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.

The various insolvency law systems in African jurisdictions have historical roots in the legal systems of their former colonial powers. Thus, depending on the specific African country, its insolvency law can be traced to English, French, Portuguese, or Roman-Dutch law. **Which countries?**

Some countries which have had multiple colonial powers in the course of their history, such as South Africa, have insolvency systems which draw from multiple legal systems.

There is scope to elaborate

2

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 Asian Financial Crisis gave rise to insolvency law reform in East Asia. Thailand overhauled its bankruptcy laws. Before the financial crisis, Thai law only provided for the liquidation of insolvent companies. After the reforms, Thai law permitted for the rehabilitation of financially-distressed businesses. A similar example is Japan, which established a new rescue process, modelled on the American Chapter 11, after the financial crisis. **There is some scope to elaborate.**

2.5

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.

In the 1970s, the two countries tried to reach a bilateral insolvency treaty but were unsuccessful. Since then, both countries have adopted the UNCITRAL Model Law on Cross-Border Insolvency which means that their legislative approach to cross-border insolvency is aligned in the form of "soft" law. The American Law Institute has also developed guidelines to which American and Canadian courts can refer to promote co-operation and co-ordination between them (the ALI NAFTA Guidelines). This has been successful, as can be seen from the fact that the ALI also conducted a project to consider implementing these guidelines worldwide.

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 6.5 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.

The essential principle in insolvency proceedings is that the insolvent party's assets are pooled, and those assets are available to creditors *pari passu* (in proportion to their debts). Certain transactions, if effected before insolvency proceedings commence, would defeat this principle – for example, by taking assets out of the hands of creditors, or by providing one creditor with

a disproportionately large share of the assets. Thus, insolvency systems contain a mechanism through which such transactions may be voided once insolvency proceedings commence. However, the precise rules regarding *what* transactions may be voided differs from system to system, and differs in particular between English law and civil law jurisdictions. **This is well written. But it would be beneficial to elaborate on the types of voidable transactions.**

The divergence between the English and civil law systems in this regard arises from the fact that they developed from two different statutes. The Act of Elizabeth of 1570 is the basis for the English approach, whereas the *actio Pauliana* is the basis for the civil approach. The *actio Pauliana* was a single action which could be taken by a creditor to recover any assets that were fraudulently transferred to third parties.

There is scope to elaborate upon the importance of voidable transactions.

3.5

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.

This definition has limitations because it can only be understood if one accepts that there is domestic insolvency law in place that cannot be "executed immediately and exclusively". Thus, the definition fails to explain what international insolvency law would be in the context of a jurisdiction in which there is no domestic insolvency law. It will also a somewhat limited definition because what different jurisdictions refer to as "insolvency law" is not necessarily the same. Insolvency law is intimately connected to property law, company law and other areas of law. The definition above therefore would not give a consistent picture across jurisdictions.

There is scope to elaborate. While the question says 'briefly' it is for 5 marks.

4

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 agreed to between States. They affect the domestic law of those States because they typically set out certain requirements that the domestic law must comply with. Once the domestic law has been enacted, it forms part of that State's insolvency law.

There is scope to elaborate upon the nature of treaties / conventions.

Theoretically, this would be the best way to achieve a unified cross-border insolvency regime between states. In practice however, it has proven difficult for states to agree and ratify such treaties and conventions. For example, the Council of Europe concluded an Istanbul Convention on Certain International Aspects of Bankruptcy, but it was not ratified by a sufficient number for it to enter into force. Of course, there are successful examples such as the Nordic Convention (1933), the Montevideo Treaties of 1889 and 1940 and the Havana Convention of 1928, but these are rare.

The practical difficulty in achieving successful treaties and conventions can be explained by a reluctance from states to bind themselves to a particular set of rules. This is perfectly understandable, given that states have extremely divergent approaches to insolvency law, arising from their different legal traditions, social and business cultures and theoretical understandings of the purpose of insolvency law.

In contrast, there is the comparative success of "soft law" approaches such as the UNCITRAL Model Law. This is draft legislation, developed by a multilateral organisation, that states are *encouraged* to adopt rather than *bound to*. At present, the adoption of the Model Law has been significant – in terms of the number of states, economic size of states and geographical spread of states. This approach is particularly effective, because once a certain level of adoption is reached, there is an incentive for other states to adopt the law as well.

This is answered quite well. I'd have loved to see you discuss some more examples in your analysis
4
Marks awarded 11.5 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?

"Formal" insolvency proceedings in this case would be legal proceedings commenced under the relevant insolvency legislation in Asgard, Broadly speaking, there can be two outcomes of "formal" insolvency proceedings: liquidation of FPPL or a court-sanctioned rehabilitation scheme. If FPPL is liquidated, Lobo will receive a proportion of its assets to satisfy its debt. As

for rehabilitation, the specific process and what sort of arrangements can be reached would depend on Asgardian insolvency law.

An "informal" insolvency arrangement, on the other hand, will be an out of court agreement reached between Lobo and FPPL, possibly involving the restructuring of FPPL. While the agreement will not strictly depend on Asgardian insolvency law, Asgardian insolvency law will form an important backdrop in that it guides what is a good bargain for parties and provides the incentive for them to reach an agreement.

The key advantage of formal debt recovery is that it is regulated and does not depend on Lobo securing an agreement with FPPL. The Asgardian legal system will protect FPPL's interests. It also ensures that Lobo need not worry about other creditors in Asgard securing agreements with FPPL before it manages to do so. **Explaining the moratorium would be beneficial.** However, formal debt recovery takes time and involves legal expenses. Also, depending on Asgardian insolvency law, the possible rescue proceedings available could be restrictive or limited. **The ability to bind dissenting creditors is relevant.**

In this specific scenario, where FPPL is a successful global company, there could be good reason for Lobo to think that informal negotiations will be successful and it can secure a way to recover its debt. Thus, it could be fruitful to pursue informal negotiations before filing formal insolvency proceedings. **Avoiding publicity is a relevant consideration.**

3.5

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 Asgardian insolvency is likely to face issues including: the recognition in Encanto of the Asgardian insolvency proceedings; the status of the assets in Encanto with respect to the Asgardian proceedings; the priority of Lobo as against creditors of FFPL in Encanto; and whether Lobo may participate in the Encanto proceedings.

To deal with these difficulties, some states have adopted "soft law" in the form of the UNCITRAL Model Law on Cross-Border Insolvency. The Model Law deals with the above issues and also makes provision for co-operation and co-ordination between states. Assuming that Encanto has adopted the Model Law, the Asgardian insolvency representative will be able to obtain recognition as a foreign representative in the Encanto proceedings.

These instruments are important because the situation described in this scenario is extremely common today. Businesses are conducted across various jurisdictions, and therefore creditors and assets are also spread across various jurisdictions. Without the issues in the first paragraph being dealt with, it is difficult for any domestic insolvency regime to dispose of a case fully. Another problem would be where those issues are all dealt with differently in different jurisdictions. Finally, there is the fact that without any there is always a risk that a

jurisdiction will adopt a ring-fencing approach (preserving local assets for local creditors), which is contrary to the principle that creditors be treated equally.

Thus, it is important that jurisdictions deal with those issues in a manner that is broadly aligned, such that creditors and companies are treated fairly in insolvency proceedings. Whether this is done by "soft law" instruments like the Model Law or "hard law" instruments that result from treaties, it is important that states find some solution.

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.

The European Insolvency Regulation Recast ("EIR") applies between member states of the EU. Thus, whether it applies to the UK proceedings depends on the date that they were commenced. If they were commenced before 11pm on 31 December 2020, the EIR would apply. If they were commenced after, the EIR would not apply because the UK ceased to be part of the EU on that date. Here, the proceedings were commenced on 30 June 2022, and therefore the EIR would not apply with respect to the UK commenced insolvency proceedings.

Thus, to determine the effect of the proceedings in the UK, one would have to know the domestic cross-border insolvency approach of the European country in which Lobo commenced proceedings. Assuming that this country adopted the UNCITRAL Model Law on Cross-Border Insolvency, Lobo can note Articles 25–32 which provide for coordination and co-operation between the European court and the UK court. Lobo should also note that the European court will have to consider whether the UK proceedings are the main, or non-main proceedings.

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Marks awarded 12 out of 15

*** End of Assessment ***

TOTAL MARKS 39/50

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