INSOL INTERNATIONAL

FOUNDATION CERTIFICATE

IN INTERNATIONAL INSOLVENCY LAW

SUMMATIVE (FORMAL) ASSESSMENT: MODULE 1

(INTRODUCTION TO INTERNATIONAL INSOLVENCY LAW)

This is the **summative (or formal) assessment for Module 1** of this course and is compulsory for all registered candidates on the Foundation Certificate. The mark awarded for this assessment will determine your final mark for Module 1. In order to pass this module you need to obtain a mark of 50% or more for this assessment.

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.assessment1summative]**. An example would be something along the following lines: 202223-363.assessment1summative. **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 ID 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 November 2022**. The assessment submission portal will close at **23:00 (11 pm) GMT on 15 November 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

Civil Law and English (Common) Law countries have the same historical roots. Select from the following the **best response** to this statement.

(a) This statement is untrue because English Insolvency Law developed from Roman law principles, and Civil Law Systems were based on the statute of Marlborough of 1267.

(b) This statement is untrue since Civil Law developed from early Roman law principles relating to debt recovery and English Insolvency Law developed via legislation, especially from the 16th century onwards.

(c) This statement is true since, on a principle basis, the developments of insolvency law as a system is the same in all systems.

(d) The statement is true since both systems developed from a pro debtor approach towards the notion of over-indebtedness.

Question 1.2

Both Civil Law and English Law systems in general allowed for a rather liberal discharge of debt for over-indebted debtors right from the inception of these systems. Select from the following the **best response** to this statement.

(a) This statement is untrue since in both systems the notion of discharge only developed at a later stage.

(b) This statement is true since in both systems insolvency and rehabilitation procedures developed with discharge as a way of departure.

(c) This statement is untrue since discharge of debt never became part of any of these systems.

(d) This statement is true since creditors in both systems had an accommodative approach towards over-indebted debtors.

Question 1.3

England and America each have their own single unified piece of insolvency legislation which apply to both personal and corporate insolvency. Select from the following the **best response** to this statement.

(a) This statement is true since England has the unified 1986 Insolvency Act and the USA has the 1978 Bankruptcy Code. Both Acts cover personal and corporate insolvency.

(b) This statement is untrue since in England the Insolvency Act 1986 deals only with personal insolvency.

(c) This statement is untrue because the USA has separate Acts dealing with corporate liquidation and rescue.

(d) The statement is true since in England its companies' legislation deals with corporate insolvency and rescue.

Question 1.4

There are no good reasons to distinguish between insolvency rules pertaining to individuals (consumers, natural person debtors, also referred to as personal insolvency) and those insolvency rules applying to corporations or companies since in both instances the applicable insolvency rules are intrinsically collective in nature. Select from the following the **best response** to this statement.

(a) The statement is true since global insolvency law systems provide exactly the same rules to cover all aspects of insolvency in both instances, ie personal insolvency and corporate insolvency.

(b) The statement is untrue since there are pertinent differences in the treatment of certain aspects in insolvency of an individual and that of a company, like the fact that individuals are not "dissolved' after their estate assets have been liquidated as is the case once the assets of a company have been liquidated and it is finally wound up.

(c) The statement is untrue since insolvency law rules are not collective in nature.

(d) The statement is true since insolvent companies usually survive their liquidation and may continue to conduct business after the debt has been discharged through the liquidation process.

Question 1.5

All countries have one and the same set of rules to apply in the case of recognition of a foreign insolvency order. Select from the following the **best response** to this statement.

(a) The statement is untrue since the systems differ and some countries have no formal cross-border insolvency rules in place at all.

(b) This statement is true because all member states of the UN have adopted the UNCITRAL Model Law on Cross-Border Insolvency.

(c) This statement is true because the UNCITRAL Model Law on Cross-Border Insolvency applies directly to all UN member States.

(d) This statement is true since the International Court of Justice has a set of global cross-border insolvency principles that apply globally.

Question 1.6

The domestic corporate insolvency laws of a particular country make no mention of the possibility of a foreign element in a liquidation commenced locally. There is also no locally applicable treaty or convention on insolvency proceedings in place.

In a local liquidation commenced in that country, to what other area of domestic law can the local court refer in order to resolve an insolvency related international law issue that has arisen because of concurrent insolvency proceedings over the same debtor in a different country?

(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

Private international law raises questions of the conclusive effect of a foreign judgment and the enforcement of a foreign judgment. A German court has issued a judgment in a German insolvency which has a connection with England. The foreign insolvency office holder seeks recognition and enforcement in an English court of the insolvency order made in the German insolvency proceedings.

Which of the following statements, concerning the request for recognition and enforcement in England, is **true**?

(a) The English Court hearing the request for recognition and enforcement may apply the EU Recast Insolvency Regulation (2015).

(b) It is relevant factor for the English Court hearing the matter to consider whether Germany has adopted the UNCITRAL Model Law on Cross-border Insolvency 1997, or not.

(c) The English Court will be able to consider the request based on its 2006 Insolvency Regulations (the adopted UNCITRAL Model Law on Cross-Border Insolvency) and / or common law principles.

(d) The German order will be automatically recognised in England due to a cross-border insolvency treaty between England and Germany.

Question 1.8

Which of the following **best describes** international insolvency law?

(a) It is public international law governing insolvency law between States.

(b) It is private international law governing insolvency law between States.

(c) It may involve aspects of both public international law and private international law.

(d) It involves a simple classification within either public international law or private international law.

Question 1.9

To date, the most successful soft law approach to international insolvency law issues has been the Model Law on Cross-border Insolvency. Select from the following the **best response** to this statement.

(a) This statement is untrue because not all States have adopted the Model Law on Cross-border Insolvency.

(b) This statement is untrue because of the requirement for reciprocity in relation to the Model Law on Cross-border Insolvency.

(c) This statement is true because the Model Law on Cross-border Insolvency creates regulations which binds each State and has been the most influential response to international insolvency law issues.

(d) This statement is true because the Model Law on Cross-border Insolvency has been adopted by numerous States and is gaining momentum as an influential response to international insolvency law issues.

Question 1.10

Latin American States have some of the most long-lasting multilateral agreements regarding international insolvency issues. Select from the following the **best response** to this statement.

(a) This statement is untrue because the Bustamante Code was concluded in 1928, which was only a few years before the Nordic Convention of 1933.

(b) This statement is untrue because North America was not a party to these agreements.

(c) This statement is true because agreements such as the Escazú Agreement have been extremely long lasting.

(d) This statement is true because of agreements such as the Montevideo Treaties and Havana Convention on Private International Law.

Marks awarded 10 out of 10

QUESTION 2 (direct questions) [10 marks]

Question 2.1 [maximum 3 marks]

Briefly indicate the historical roots of the various insolvency law systems to be found in African jurisdictions.

Insolvency law systems vary from country to country in Africa. As many of the imported laws during the colonial period are still largely followed and form the basis of the current legislation of relevant countries, you could see various insolvency law system in African countries. For example,

- English law tradition: Nigeria, Kenya, Botswana and Zambia and countries in the Eastern part of Africa such as Tanzania:
- Civil law tradition based on Portuguese law: Angola, Mozambique
- Civil law tradition based on French law: Francophone countries of West Africa
- Mixed legal systems influenced by both the Roman-Dutch law and English law: South Africa, Namibia

Notwithstanding the influences from the colonial period, it is noteworthy that some African countries have started to introduce new and modern legislations of their own.

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Question 2.2 [maximum 3 marks]

Indicate what important events and / or developments gave rise to some insolvency law reform in Eastern Asia and provide two examples of such reform initiatives.

The 1998 financial crisis in East Asia gave rise to the insolvency law reform in Indonesia and Thailand. In particular, Thailand overhauled its bankruptcy laws in light of the financial crisis.

Singapore also underwent significant reforms in insolvency law since the 2010s. Most importantly, in October 2018, Singapore passed a new Insolvency, Restructuring and Dissolution Act (which came into force on 30 July 2020) that consolidated the corporate and personal insolvency and restructuring laws in Singapore into a unified Act.

3

Question 2.3 [maximum 4 marks]

Briefly indicate the various initiatives undertaken to assist with the resolution of international insolvency issues between North America and Canada and the success or otherwise of these initiatives.

Various initiatives were undertaken to assist with the resolution of international insolvency issues between countries in North America. These include:

- In the 1970s, Canada and the United States tried to negotiate for a bilateral insolvency treaty. However, the two countries failed to reach an agreement as the treaty was too ambitious in its scope;
- Both Canada and the United States adopted the Model Law and made practical progress through mechanisms such as Protocols;
- Canada and the United States also relied on bilateral co-operation and co-ordination based on existing legislation and long-standing case law around comity to solve issues in international insolvency;
- An initiative to improve co-operation in international insolvencies across the NAFTA countries was initiated by the American Law Institution ("ALI"). The ALI Transnational Insolvency Project prepared an International Statement on the relevant country's insolvency law as applicable to international cases;
- The ALI Transnational Insolvency Project also successfully developed the ALI NAFTA Guidelines Applicable to Court-to-Court Communications in Cross-Border Cases (2000) for international insolvencies involving the US, Canada and Mexico (ALI NAFTA Principles);
- In light of the ALI Transnational Insolvency Project, Principles of Cooperation among the NAFTA countries approved in 2000, focusing on insolvency of corporations and other legal entities engaged in commercial operations.

There is scope to elaborate regarding case law *Re Nortel Networks Corporation* [2016] ONCA 332; *In re Nortel Networks, Inc.*, 669 F.3d 128

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Marks awarded 9 out of 10

QUESTION 3 (essay-type questions) [15 marks in total]

Question 3.1 [maximum 5 marks]

It is said that one of the difficulties in designing a proper cross-border insolvency dispensation is the fact that domestic insolvency laws and approaches towards insolvency in various jurisdictions are not the same and in fact sometimes differ vastly. Discuss the possible historical reasons for the difference in approaches regarding the treatment of voidable dispositions, given the way such rules developed in English law and civil law jurisdictions respectively. In your answer you must provide a context or framework for the treatment of these rules in insolvency systems and indicate why these rules are important in insolvency.

There are important policy considerations behind the treatment of voidable dispositions. These include:

- Prevention of fraud;
- Principle of equality between creditors and prevention of favourism, ensuring equitable treatment of all creditors;
- Prevention of a sudden loss of value for the business immediately before the supervision of the insolvency proceeding is imposed;
- Encouraging out-of-court settlements

Voidable dispositions will be set aside, and any benefits received by the beneficiary will need to be repaid to the insolvent estate. There are two main types for voidable dispositions, fraudulent conveyances and preferences. The first type of transactions includes a disposition of property by the insolvent usually in the form of a donation or undervalue transaction, which causes or increases the debtor's insolvency. In civil law systems, the *action Pauliana* forms the basis of fraudulent conveyance law; in English law, the Act of Elizabeth of 1570 forms the basis of fraudulent conveyance law.

The second type of voidable disposition is preferences, this is usually done by providing security or settlement to a certain unsecured creditor immediately before the insolvency, therefore put the previously unsecured creditor in a better position once the insolvency proceeding commences.

The structure of your answer would benefit from reconsideration. There is some scope to elaborate in parts.

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Question 3.2 [maximum 5 marks]

A Dutch commentator on international insolvency law defines international insolvency law as that part of the law that:

> "[i]s commonly described in international literature as a body of rules concerning 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."

However, the author concedes that this definition has limitations. Briefly discuss the reasons why the definition is perceived to have limitations.

The definition is perceived to have limitations because it is connected to the existence of a national legal framework of insolvency law, while recent developments has highlighted that most domestic legal systems are ill-equipped in dealing with cross-border insolvency law issues and do not cater with the international dimensions in a comprehensive way. National laws on insolvency traditionally shows a lack of structure, both formally and informally, to deal with cross-border insolvency cases. The limitations in many domestic insolvency laws bring private international law or conflicts of law into play.

In addition, although generally speaking sovereign States govern their own legislation and are involved in amending their legislations to meet challenges in international insolvency laws, in some places like the European Union, nation States have transferred some of these powers to a superanational body. In such cases the limitation of this definition shows.

Modern time insolvency issues and the principle of equality between creditors calls for deeper and more comprehensive integration of laws among and between nations and a clear and uniform rule relating to cross-border insolvency issues to provide clarity and predictability in international insolvency laws.

This is answered well. There is scope to elaborate in parts.

4.5

Question 3.3 [maximum 5 marks]

Briefly discuss treaties or conventions as a source for cross-border insolvency law. In your answer you should also indicate if these are viewed as a successful way in establishing such rules by providing examples in this regard.

Treaties or conventions are classic public international instruments used by regional groupings of nation states to address issues in international insolvencies within their geographical regions. The advantage of entering into conventions or treaties is that they become directly enforceable in domestic courts of the signatories and forms part of the “hard law” of the state.

Bilateral or multi-lateral treaties are rarely successful, as it is very difficult to reach agreement among and between the nations and usually involves multiple rounds of negotiations. Even after a treaty or convention is concluded, it needs to be adopted and/or ratified by the member states. For example, in 1990, the Council of Europe concluded the Istanbul Convention (Series No.136). Istanbul Convention was signed by 8 member States, but was not ratified by a sufficient number of the member states for it to enter into force. Nevertheless, the Istanbul Convention had an important influence on the development of a European Union in solving issues in international insolvencies law.

One remarkably successful treaty concluded is the Nordic Convention in 1933. This convention was concluded between 5 Scandinavian States and is significant for the comity it displays. The Nordic Convention accord special recognition and enforcement of a “domiciliary” adjudication in the other member States, who recognises a “domiciliary” bankruptcy order as applying to property throughout the member States. Under the Nordic Convention, the law of the place of adjudication will determine almost all the effects of the order in all member States without the need for further formalities such as registration. An insolvency administrator may directly request assistance from the courts of the other member States in respect of property situate there.

It’s good that you consider the Nordic Convention and Istanbul Convention. I’d love to see you consider some other examples.

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Marks awarded 12.5 out of 15

QUESTION 4 (fact-based application-type question) [15 marks in total]

Flor Prim Pty Ltd (FPPL) is a company incorporated with its head office and significant operations in Encanto as well as being registered as a foreign company in Asgard, where it also carries on business. FPPL therefore carries on business in more than one State. Lobo Lending Ltd (Lobo) is incorporated and has its head office in Asgard.

FPPL is managing to meet its debts as they fall due in Encanto. However, due to various staffing issues combined with market turndown in Asgard, FPPL is struggling financially in Asgard. FPPL has fallen behind with payments due and owing to Lobo. FPPL's CEO approaches Lobo to discuss possible informal payment arrangements.

If you require additional information to answer these questions, briefly state what it is and why it is relevant.

Question 4.1 [Maximum 5 marks]

What are the main differences between "formal" insolvency proceedings and "informal" insolvency arrangements? What key advantages and disadvantages should Lobo consider regarding any informal out-of-court workout arrangement it could enter with FPPL, compared with its formal debt recovery options?

In an "informal" insolvency arrangement, an out-of-court workout can be agreed between the parties; by contrast, "formal" insolvency proceedings mean statutory corporate rescue mechanism.

The key advantages of an informal creditor workout that Lobo could take into consideration include:

i) As the courts are not involved, the cost is significantly lower; note that formal mechanisms can be quite expensive (especially with court involvement).

ii) Publicity. In an informal workout, there is no publicity regarding the fact that the debtor company is experiencing financial difficulties. This could protect FPPL's goodwill of the corporation as well as its businesses in Encanto, which is advantageous to both parties as the value of the company is protected.

The disadvantages should Lobo consider regarding any informal out-of-court workout arrangement include that

i) No moratorium in place preventing other creditors from approaching the courts and commencing an insolvency proceeding., a statutory moratorium is available in a formal insolvency proceeding, which prevents any legal proceedings being taken against the company (for liquidation or enforcement of execution proceedings).

ii) Agreements reached between FPPL and Lobo are contractual in nature and they do not bind any dissenting creditors to any agreement reached between FPPL and Lobo. In a formal insolvency proceeding, it may be possible to bind dissenting creditors to whatever workout is proposed by the officeholder or the corporation itself.

In order to make an informed decision, further information would be needed as to whether Lobo is a secured/unsecured creditor, the amount of debt, the primary goal to be achieved by Lobo, the prospect of repayment by FPPL, which requires information on the financial status of its businesses in both Encanto and Asgard, existence of any other creditors, etc.

Also, it is made more complex by FPPL carrying on business in more than one State because it is more complicated and costly to monitor the other creditors.

4.5

Question 4.2 [Maximum 5 marks]

Assume that instead of the scenario described above, Lobo obtained a formal court order against FPPL for a court-supervised insolvency proceeding in Asgard. The Asgardian insolvency representative then discovered there was already a concurrent insolvency proceeding commenced against FPPL in Encanto. Detail difficulties that may arise for the

insolvency representative pertaining to co-operation and co-ordination and the international insolvency instruments that have been developed to assist with respect to those difficulties. In your answer make sure to comment as to whether the development of these international insolvency instruments is important and why, or why not.

The following difficulties may arise for the insolvency representative pertaining to co-operation and co-ordination:

- Standing for (i.e. recognition of) the Asgardian insolvency representative in Encanto;
- Co-ordinated claims procedures in Encanto;
- Due to differences in domestic norms between Encanto and Asgard, different rules in
    - priorities and preferences;
    - avoidance provision powers;
- Conflict-of-law issues. Specifically, which country's law should be applied in respect of different aspects of the matter?
- issues of enforcement

The international insolvency instruments that have been developed to assist with respect to those difficulties includes:

- bilateral or multilateral treaties or conventions between states which import into domestic laws principles to resolve international insolvency issues.

- soft law responses promoted by inter-governmental bodies such as UNCITRAL, e.g. the Hague Conference on Private International Law (the Hague Conference) that prepared the UNCITRAL Legislative Guide on Insolvency Law with UNCITRAL; the Model Law on Cross-border Insolvency in the mid 1990s.

- Proposed solutions and strategies by multilateral commercial or professional bodies (e.g. International Bar Association (IBA) and INSOL International) including the below categories:
    - harmonisation of domestic insolvency laws;
        - the moves to harmonise domestic insolvency laws are very important as they can reduce the significance of an insolvency crossing a State boundary and the need for regulators or courts to resolve international insolvency issues.
    - uniform choice of law principles;
        - this is important because where States can agree on a uniform approach to choice of law, a uniform referral by the States to the same applicable insolvency law produces the same outcome even if domestic insolvency laws differ.
    - uniform recognition laws;
        - this is a very successful strategy to address international insolvency issues as it accepts that there are likely to be concurrent insolvency proceedings.
    - co-operation and co-ordination to promote recognition and enforcement. For example:
        - European Guidelines on Communication and Cooperation (2007)
        - ALI - III Global Principles for Cooperation in International Insolvency Cases and Global Guidelines Applicable to Court-to-Court Communication in Cross-Border Cases (2012)
        - EU JudgeCo Principles and EU Cross-border Insolvency JudgeCo Guidelines (2015)

- Judicial Insolvency Network, Guidelines for Communication and Cooperation between Courts in Cross-Border Insolvency Matters (2016).

The development of the international instruments indicates the important role of co-operation and and co-ordination in solving international insolvency issues.

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Question 4.3 [Maximum 5 marks]

Assume that instead of the hypothetical facts mentioned above, FPPL is an incorporated company with offices in the UK, and throughout Europe and other non-European countries. Lobo is its major creditor and is incorporated in a country in Europe. An insolvency proceeding against FFPL was opened in the UK by a minor creditor on 30 June 2022. A month later, Lobo was considering also opening proceedings in another country in Europe. Discuss whether the European Insolvency Regulation Recast would apply with respect to the UK commenced insolvency proceedings, and the consequences of same. In answering this question set out what further information, if any, you might need.

As a result of Brexit, from 31 December 2020 onwards the European Insolvency Regulation Recast ceased to apply in the UK with respect to the UK commenced insolvency proceedings.

The EIR Recast regulates the applicable law in proceedings subject to the Regulation. Article 7.1 states that "[s]ave as otherwise provided in this Regulation, the law applicable to insolvency proceedings and their effects shall be that of … the 'State of the opening of proceedings'". Under Article 7.1 of the EIR Recast, English law would be applicable to the insolvency proceedings. However, EIR Recast no longer applies, we would need to get more information on domestic English legislations in order to determine the applicable law to the proceedings (e.g. Retained EU Law).

It would be beneficial to consider the MLCBI

3.5

Marks awarded 13 out of 15

*** End of Assessment ***

TOTAL MARKS AWARDED 44.5/50

An excellent paper - a thorough response that addresses the questions asked and substantiates the answers well.