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 2023.

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 2023**.** ***The assessment submission portal will close at*** 23:00 (11 pm) BST (GMT +1) on 15 October 2023**.** ***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.

International insolvency law is the composition of rules and guidelines pertaining to insolvency matters that transcend a single domestic legal system and due consideration on international aspects has to be given towards the insolvency matter

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 and territoriality are two approaches/theories when dealing with cross-border insolvency. Universality is an approach that there should only be one insolvency proceeding opened to cover all the debtors' assets and debts regardless of State in the spirit of comity. An advantage of Universality is its lower cost as only one proceeding will commence.

Territoriality is the theory whereby multiple insolvency proceedings can commence and run concurrently in every State where the debtor has assets. Proceedings are restricted by the borders of the territory and assets within the State. This approach would allow for the interest of national/local creditors to be protected before any assets/distributions are distributed abroad.

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

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.***

Despite not having any international instruments regulating insolvencies in the Middle East region, the countries in the Gulf Cooperation Council have been working closely with the World Bank for forty years.

A comparative survey was conducted in 2009 to compare insolvency systems in the Middle East and North Africa (MENA) region and was based on the World Bank's Principles for Effective Insolvency and Creditor Rights Systems (2005) as an indicator of best practice.

what impact did this have on reforming domestic insolvency laws or addressing international insolvency Issues in the Middle East?

As recent as 2019, States in the Middle East have reformed their domestic insolvency laws for example UAE in 2016 and 2019, Saudi Arabia in 2018 and Dubai in 2019. As for international insolvency issues, Bahrain has adopted the Model Law on Cross-Border Insolvency in 2018 and the Dubai International Financial Centre in 2019.

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

2

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.

The objective of insolvency for individuals is to protect the debtor from harassment by his creditors. In the medieval past, in the event where a merchant is unable to pay his debts, creditors would close his business by breaking his bench or counter. In worse scenarios, debtors could be sold as slave in order to secure repayment of a debt or pledge his own body for the repayment of a loan. Besides that, it would enable the debtor to start afresh with a clean state by discharging debts (The Statute of Ann of 1705) although it is not an automatic

entitlement. Lastly, individual insolvency aims to reduce indebtedness by pledging present and future income contributions towards the estate.

In corporation insolvency, the first determine if the insolvency is a balance sheet insolvency or a cash-flow insolvency. This would then determine the type of measure to be utilized; a restructuring of debts or a winding-up process. Generally, there will be a need to preserve viable parts of the business to secure the maximum recovery for creditors. In addition, should there be any personal liability, foul play or illegal disposition of assets, to proceed to exercise and recover the same.

Only in the aspect of individual insolvency that the concept of exempt or excluded assets will apply, allowing for the insolvent debtor to keep some assets to maintain him or his dependents as compared to a general corporate insolvency whereby the estate administrator/liquidator will take possession and control over all assets of the corporation.

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 most pertinent difference would be the absence of a global international court and global insolvency law that governs specifically cross-border insolvency issues that we can refer to (albeit there are several hard/soft laws based on regions).

From the onset, there is no clear definition of "Insolvency". Traditionally defined as a situation where the total liabilities exceed total assets, there are States that define Insolvency to include the inability to service short term liabilities (i.e. cash flow insolvency). Therefore, a situation might arise whereby a debtor is deemed insolvent in one State while still deemed solvent in another State during a cross-border insolvency context.

Besides that, conflict of laws would also affect insolvency law during a cross-border matter. Important aspects such as position of creditors, distribution priorities, moratorium, presence of security and national laws might differ from one State to another therefore causing difficulties in the cross-border context.

Westbrook, has identified several key issues in cross-border cases such as recognition of foreign representative (whether one State will recognise an Order/Declaration of another State), priorities and preferences (in relation to distribution of assets/funds) that might differ between States as well as moratorium on creditor actions (the extent and criteria to which moratorium is granted to the defaulting debtor against incoming legal suits).

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.

Several multilateral steps had been taken in recent years to promote the harmonisation of domestic insolvency laws. An example of it is the drafting/adoption of UNCITRAL Model Law on Cross-Border Insolvency (MLCBI) which contains provisions that enables cooperation and coordination of proceedings that are running concurrently. To further better the same, Chapter

IV of the MLCBI authorises (mandates, if the draft by UNCITRAL is adopted) local and foreign courts to directly cooperate and communicate between one another. Harmonising this aspect of insolvency law would result in a more holistic legal proceeding, avoid a scenario where conflicting judgements are given and not to mention speed up the process of the proceedings. **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.**

In addition to the MLCBI, the World Bank in the early 2000s came out with guideline called Principles to Effective Insolvency and Creditor/Debtor Regime to regulate international insolvency proceedings and are meant to promote the harmonisation of insolvency law. By converging the domestic and international insolvency laws, it is able to minimise the impact of an insolvency matter crossing a State boundary and reduce the involvement of regulators or courts to resolve international insolvency issues.

To add further, the UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation was affected by the Commission on 1 July 2009 and provided pragmatic guidance on cooperation and communication pertaining cross-border insolvency matters to insolvency practitioners and judges, by specifically pivoting on the usage of negotiations and multilateral agreements.

There is a plethora of issues surrounding international insolvency and the lack of harmonisation of domestic insolvency laws and absence of treaties or conventions addressing international insolvency will most definitely hamper cross-border insolvency proceedings. While blending domestic insolvency laws between States will be challenging due to the different legal culture, social norms, rights and conditions, it would have a magnitude of impact on international insolvency issues by providing greater clarity in terms of court jurisdiction, recognition of order and choice of law. It would also enable insolvency practitioners and judges the ability to have certainty when dealing aspects of insolvency such as distribution, priorities, rights of creditors etc. Another added benefit would be the speed of which insolvency proceedings can be resolved due to streamlined processes and procedures.
There is scope to consider political pressure, foreign investor pressure and/or loan conditions.

3.5
Marks awarded 13.5 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.

The Model Law on Cross-Border Insolvency (MLCBI) is a multilateral regulation aimed to assist and guide insolvency practitioners and lawyers on international insolvency issues. The case above mentions that Utopia is a State that adopted the MLCBI. While at this juncture the MLCBI does not require reciprocity, Chapter IV of the MLCBI authorises (and should the draft by UNCITRAL be adopted, would mandate) cooperation and direct communication between the local and foreign court. Therefore, the liquidator of Nadir in Erewhon could rely on this provision and acquire recognition of the court in Utopia to recognise the winding-up order and appointment of the liquidator and for the court action against Nadir in Utopia to be stayed/striked out. Principle of modified-universality can also be applied here.

In addition, countries that adopted the MLCBI in their domestic laws would usually contain provisions for an automatic stay of proceedings. The Erewhon liquidator should confirm the existence of such provisions and if so, apply for an automatic stay of proceedings for the Apex court action in Utopia.

Not mentioned in the text above is the location of the assets, the insolvency type of Nadir (balance sheet insolvency or cash flow insolvency) and viability of business of Nadir. These would assist the advise to the Erewhon liquidator on his position and legal standing. In the event assets are available in Utopia that are subjected to the estate of Nadir that the Erewhon liquidator should seize, the Erewhon liquidator should be allowed to take control and realise the same. Should the Apex suit in Utopia proceed, it may jeopardise the Erewhon liquidator's position.

The Erewhon liquidator of Nadir would apply for a recognition in Utopia Court of the winding-up of Nadir and to seize and realise all the assets belonging to Nadir in Utopia and Erewhon. Subsequently, with the guidance of the MLCBI, to proceed with the filing of proof of debts by the creditors and to conduct a distribution exercise to all the creditors.

You demonstrate a good understanding of the issues. It would be beneficial to apply the relevant MLCBI articles to the facts provided in more detail than that above.

4.5

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.

It would not make any difference

(b) Apex had obtained a court order to wind-up Nadir in Utopia prior to the Erewhon winding-up order.

Yes, as the liquidator of Nadir in Utopia would apply for recognition of the winding-up order in Erewhon and to use the guidance of the MLCBI during its liquidation administration

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?

Corporate Debtor – incorporated and head office in Malaysia

1. Recognition of Order for the Commencement of the Insolvency Proceeding

The first issue would be the jurisdiction of the foreign courts to recognise the insolvency proceeding order granted in the local court. At of todate, Malaysia has not adopted the UNCITRAL Model Law on Cross-Border Insolvency (MLCBI). However, Malaysia is among the reciprocating countries that adopts and enforces the Reciprocal Enforcement of Judgements Act 1958 (REJA). Other reciprocating countries under the act are the United Kingdom, Hong Kong, Singapore and Brunei. Judgements are limited to monetary sums and has to be registered and recognised within six years of the date the judgement was procured.

2. Priorities and preferences

In the event the local court recognises the foreign order, the insolvency practitioner would then be faced to determine the priorities of different class of creditors and the preferences to deal with them. Section 524 and 525 of the Companies Act 2016 governs the rights and duties of

secured and unsecured creditors respectively while Section 527 of the act governs the priorities towards distribution of assets.

3. Moratorium on Creditor Actions
In the event the insolvency proceeding is to restructure the debts of the Company, the insolvency practitioner would to note whether there is a moratorium provided oncethe restructuring exercise is applied for i.e. whether an automatic moratorium is granted otherwise whether the insolvency practitioner has an option to apply for the same. In Malaysia, a restructuring process is usually conducted pursuant to Section 366 of the Companies Act 2016 and no automatic moratorium is granted to the debtor. In the event the same is required, the debtor has an option to apply for a restraining order from court and the restraining order can have effect for up to 3 months and a further extension of 9 months subject to court.

4. Taxation / Revenue Authorities

The insolvency practitioner should also be mindful of the relevant domestic taxation laws when dealing with the assets of the estate and ensure compliance of the same. Tax revenues are usually ranked in priority above unsecured creditors.

Other key international insolvency issues that the insolvency practitioner should consider and be aware of would be pertaining to creditor participation, executory contracts, claims procedures of different States, discharge process and procedures and lastly regarding conflict of law issues

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

6.5

Marks awarded 12 out of 15

*** End of Assessment ***

TOTAL MARKS 40.5/50

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