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.

African jurisdictions, despite being close in proximity, have varied historical roots to their insolvency law systems. These different roots stem from the states' colonial past. Africa was divided and colonised by different European states and the result is a modern-day continent with legal roots that are a mix of the states' inherited legal systems. For example, Nigeria's legal system is based on the laws of England whereas states in West Africa have a civil law insolvency jurisdiction based upon that of their French colonisers. South Africa has a dual influence from both Dutch (civil) and English (common) laws. However in recent years African states have begun to introduce more modern insolvency regimes and some 17 states in the region signed the Organisation pour l'Harmonisation en Afrique du Droit des affaires (OHADA) in 1993. All 17 member states have now also adopted the UNCITRAL model law.

3

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 had a profound effect on the states in East Asia – notably Thailand and Indonesia. This prompted insolvency law reform and in particular, Thailand revamped its Bankruptcy laws as a result. Singapore has become large financial centre in the region with many foreign companies doing business or setting up corporate vehicles there. Singapore in October 2018 passed the new Insolvency, Restructuring and Dissolution Act which came into force in 2020 unifying the state's corporate and personal insolvency regimes.

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.

North America and Canada have made various attempts over the years to tackle the issue of cross-border insolvency between them as neighbouring states with varying success. Firstly, an unsuccessful attempt was made to agree a bilateral insolvency treaty in the 1970s. Subsequently, the states have pursued more achievable goals of co-operation and co-ordination by way of Protocols and case law as exemplified in the Nortel Networks case in which the US court recognised the proceedings in both the UK and Canada effecting a global moratorium.

Arguably the most successful step taken by North America and Canada was their adoption of the Model Law which not only regulates cross-border insolvencies between themselves but governs their interactions with other member states globally.

Finally, the US, Canada and Mexico (the North American Free Trade Agreement countries – NAFTA) have agreed certain principles aimed at corporate insolvencies in the region. The general principles are as follows:

1. Co-operation - states should encourage courts and administrators to co-operate with the goal of maximising the Debtor's global assets; and
2. Recognition – the insolvency process in one NAFTA state should be recognised in another and given appropriate validity in order to assist with the proper function of the office holder. Further the principle requires that such recognition is given without delay and without unnecessary expense.

4

Marks awarded 10 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.

Wessels (Kluwer, 2006) rightly states that there is not a single set of insolvency rules that applies globally. This has implications for the concept of cross-border insolvency at the macro level but the difficulties filter down into the discreet and specific issues of a particular insolvency case. For example, the approach to, remedy of and relevant period for voidable transactions varies vastly.

The concept of voidable transactions focuses on transactions that occurred prior to the formal insolvency event that may be open to attack by the insolvency practitioner. The insolvency practitioner's arsenal and abilities in this regard vary greatly from jurisdiction to jurisdiction. Voidable transactions can be split into 'fraudulent conveyances' and 'preferences'. Fraudulent conveyances are transactions where an inadequate value was received for a debtor's asset that causes or worsens the insolvency of the estate. Preferences are transactions that sought to settle an existing creditor's debt or put then in an advantageous position ahead of the impending insolvency.

An insolvency practitioner's ability to attack these types of transactions is vital to achieving the concept of pari passu between creditors of the same class. Fraudulent acts that prefer one creditor over another undermines this doctrine. In addition, the goal of any insolvency procedure is to maximise the debtor's estate for the benefit of those who have made losses as a result of the debtor's actions. This goal would be defeated if a debtor could dispose of its assets prior to the insolvency for an undervalue.

The historical differences stem from the development of the two principle insolvency law families – the civil law states (European states following the Roman law tradition) as opposed to common law states (predominantly developed by the laws of England and former colonies and commonwealth countries). The actio Pauliana forms the basis for fraudulent conveyance laws in civil law countries. Whereas in English law countries the Act of Elizabeth of 1570 is the relevant rule.

By way of example, insolvency practitioners in the UK have access to a vast arsenal of remedies and actions they can deploy to deal with voidable transactions such as the right to examine directors in court, look-back periods that allow for transactions to be unwound up to two years after the event if fraud can be proven and the beneficiary of the fraud is a connected party. By contrast, insolvency rules in Jersey stem from Norman French law which is a civil jurisdiction. Here so called Pauline actions are available to creditors but they are more limited in scope.

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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 given is from Wessels. He conceded that his definition has limitations for the following reasons:

1. The definition is limited to the view from a national law perspective. His definition focuses on the effect of an international element of an insolvent estate on the proper function of a state's insolvency regime.

2. An alternative definition from Fletcher demonstrates the limitations further. Fletcher states that international insolvency is an instance in which "insolvency occurs in circumstances which in some way transcend the confines of a single legal system so that single set of insolvency law provisions cannot be immediately and exclusively applied without regard to the issues raised by the foreign elements of the case." Here Fletcher acknowledges that the reality is that states looking inward is part of the issue. International insolvency is now a fact of corporate life and as such the concept of 'international insolvency' needs to attend to this reality rather than focus on the states' individual laws and their inability to deal with foreign elements of a case.

International insolvency as a concept is now also defined by a plethora of supranational attempts at standardisation, co-operation and recognition. The concept has gone beyond each state's interpretation of a situation when compared to their own laws. As necessitated by the existence of a truly global economy, freedom of movement and multinational conglomerates, international law is a developing and relevant part of each state's laws that is only becoming more in need of attention and

revision to bring it in line with the needs of companies and individuals who reside, work or trade within its borders and their international connections.

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 a public international law response to the issues posed by international insolvency law. If a state enacts a treaty or convention they are agreeing to amend or bind their domestic laws accordingly. If enacted the laws become enforceable in the state's courts alongside domestic laws and they become 'hard law'.

When enacted properly they can be a very successful way of updating a state's insolvency law to unify states' insolvency procedures with the goal of creating co-operation and recognition. A successful example of a regional treaty is the Organisation pour l'Harmonisation en Afrique du Droit des affaires (OHADA) enacted by 17 African states in 1993. Some regional conventions and treaties have been highly successful and have lasted for many years such as the Montevideo treaties in Latin America.

The problem with treaties or conventions is that they are a set of laws at a supranational level that require a state to alter or amend their current laws in order to agree to the treaty. Very often attempts at treaties are unsuccessful because of the differences between states' domestic laws, public policy considerations and public opinion. As an example, the US and Canada attempted to enact a bilateral treaty on cross-border insolvency issues in the 1970s but they were ultimately unsuccessful. Additionally, the issues seen in the European Union with the UK's exit demonstrate how public opinion can cause the collapse of such agreements.

No truly global convention has been attempted – the UNCITRAL model law represents the 'soft law' alternative approach developed by the UN to this issue but until such time as it is adopted across the globe its scope is limited despite its success in relative terms to treaties and conventions.

This is answered well. I'd love to see a few additional examples discussed.

4.5

Marks awarded 14.5 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?

There are vast differences between the 'formal' insolvency options open to Lobo and the 'informal' routes they can pursue with FPPL.

Firstly, 'informal' arrangements tend to come under the banner of corporate rescue or turnaround proceedings. These options are advantageous for a number for a number of reasons:

1. ***Corporate rescue is now a major focus of insolvency reform globally and as such the courts are likely to look favourably on parties that attempt a less formal insolvency route first particularly from a social policy perspective in respect of job retention etc.;***
2. ***Generally informal procedures are cheaper than the formal options available;***
3. ***These routes can be pursued with limited publicity or formal notification, maintaining business continuity and goodwill; and***
4. ***Better returns are usually available to creditors in this scenario as opposed to a fire sale of FPPL's assets.***

The disadvantages that Lobo will need to bear in mind with an informal process are:

1. ***No moratorium will be in place, as such another creditor of FPPL is free and able to take formal (or further informal) action;***
2. ***Lobo's enforceability of any terms agreed will also be limited owing to the informality of the process;***
3. ***FPPL may not be able to abide by the terms if insolvency becomes a real prospect and as such a formal insolvency process may be needed at a later date; and***
4. ***Lobo may not have an independent third party to rely on such as an insolvency practitioner and will not have access to the powers that come with a formal insolvency such as in respect of voidable transactions.***

'Formal' insolvency proceedings have their own advantages and disadvantages that Lobo will also need to consider:

1. ***A moratorium will be in place to protect FPPL's estate from action taken by another creditor;***
2. ***Lobo will rank alongside other creditors pari passu because dissenting creditors will also be bound;***
3. ***An independent third party insolvency practitioner will be appointed. These parties have expertise in maximising a debtor's estate for the benefit of creditors; and***
4. ***The insolvency practitioner will have certain powers to deal with voidable transactions and actions against directors not available in an informal process.***

The disadvantages of a formal process are:

1. ***Formal processes are generally more costly than informal ones and may require the supervision of a court leading to large legal bills in some cases;***
2. ***Formal processes are also public. Generally, there is a requirement to advertise the insolvency of the debtor and this can cause a sharp deterioration in the value of the debtor's assets; and***
3. ***If jobs cannot be saved then the creditor pool increases with any unpaid wages and in some jurisdictions these sums may rank ahead of Lobo's debt in the order of priority.***

   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 difficulties that will arise for the insolvency representative are those of co-operation, recognition and co-ordination. If these issues are not resolved in a meaningful way the concurrent insolvency proceedings run the risk of being in conflict with each other resulting in potentially different treatment for creditors in the different jurisdictions and different outcomes in terms of funds available.

For example, it may be that the bulk of the assets of FPPL are in Encanto with the creditor base largely residing in Asgard. This could create a scenario where FPPL returns to solvency in Encanto but little to no funds are returned to creditors in Asgard.

Additionally, the two jurisdictions may have different policies in terms of employee claims. A situation could be envisaged where employees in Encanto receive the full sums owed to them plus contractual notice. Whereas the same employees in Asagrd would receive cents on the dollar with no entitlement to any notice.
The international insolvency instruments that have been developed to assist with the above issues fall into two categories: hard law and soft law approaches.

'Hard law' in this context would be any treaties or conventions in place that govern the international insolvency proceedings between Encanto and Asagrd. If such a treaty exists it is likely to mandate co-operation between the courts and recognition of the foreign proceedings. If applied properly the treatment of creditors and employees across the two states would be equal. A real-life example of this would be the Havana Convention agreed by Latin American states.

'Soft law' in this context would be doctrines or multilateral developments that the jurisdictions have adopted or make reference to in cross-border matters. For example the Model Law, if adopted or used as an example as to how to manage the process, would mandate co-operation and direct communication between the courts of the states involved. A focus would also be set on harmonising the proceedings to create a fair and equal outcome for all. It may be that neither of Asgard or Encanto have enacted the model law but the courts may be minded to find the protocols and principles set out as persuasive in the circumstances.

In order to answer this fully I would need to know more about the laws enacted in Asgard and Encanto – particularly if there are any treaties or conventions in place or if either (or both) states have adopted the Model Law.
It is good that you raise the MLCBI. Reference to article 27 is warranted. Reference to additional international insolvency instruments is also warranted.

3.5

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.

From 11pm on 31 December 2020 the European Insolvency Regulation Recast ceased to apply to the UK formally following the UK's exit from the EU. This poses a challenge to what would have been a more simple cross-border insolvency prior to 'Brexit'.

However, as the laws of the UK (the laws of England and Wales, Northern Island and Scotland collectively) are a common law jurisdiction, an argument could be made to a UK court that previous interpretations of these matters can apply or at least be persuasive.

Given the UK insolvency proceeding was opened by a 'minor' creditor an argument could be made by Lobo that the concept of COMI (Centre of Main Interests) should still apply and the main proceedings be opened in the European country. We would need to know more about FPPL's trading practices and creditor base to confirm this.
It would be beneficial to consider the MLCBI.

3.5
Marks awarded 11.5 out of 15

* End of Assessment *

TOTAL MARKS AWARDED 46/50

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