end the life of the company in an orderly manner that maximises the returns for creditors. It is typical for corporate insolvency regimes to allow for investigation into the conduct of persons involved with the company prior to its insolvency.

In summary, individual insolvencies are weighted more towards protecting the debtor than corporate insolvencies are, although in both cases there is a focus on protecting the interests of creditors.

There is some scope to elaborate

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 difficulties that arise when dealing with insolvency law in a cross-border context do so as a result of: (a) differences between States' insolvency laws, policies and regimes; and (b) the interaction between different States' laws, policies and regimes.

With regard to (a), above, States have different insolvency procedures for both individual and companies, governed by different rules, applying to different assets, and concerning different security interests and enforcement methods. In addition, different jurisdictions will use varying terminology to describe similar and identical concepts. The insolvency regimes of some jurisdictions are weighted more in favour of debtors (England, for example) and other more in favour of creditors (France, for example). Finally, some insolvency regimes are based on common law (mostly countries with Anglo-Saxon roots

and/or influence) whilst others are based on civil law (mostly continental European countries and areas where those countries have had influence).

With regard to (b), above, those differences are of relevance where multiple States have jurisdiction in relation to a debtor because an inherent conflict may arise between the different approaches to the characteristics identified above. Not only that, there are various cross-border regimes in relation to which cross-border insolvency cases are governed, depending on the relevant States and their relationships with each other.

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.

One of the most significant recent developments has been the publication of the UNCITRAL Model Law on Cross-Border Insolvency (the "Model Law"). The Model Law consists of a recommendation for States to adopt into their domestic insolvency regimes - and the widespread adoption of the Model Law would contribute towards the harmonisation of those regimes. The World Bank has also produced similar 'soft law' guidelines to promote harmonisation amongst domestic insolvency regimes (revising their guidelines at various intervals in the last 20 years, which suggests some level of engagement with them).

In my view, it is implausible that insolvency regimes that have developed organically and in different ways over centuries can be fully harmonised because their differences are deep-rooted. Any attempted harmonisation must also overcome different States' policy objectives with regard to their insolvency regimes (for instance, some jurisdictions - such as England - are said to have a much more 'rescue-friendly' insolvency culture). Where harmonisation attempts can achieve success, however, is in the recognition and enforcement of judgments across borders, which ought to be in all States' interests as it would reduce the cost to both debtors and creditors of engaging in the insolvency world.

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.

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.

The Cross-border Insolvency Act of Utopia (the "CBIAU") will govern the recognition in Utopia's court of the insolvency proceedings of Nadir in Erewhon. As is the case with the Model Law, the CBIAU will not require reciprocity in Erewhon. The CBIAU will also govern the Erewhon liquidator's standing to make an application in Utopia's court.

The CBIAU will also be of relevance in establishing whether the Erewhon liquidator is capable of obtaining a stay in Utopia's court, in relation to Apex's action against Nadir.

The CBIAU will mandate co-operation and direct communication between Utopia's court and Erewhon's court. It would be helpful to understand whether Erewhon's court would in practice co-operate and communicate with Utopia's court.

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) No: the underlying questions are whether the Erewhon liquidator has standing to apply for a stay in relation to actions against Nadir in Utopia and whether Utopia's court will recognise the insolvency proceedings in Erewhon. If a stay were capable of being granted, it would prevent Apex from suing Nadir and from a winding-up petition being heard.

(b) Yes.

Elaboration and reference to article 29 of MLCBI is needed.

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 company is incorporated in England.

(a) The insolvency representative must obtain recognition of the English court's order in the relevant foreign States. This will be governed by any treaties between England and the relevant State and the relevant State's domestic law (including any adoption of the Model Law).

(b) The insolvency representative must obtain enforcement of the English court's judgment and/or enforcement orders in the relevant foreign States. This will be governed by the relevant State's domestic law.

(c) The insolvency representative must evaluate and understand any disposition/avoidance rules in the relevant foreign States, which will be governed by the relevant State's domestic law.

(d) The insolvency representative must consider investigations into directors ordinarily resident in other jurisdictions.

More detail would assist. 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.

4

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 35.5/50