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 9 out of 10

QUESTION 2 (direct questions) [10 marks]

Question 2.1 [maximum 2 marks]

Explain what the term "international insolvency law" means.

International insolvency law, as defined by Wessels, refers to the body of rules dealing with certain insolvency proceedings or measures which cannot be fully enforced because the applicable law cannot be executed immediately and exclusively without consideration being given to the international aspect of a given case.

These is an authoritative source. There is scope to elaborate to better convey your personal understanding.

1.5

Question 2.2 [maximum 5 marks]

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

The concept of universalism posits that there should only be one insolvency proceeding covering all of the debtor's assets and debts worldwide – once insolvency proceedings are commenced, no other insolvency proceedings should be commenced, nor should there be other forms of execution of the debtor's assets. Creditors worldwide should be able to participate in proceedings, with their claims being treated on an equal basis. Under this approach, a single insolvency proceeding would have extraterritorial effect.

In contrast, territorialism posits that insolvency proceedings can be commenced in every State/jurisdiction where the debtor has assets – but these proceedings are limited to that particular State/jurisdiction. Insolvency proceedings under territorialism do not have extraterritorial effect. Unlike universalism, territorialism provides that there

be multiple insolvency proceedings running concurrently in relation to the same debtor. Further, unlike universalism which treats creditors' claims on an equal basis, the principle of territorialism prioritises the protection of the interest of local creditors, before any assets are transmitted abroad to the satisfaction of the interests of foreign creditors.

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.

The UAE has reformed their domestic insolvency laws in 2016 and 2019. Before 2016, UAE did not have modern bankruptcy regulations – it was difficult for companies to restructure or to wind up. Unpaid debt or issuance of dishonoured cheques could result in jail terms. The modern legislation introduced in 2016 introduced new measures to rescue businesses in distress, such as preventive compositions (similar to voluntary arrangement schemes under English Law) and debt restructurings and by reforming the bankruptcy regime.

Saudi Arabia reformed their domestic insolvency laws in 2018 – the new insolvency legislation allows debtors to apply to court for a suspension of claims. It also allows for debtors to be discharged from bankruptcy, although this is contingent on the creditors granting such a discharge.

The Model Law on Cross-Border Insolvency was adopted by Bahrain in 2018 as well as Dubai in 2019.

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.

The objective of insolvency for individuals is to: a) protect the debtor from harassment by creditors (ie, the stay of claims once the debtor has declared bankruptcy), b) enable the debtor to start afresh, and c) allow the debtor to pay off his/her debts by making contributions from the debtor's present and future income to the estate in bankruptcy whilst taking the debtor's personal circumstances into consideration (for example, the debtor's family home may not be seized and sold off to satisfy the debts owed).

In contrast, the objective of insolvency of corporations is to: a) preserve the business – or the viable parts of the business – as a going concern (this stems from the view that it is more worthwhile to keep businesses afloat as a going concern rather than to wind them up) and b) impose personal liability on responsible persons (ie, officers of the company).

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.

The first difficulty is that while insolvency is quite clearly defined in the domestic context, the definition of insolvency, which is the trigger for the commencement of proceedings, is not uniform – for example, the traditional definition of insolvency is a situation where the total outstanding liabilities exceeds the measurable value of all the debtor's assets. However, in some countries, a short-term inability to service debts (ie, a liquidity crisis) is also sufficient to begin insolvency proceedings.

The second difficulty involves the issue of conflict of laws. There are three aspects to this:
a) the choice of forum to exercise jurisdiction in the matter – this requires an examination of the connection with the jurisdiction of the parties or the dispute.
b) the recognition and effect accorded to foreign proceedings in the same matter – here, one looks at the type of judgment, whether it is one commencing insolvency proceedings against a debtor or an order during the course of an insolvency proceeding.
c) the applicable choice of law – in common law systems, choice of law issues arise only if parties invoke them. In civil law systems, foreign law is presumed to be a question of law to be applied regardless of whether parties have pleaded it or not.

Apart from these difficulties, Westbrook has identified a few others which include: a) standing for the recognition of the foreign representative, b) moratorium on creditor actions, c) creditor participation, d) executory contracts, e) co-ordinated claims procedures,

f) priorities and preferences, g) avoidance provision powers and h) discharges. The reason for divergence between how the relevant systems approach some of the areas identified may be boiled down to whether the system in question is pro-debtor or pro-creditor. For example, in a pro-debtor system, it may be easier to obtain a discharge. Also, local culture and conditions may result in different treatment of executory contracts – such as employment contracts. Some systems may stipulate that employment contracts are terminated or suspended upon commencement of insolvency proceedings.

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.

There have been a number of multilateral steps taken to promote the harmonisation of domestic insolvency laws. The first was the draft EC Convention on Bankruptcy and Related matters – if adopted this would have required contracting States to enact a uniform insolvency law. There was also the attempt by the IBA to draft a Model Bankruptcy Code to be available for any State to consider when developing their domestic insolvency laws. While this failed, the IBA contributed and subsequently endorsed UNCITRAL's Legislative Guide on Insolvency Law – this Guide was intended to be used as a reference by countries seeking to reform their domestic insolvency legislation. The World Bank has also produced guidelines on the regulation of insolvency: *Principles for Effective Insolvency and Creditor / Debtor Regimes*. The EU has also published a report on the Harmonisation of Insolvency Law at the EU Level – this report identified areas where harmonisation is believed to be worthwhile and achievable.

From the brief summary of the various initiatives above, I think that these steps are likely to have a great impact in addressing international insolvency issues. For one, in preparing these reports, studies would have to be undertaken of the domestic insolvency legislation of various States/jurisdictions. It is in this process of identifying similarities and differences between the different legislative regimes that one can then figure out areas of overlap, where harmonisation may be easier to achieve. It can also help narrow the differences between the different States/jurisdictions in that methods of cooperation and coordination can then be negotiated to bridge that gap.

[Type your answer here]

There is scope to elaborate regarding your opinion on how much impact these are likely to have in addressing international insolvency issues e.g. 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.

The Cross-border Insolvency Act of Utopia would apply pursuant to Art 1(c) given that a foreign proceeding (the winding up against Nadir taking place in Erewhon) is taking place concurrently with Apex's court action against Nadir in Utopia.

More information, however, is needed as to whether the liquidator has the authority – pursuant to the laws of Erewhon – to act as the foreign representative of the winding up that is taking place in Erewhon. For example if Erewhon had adopted the UNCITRAL Model Law on Cross-Border Insolvency, then pursuant to Art 5, it would be clear that the Erewhon liquidator has the authority to act abroad in Utopia.
Assuming the Erewhon liquidator has such authority, the next question is where the centre of main interest is. Pursuant to Art 16(3) – the presumption is that the debtor's registered office is its centre of main interest – and so in the present case, Nadir's COMI is in Utopia. But that being said, it is merely a presumption, and the Erewhon liquidator can seek to rebut this presumption. What must also be considered is the fact that Nadir had moved its head office and registration to Utopia one month ago. Here, the date relevant to the determination of Nadir's COMI is the date of commencement of the foreign proceeding in Erewhon – this information is not provided and must be obtained.

The Erewhon liquidator would then have to get the winding up proceedings in Erewhon recognised as a foreign proceeding pursuant to Art 17. This would allow the liquidator to intervene in proceedings in which the debtor is a party – Art 24.

The analysis bifurcates – depending on whether the proceedings in Erewhon are recognised as a foreign main proceeding or not. If the liquidator successfully convinces the Utopian court that the proceeding in Erewhon is the foreign main proceeding, then a stay will be granted as of right – pursuant to Art 20. If the proceedings in Erewhon are not the foreign main proceedings, then any relief granted is discretionary – pursuant to Art 21.
The MLCBI as drafted by UNCITRAL does not require reciprocity so it does not matter whether Erewhon has adopted the MLCBI or not. It would be beneficial to make this clear in your answer.

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.

Yes it would – Arts 28 and 29 of the UNCITRAL Model Law would then be relevant.

(b) Apex had obtained a court order to wind-up Nadir in Utopia prior to the Erewhon winding-up order.
No, it would not make a difference.
There is scope to elaborate. The MLCBI on concurrent proceedings is relevant to (b).

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?

I choose Singapore for the company's incorporation. The relevant domestic legislation is the Insolvency and Debt Restructuring Act ("IRDA"). Singapore has also adopted the UNCITRAL Model Law on Cross-Border Insolvency.
These are the four key international insolvency issues:

- Standing of the foreign representative (ie, the liquidator) in the States where the company has assets. Assuming that insolvency proceedings are commenced in Singapore which is the COMI, and a liquidator is appointed, the next step for the liquidator is to ensure that it is authorised to act in the States where the company has assets. Singapore has adopted Art 5 of the UNCITRAL Model Law – and so the liquidator would be authorised.
- Seeking a moratorium on creditor's actions in the States where the company has assets. The liquidator would want to do this to prevent a run on the company's assets.
- Priorities and preferences of creditors given that some of the company's creditors includes revenue authorities.
- Notification will also have to be provided to the foreign creditors given that proceedings are commenced under Singapore's insolvency law (IRDA). This will allow foreign creditors to file their claims in Singapore.

There is scope to elaborate. This is an 8 mark question.

6

Marks awarded 11 out of 15

*** End of Assessment ***

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

TOTAL MARKS AWARDED 41.5/50