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.

The term "international insolvency law" is to be understood as the totality of regulations, conventions and international agreements that can be used for the handling of insolvency matters that go beyond national borders. There is no international law regulating cross-border insolvency matters. However, numerous associations and agreements between countries help to create common starting points for the uniform handling of insolvency cases through communication and cooperation between courts or parties involved in the insolvency.

2

Question 2.2 [maximum 5 marks]

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

The concepts of universalism and territorialism represent diametrically opposed theories that offer solutions to cross-border insolvency issues. According to the principle of universalism, the application of the insolvency law of only one of the countries involved always applies in cross-border insolvency cases. This country can be determined, for example, according to the centre of its main interests (COMI). The insolvency law of one country is thus used outside its own territory. In contrast, the principle of territorialism provides that the insolvency law of a country always applies only within its borders. Consequently, if a cross-border insolvency situation exists, this regularly results in the opening of several insolvency proceedings in different countries.

There is scope to elaborate. These theories also involve recognition and effect (as well as jurisdiction) 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.

In the Middle East, there are currently no uniform rules for an international insolvency law. However, Bahrain, Kuwait, Oman, Qatar, Saudi Arabia and the United Arab Emirates, which together form the Gulf Cooperation Council, have been cooperating with the World Bank on cross-border insolvency issues for over 40 years. **what impact did this have on reforming domestic insolvency laws or addressing international insolvency Issues in the Middle East?**

In 2009, the World Bank, together with the Hawkamah Institute for Corporate Governance and the OECD and INSOL International, published the first comparative study of insolvency systems in the Middle East and North Africa (MENA). This focused on the principles already published by the World Bank. **what impact did this have on reforming domestic insolvency laws or addressing international insolvency Issues in the Middle East?**

The United Arab Emirates, Saudi Arabia and Dubai have each reformed their national insolvency laws in the years since 2016. **More detail would have improved the mark awarded for this sub-question.**
Bahrain adopted the Model Law on Cross-Border Insolvency in 2018 and Dubai the International Financial Centre in 2019.

1.5
Marks awarded 7 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.

Basically, regardless of which insolvency code from which country is considered, insolvency law is divided into two main subject areas. One is the insolvency of private individuals and the other is the insolvency of companies. In a direct comparison of these two insolvency debtors concerned, on the one hand there are concordant regulations, but on the other hand there are equally significant differences. The decisive factor here is that "dissolution" of the debtor after the conclusion of insolvency proceedings is already not possible in the

case of natural persons. In the insolvency of these, the focus is therefore on the discharge of the debtor, which results in a new start for the debtor upon conclusion of the insolvency proceedings. Such rehabilitation is not possible in the case of companies, so that they are regularly liquidated. In the case of companies, the possibility of reorganization or restructuring is increasingly being sought as a means of preventing liquidation.

There is scope to elaborate further

3.5

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.

If an insolvency case arises which crosses national borders into the territory of another state, it must regularly be dealt with the fact that the insolvency law of most states ends at their national borders. This can result in a situation that leads to different insolvency proceedings. In this case, insolvency laws with different characteristics may clash. For example, one of the countries involved may have an insolvency code that is particularly creditor-friendly, while the other country may have an insolvency code that is particularly debtor-friendly. This can lead to a race among creditors in one country, while in the other country the debtor concerned is deprived of any prospects. The so-called "forum shopping" can occur, according to which parties in the proceedings choose the country that is more favourable for them.

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.

Multilateral approaches to harmonizing the insolvency laws of different states have existed, through treaties and conventions between states, since the 13th and 14th centuries. ***The question specifically asks about the 21st century.*** *Through these approaches, attempts are made to regulate international insolvencies either through so-called " hard law" or to influence them through "soft law". within the European union, a significant success was achieved in this context through the enactment of the European Insolvency Regulation (EIR), which has also influenced multilateral developments in international insolvency law beyond this. The EIR is so-called hard law. Even more influential were measures of so-called "soft law", which advanced international directives or guidelines for the establishment of harmonization of common insolvency regimes. One example is the UNCITRAL Legislative Guide on Insolvency Law 2004, while the World Bank's Principles for Effective Insolvency and Creditor/Debtor Regimes of 2005 were also influential. The ALI NAFTA Guidelines*

Applicable to Court-to-Court Communications in Cross-Border Cases (2000) should also be mentioned.

In my opinion, the aforementioned regulations or directives and guidelines contribute quite significantly to a favourable development of the harmonization of national insolvency law systems. Against the backdrop of the international nature of business, which has also become prevalent in the economy as a result of digitalization alone, there is an urgent need for concepts that create common structures for resolving insolvency issues. Since many countries look to national legislation, guidelines such as those issued by UNCITRAL or the World Bank can support harmonization efforts. This is especially true as long as they have binding effect when referenced.

There is some scope to elaborate regarding loan pressures etc.

4.5

Marks awarded 10.5 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.

First of all, it should be borne in mind that the UNCITRAL Model Law on Cross-border Insolvency is in principle only a guideline which countries can use as a reference when drafting their own national insolvency regulations. As Utopia has adopted the UNICITRAL

model in its entirety, the authority of the liquidator from Erewhon to act is also determined by the principles of this model. One of the most important principles of this model law is the cooperation and coordination of cross-border insolvency proceedings. Insofar as the liquidator in Erewhon wishes to obtain a discontinuance of the action of Apex against Nadir, this is essentially aimed at ensuring that assets of Nadir do not already reach Apex on the basis of the action. **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.) The question requires candidates to apply the relevant MLCBI articles to the facts provided.** *The efforts of the liquidator must be aimed at achieving an equal distribution of the proceeds from liquidation to all creditors. On the basis of the application of the UNCITRAL model, it should be possible to establish contact with the court hearing the action against Nadir and initially obtain an interruption of the proceedings. In the next step, the liquidator should attempt to reach an agreement with Apex that will result in at least a partial amount of Apex's claim as the amount to be paid to Apex by way of a specific liquidation. With an existing cooperation with the court in Utopia and a basis for discussion with Apex, it should be possible for the liquidator, with reference to the principles of the UNCITRAL model, to achieve cross-border coordination of the liquidation and, including Apex, to make it possible for all creditors to participate in the proceeds liquidation. With Apex involved from the beginning, this further procedure is not expected to be negative.*

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.

Re a):

If Apex, for its part, has applied for the winding up of Nadir, the first step should be to quickly seek talks with Apex in order to persuade Apex to withdraw its application on the basis of an agreement. It must be made clear in good time that a winding-up has already been initiated and that a simplification as well as harmonization of the procedure will be achieved if a liquidator pursues the winding-up.

Re b):

If a liquidation of Nadir has also been initiated in Utopia due to the application of Apex, the discussion with the liquidator in Utopia should also be sought. Since the UNCITRAL model strives for a standardization and harmonization of liquidation procedures, a basis should be

found as soon as possible, according to which a uniform liquidation procedure can be carried out over the assets of the Nadir. With reference to the modified universalism, it should be worked out where the main procedure of liquidation should be conducted. Since it can be assumed that the main proceedings will be conducted where the company has its headquarters, the liquidator in Utopia should also essentially take care of the liquidation. The own role in this case can be that by support from the perspective of the events and assets of the company in Erewhon.

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?

The company is incorporated in the United Kingdom.

On the four important insolvency law issues related to the cross-border insolvency situation:

1. In which other countries was the company active and have insolvency proceedings already been opened against the assets of this company there? Are there ongoing legal disputes in the respective states?

This first question is more concerned with clarifying the existing facts. The situation is different if insolvency proceedings have been opened in one country and the question arises whether or how to deal with assets or services of this company in other countries. However, if efforts have already been made in another country to take legal measures to deal with insolvency or if insolvency proceedings have already been opened, the cooperation must be approached differently.

The United Kingdom has uniform insolvency legislation in the form of the Insolvency Act 1986. The United Kingdom has uniform insolvency legislation in the form of the Insolvency

Act 1986. England and Wales have fully adopted the UNICITRAL model on cross-border insolvency. Section 456 of the Insolvency Act 1986 only applies to relevant countries and common law principles also continue to apply.

In this context, it may be important whether the country in question is one of the "relevant" countries or a country that is also part of the common law. It is also important whether it is a country that has also adopted the UNCITRAL model.

2. What type of insolvency law applies in these countries? Is the insolvency code more creditor-friendly or debtor-friendly? Does the respective insolvency code tend more towards reorganization or liquidation?

This question is essentially to clarify which legal systems my context of a cross-border insolvency is confronted with. Depending on the orientation of the system, the proceedings can proceed harmoniously from the outset or end in conflict, for example if a creditor-friendly insolvency system is operated in one country but a debtor-friendly insolvency system in the other. The way in which the procedures are structured in the different countries also plays a key role in finding points of contact that enable the procedure to be handled cooperatively.

First of all, English insolvency law is based on uniform legislation and not on general law. Any provisions and regulations on the course of insolvency proceedings can consequently be derived from the Insolvency Act 1986. In English insolvency law, a differentiation is made between consumer insolvency and that of companies. As a source of common law, there are numerous similarities and regulations that apply in all the countries that also belong to the common law. In addition, England and Wales has adapted the UNCITRAL model, which provides significant support in the regulation of cross-border insolvency matters.

English insolvency law is more debtor-friendly and therefore tends to favor debt restructuring and reorganization.

3. Do the countries concerned individually participate in international agreements or have they adopted certain international guidelines to harmonize cross-border solvency issues?

This question is mainly aimed at finding a platform through which a cross-border insolvency can be resolved in a cooperative manner. This platform can essentially consist of the fact that international insolvency law provisions already exist uniformly or that the states involved have adopted international agreements or guidelines into their system.

England and Wales have adopted the UNCITRAL model in their legal system, so that cross-border insolvency cases can be handled harmoniously, especially if the other countries involved also adhere to the UNCITRAL model.

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.

4.5
Marks awarded 9 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 34.5/50