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 9 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.

Ans:

In case of African countries, they are still largely follow the laws of the

respective former colonial powers. F. e. countries such as Nigeria, Kenya, Botswana and Zambia, and countries in the Eastern part of Africa such as Tanzania, have an English law tradition, as against, Angola and Mozambique have a civil law tradition based on Portuguese law.

West African countries are steeped in civil law, in particular French law. There are some countries, such as South Africa and Namibia, have mixed legal systems since both the Roman-Dutch law (civil law) and English law have an impact on their respective legal systems.

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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.

Ans:

Due to the adverse impact of the 1998 financial crisis in East Asia, economies of many countries got affected especially Indonesia and Thailand. As far as insolvency law is concerned, this gave reason to some insolvency law reforms and Thailand in particular overhauled its bankruptcy laws.

The country like Singapore is also now becoming a major role-player in the region and in October 2018 passed a new Insolvency, Restructuring and Dissolution Act to consolidate Singapore's corporate and personal insolvency and restructuring laws into a unified Act. It came into force on 30 July 2020.

Going forward, in 2022, Singapore Insolvency Courts also gave recognition to their counter part in Malaysia with regard to orders issued under insolvency and to recognize/ acknowledge the same and to take care not to bring any obstacle in the process.

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.

Ans:

A United States professional body, the American Law Institute (ALI) has taken steps to assist with the resolution of international insolvency issues between the North American Free Trade Agreement (NAFTA) countries of the United States, Canada and Mexico. The ALI Transnational Insolvency Project was an initiative to improve co-operation in international insolvencies across the NAFTA States. It appointed Professor Westbrook as designated Reporter and formed advisory groups with experts from each of the three countries. These prepared an International Statement on the relevant country's insolvency law as applicable to

international cases.

In light of these, Principles of Cooperation among the NAFTA Countries, were prepared and approved by the ALI Council and Members in 2000 as follows: -

i) General Principle I: Cooperation:-

Courts and administrators should cooperate in a transnational bankruptcy proceeding with the goal of maximizing the value of the Debtor's worldwide assets and furthering the just administration of the proceedings

General Principle II: Recognition

- The bankruptcy of a debtor in one NAFTA country should be recognized and given appropriate effect under the circumstances in each of the other NAFTA countries.
- Recognition should be granted as quickly and inexpensively as possible, with a minimum of legal formalities.

Additional General Principles:- Address Moratorium, Information, Sharing of Value, National Treatment and Adjustments of Distributions. It also talks further about adoption of the Model Law on Cross-border Insolvency, address automatic stays; notice to creditors; priority claims; binding effect of reorganisation plans; adoption of procedural principles that cannot be implemented under existing domestic laws; and simplified authentication of documents.

Experience gained over the period, it can be said that this system is working smoothly and concerned countries are mutually benefitting from it.

There is scope to elaborate. While the question says 'briefly' it is for 4 marks. There was scope to discuss, for example, *Re Nortel Networks Corporation* [2016] ONCA 332; *In re Nortel Networks, Inc.*, 669 F.3d 128

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Marks awarded 8 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.

Ans:-

The roots of civil law can be traced to Roman law and Table 3 of the Twelve Tables dealt with the execution of judgments. In this context, debt execution developed from the debtor pledging his own body for the repayment of the loan and he could be imprisoned, sentenced to death or sold as a slave in order to secure repayment of the debt.

The roots of bankruptcy law (as a collective debt collecting procedure) are to be found in the following procedures of the Roman law, namely: *cessio bonorum* (assignment of property); *distractio bonorum* (forced liquidation of assets); *remission* and *dilatio* (compositions with creditors). These procedures developed from individual debt collecting procedures, which in turn gave rise to the development of collective debt collecting mechanisms (insolvency law) when the debtor was found to be insolvent.

There are various points of view regarding the notion of international insolvency law. The point of departure is that there is not a single set of insolvency rules that applies globally. In fact, all States with a developed legal system do have some kind of bankruptcy / insolvency system - also referred to as a collective debt collecting procedure - but there are differences in approach and policy as well as differences in substantive and procedural rules.

Apart from different approaches in insolvency law, essential areas of the general law also differ. Amidst these differences, scholars, legislatures international organisations – such as the United Nations Commission for International Trade Law (UNCITRAL) and the World Bank – and courts are continuously trying to devise solutions for dealing with insolvency issues on a transnational basis.

Consequently, the point of departure on this course is that there is no single set of insolvency rules that apply on a global basis. It is, nevertheless, important to have a basic knowledge of the historical roots and essential characteristics of insolvency law in order to understand the various initiatives in trying to establish a more effective and uniform approach to cross-border insolvency law dispensation; this in spite of the differences in legal systems, insolvency dispensations and approaches.

It is evident, then, that bankruptcy started off as a collective debt-collecting mechanism that favoured creditors (pro-creditor). The development of the concept of a discharge of debts (sometimes referred to as “fresh start” or “rehabilitation”) and the abolishment of imprisonment for debt, only arrived at a much later stage, providing insolvency law with a far more “humane” face.

In today’s world, no one talks about sending defaulter to prison unless there is a fraud or wilful default on borrower’s side. Most of the insolvency laws talks about lenders controlled resolution process.

Despite these variation in insolvency laws of different countries, there is need to have an commonly acceptable law which can be recognised, accepted by the relevant countries. This is important because without it, insolvency process cannot run smoothly. There can be issues like delay in implementation, increase in litigation, erosion in value of assets under insolvency and so on.

In my view, UNICITRAL law on Insolvency is one of the best examples to handle cross border insolvency issue effectively.

This question requires an answer that deals specifically with voidable transactions and their historical basis: the *actio Pauliana* forms the basis of fraudulent conveyance law in civil law systems, whilst the Act of Elizabeth of 1570 is the basis for this remedy in English law.

1

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.

Ans:-

Take care to provide an answer to all sub-questions.

0

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.

i) The Hague Conference on Private International Law (the Hague Conference) was established in the 19th century to work towards the progressive unification of private international law. The adoption of a Model Treaty on Bankruptcy at the 1925 conference was an early initiative. While never ratified, this Model Treaty likewise has contributed to the international deliberations on regulating international insolvency.

The Hague Conference now describes itself as "The World Organisation for Cross-border Co-operation in Civil and Commercial Matters". It coordinates its activities with the International Institute for the Unification of Private Law (UNIDROIT), and the United Nations Commission on

International Trade Law (UNCITRAL). One example was its co- operation with UNCITRAL in the preparation of the UNCITRAL Legislative Guide on Insolvency Law (2004).

The most successful "soft law" approach to date has been undertaken by UNCITRAL. In the mid- 1990s, it developed a Model Law on Cross-border Insolvency (MLCBI). This initiative did not take the form of a treaty or convention, but rather that of a Model Law, draft legislation that UNCITRAL recommended member States to adopt, with or without modification. Given the number, economic size and geographic spread of States that are now adopting the MLCBI, it is gathering momentum as an influential response to international insolvency law.

There are many countries as on date who are signatories to this law, few without any modifications and rest with some modifications in it.

You needed to discuss the nature of treaties and conventions and to discuss a number of examples such as the Nordic Convention, then consider the success or otherwise of same. Elaboration was warranted.

2.5
Marks awarded 3.5 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?

Ans:-

Formal insolvency proceedings are those commenced under the insolvency law and governed by that law. They generally include both liquidation and reorganization or rescue proceedings. Informal insolvency processes which are not regulated by the insolvency law and will generally involve voluntary negotiations between the debtor and its creditors.

In case of informal insolvency, normally, negotiations have been developed through the banking and commercial sectors and typically provide for some form of restructuring of the insolvent debtor. While not regulated by an insolvency law, these voluntary negotiations nevertheless depend for their effectiveness upon the existence of an insolvency law, which can provide indirect incentives/ rewards with purpose to achieve resolution.

All insolvency systems make provision for a procedure whereby formal insolvency or bankruptcy commences. This procedure may be by way of a court order and in this regard it must be noted that some systems have specialised bankruptcy courts, such as in India, they have Tribunals while in other systems the general courts decide such matters.

It is also possible that the bankruptcy proceeding may be opened by way of a more informal process, in other words where the process can be opened by way of an administrative process outside the ambit of the courts. In the case of corporate insolvency some systems allow for the opening of the procedure by way of a resolution by the members (for example, equity holders) of the company.

Corporate rescue can either be on an informal basis, where an out-of-court workout can be agreed between the parties, or by way of a formal, statutory corporate rescue mechanism.

The disadvantages of informal creditor workouts are that:-

i) There is no moratorium in place preventing other creditors from approaching the courts and commencing an insolvency proceeding and
ii) There is no way of binding dissenting creditors to any agreement reached.

The advantages of an informal creditor workout are that :-

i) The cost is significantly lower in that the courts are not involved and
ii) There is no publicity regarding the fact that the debtor company is experiencing financial difficulties.

In the case of formal statutory corporate rescue regimes, the advantages are that:-

i) There is the benefit of a statutory moratorium preventing any legal proceedings being taken against the corporation (for say liquidation or the enforcement of execution proceedings) which gives pause to all the legal proceedings to the debtor and also provides some breathing time for revival etc. and

iii) it may be possible to bind dissenting creditors to whatever workout is proposed by the officeholder or the corporation itself.

The two disadvantages usually associated with formal rescue mechanisms are that :-

i) There is publicity regarding the financial distress of the company which can have a negative impact on the goodwill of the corporation which may result into reduction in it's market value into the market and

ii) formal mechanisms can be quite expensive, especially if there is court involvement like lawyer's fees, court fees etc.

Lobo should consider above mentioned advantages and disadvantages about formal and informal insolvency proceedings are should take a call accordingly.

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.

Ans:-

In the given case, following difficulties may come up if insolvency proceedings are ongoing simultaneously in two different states:-

i) On the basis of orders of the respective court, both Liquidators/ Insolvency Professionals may try to take possession of the assets and result into start of legal battle between both the courts.
ii) Who is superior amongst both the courts? This question may be difficult to answer. Whose orders will prevail with other court's order? Again, the same needs to be answered.
iii) Which law of land needs to be followed in proceedings?
iv) There is likely possibility that provision of each state's law may contradict which each other. In this scenario, it will be difficult for the officers appointment by the court about how to implement arrangement scheme etc.
v) Implementing orders of both the courts will be a cumbersome job for both the officers.

Considering above mentioned issues, cross border insolvency laws like UNICITRAL Insolvency law plays crucial role. If this law is accepted by both the countries or if there is treaty/ arrangement between both the countries given, it may take care of all possible issues like co-ordination, acknowledgement, confirmation, possession of the assets and so on.

Hence, it's need of the hour to have a particular law like UNICITRAL Insolvency law at disposal which takes care of issues which may arise in cross-border insolvency cases.

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.

Ans:-

As UK is not part of EU, European Insolvency Regulation Recast would not apply in the given case w.e.f. 31st December,2020.

Accordingly, Lobo can initiate another insolvency proceedings in other European country than UK. If insolvency proceedings are going on in different European countries, it will be governed by European Insolvency Regulation Recast and will be dealt with accordingly.

Information which may be further required:-

1) Current status of insolvency proceedings in other countries.
2) Details of assets and liabilities each country-wise.
3) Orders of various courts issued till date in the given case till date.
4) Treaties, co-ordination details amongst the involved states for insolvency proceedings where assets of the FFPL and creditors are located.

It would be beneficial to also consider the MLCBI

3.5
Marks awarded 11.5 out of 15

*** End of Assessment ***

TOTAL MARKS 32/50
A good paper on the questions answered. It identifies the issues raised, generally substantiating its answers satisfactorily.