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.

The African jurisdictions have historical roots to common law and civil law. Some countries, such as Nigeria, Kenya, Botswana, Zambia and Tanzania, base their insolvency law systems on English law. Others, such as Angola and Mozambique, base their insolvency law systems on the Portuguese civil law system. Some countries such as South Africa and Namibia have mixed legal systems since both civil law (Roman-Dutch law) and common law (English law) have influenced their 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.

The 1998 financial crisis in Eastern Asia gave rise to insolvency law reforms, including in Thailand. Following the financial crisis, Thailand reformed its bankruptcy laws to be in line with international best practices.

In Singapore, in 2010, the Singapore Ministry of Law convened the Insolvency Law Review Committee to review Singapore's bankruptcy and corporate insolvency regimes. This lead to a report which recommended enhancements to existing mechanisms, and the adoption of the UNCITRAL Model Law on Cross-Border Insolvency. Singapore has since updated its insolvency laws and in 2018, passed a new Insolvency, Restructuring and Dissolution Act.

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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.

There have been various initiatives that have been undertaken to assist with the resolution of international insolvency issues between North America and Canada. These include:

1. ***a bilateral insolvency treaty in the 1970s on which North America and Canada were unable to reach agreement;***
2. ***the successful adoption by North America and Canada on the UNCITRAL Model Law;***
3. ***the successful adoption of mechanisms such as cross-border insolvency protocols, being co-ordination agreements;***
4. ***an initiative by the American Law Institute to resolve international insolvency issues between the United States, Canada and Mexico. This included the ALI Transnational Insolvency Project which hoped to improve co-operation in international insolvencies across countries part of the North American Free Trade Agreement. The project resulted in Principles of Cooperation being prepared and approved by the American Law Institute and members in 2000; the principles cover insolvency of corporations and other legal entities engaged in commercial operations and recommend that each North American Free Trade Agreement country adopt the UNCITRAL Model Law on Cross-border Insolvency.***

   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 9 out of 10

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

Question 3.1 [maximum 5 marks]

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

Historically, the *actio Pauliana* formed the basis of fraudulent conveyance law in civil systems while the Act of Elizabeth of 1570 formed the basis for the remedy in English law.

The *action pauliana* is an action in Roman legal history which protected creditors from fraudulent legal transactions (being transactions with the intention to reduce a debtor's estate by transfers to third parties in bad faith). Civil law jurisdictions have adopted a modernised version of the action in the context of insolvency.

On the other hand, the Act of Elizabeth of 1570 was designed to address bankruptcy specifically (as opposed to being a fraud-prevention law).

The differences between the *action Pauliana* and the Act of Elizabeth 1570 may have resulted in a difference in approach in the treatment of voidable dispositions in modern English law and civil law jurisdictions.

Rules on voidable dispositions are important as they prevent fraud, ensure that all creditors are treated equitably (by preventing preferential treatment of some creditors at the expense of others), prevent a sudden loss of value in the relevant entity before insolvency proceedings are imposed and create a framework for promoting out-of-court settlements (as creditors are likely to be more willing to work with debtors when they are aware that last minute transactions are likely to be set aside).
There is scope to elaborate. While the question says 'briefly' it is for 5 marks. I'd like to see, for example, a discussion of the nature of voidable transactions to provide context/framework.

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.

The definition is perceived to have limitations because it is connected to the existence of a national framework of insolvency law. The definition itself does not explain insolvency law or what international insolvency law means as opposed to national insolvency law. The author himself refers to a definition provided by Fletcher which exposes the limitations in that the definition by Fletcher proposes that:

> *"international insolvency" or "cross-border insolvency" should be considered as a situation "... in which an insolvency occurs in circumstances which in some way transcend the confines of a single legal system, so that a single set of domestic insolvency law provisions cannot be immediately and exclusively applied without regard to the issues raised by the foreign elements of the case."*

Fletcher's definition attempts to address the existence of national insolvency law by its reference to the existence of a single legal system and single set of domestic insolvency law provisions.

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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 and conventions are a source for cross-border insolvency law. Treaties and conventions become a part of a State's domestic law when the State signs up to the treaty and convention, and bind themselves.

Treaties and conventions have only had mixed levels of success in establishing cross-border insolvency law.

For example, in Europe:

1. *In 1990, the Council of Europe concluded a Convention on Certain International Aspects of Bankruptcy. However, while it was signed by 8 member States, it did not enter into force because it was not ratified by a sufficient number of members.*
2. *On the other hand, the Scandinavian region has successfully entered into the Nordic Convention 1933, which relates to bankruptcy. Under the Convention, a bankruptcy declared in one Nordic country is recognised in the other Nordic*

countries as automatically applying to the bankrupt's property in those countries.

In other jurisdictions:

1. *Latin America, Latin American States have achieved long lasting treaties on private international law and commerce, which also addressed bankruptcy or insolvency. These include the Montevideo Treaties (1889) and (1940) and the Havana Convention on Private International Law (1928).*
2. *In Asia on the other hand, there are currently no treaties and conventions that address international insolvency issues.*

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

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Marks awarded 12.5 out of 15

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

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

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

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

Question 4.1 [Maximum 5 marks]

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

"Formal" and "informal" insolvency arrangements are different in that:

1. *"Formal" insolvency arrangements are commenced and governed in accordance with insolvency law.*
2. *"Informal" insolvency arrangements on the other hand might not be regulated by insolvency law and generally involve voluntary negotiations between the debtor and some or all of its creditors.*

The key advantages and disadvantages that Lobo should consider regarding any informal arrangement compared to its formal debt recovery options include:

Advantages

1. ***If Lobo wishes to commence formal recovery arrangements, it is likely to incur legal costs in commencing the proceedings against FPPL (although these costs may later be recoverable). It may be less costly for Lobo to enter into an informal arrangement with FPPL;***
2. ***Lobo may be able to make full recovery of the outstanding debt under an informal arrangement. On the other hand, if formal debt recovery is pursued, if creditors are paid back under the pari passu principle, FPPL may not have sufficient assets for Lobo to make full recovery;***
3. It would be beneficial to consider privacy issues.

Disadvantages

4. ***FPPL might not be able to meet its obligations under any informal arrangement entered into with Lobo and so the informal arrangement might not result in successful recovery for Lobo. If the informal arrangement is not successful, Lobo may have to resort to a formal recovery arrangement in any event.***
5. ***If FPPL pays Lobo under an informal recovery arrangement, the payments might be subject to voidable disposition rules in the event that another creditor commences formal recovery arrangements.***
6. It would be beneficial to consider inability to bind dissenting creditors and absence of moratorium.

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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 may arise for the Asgardian insolvency representative pertaining to co-operation and co-ordination include:

1. ***the insolvency law in Encanto might not contain any scope for co-operation and co-ordination with Asgard, in which case the Asgardian insolvency representative might not be recognised in Encanto;***
2. ***a lack of recognition of the Asgardian insolvency by the Encanto court, in which case the Encanto court may appoint an Encanto insolvency representative who might not co-operate or co-ordinate with the Asgardian insolvency representative;***

3. *differences in the insolvency law in Encanto as compared to the insolvency law in Asgard. Differences in the law of the two jurisdictions might result in different requirements being imposed on FPPL and as a result in the Asgardian insolvency representative and any representative that might be appointed in Encanto.*

The UNCITRAL Model Law on Cross-Border Insolvency has however been an important development in international insolvency law to assist the above difficulties. This is because the Model Law contains provisions that facilitate co-operation and co-ordination of concurrent proceedings. For example, the Model Law contains provisions which authorise cooperation and direct communication between local and foreign courts or foreign insolvency representatives.

Additional international insolvency instruments that have been developed to assist with the above difficulties include: (a) the American Law Institute NAFTA Guidelines Applicable to Court-to-Court Communications in Cross-Border Cases (2000) which applies to insolvencies in the USA, Canada and Mexico and facilitates co-operation and co-ordination; (b) the EU JudgeCo Guidelines 2015 which hopes to strengthen communication between courts in EU Member states; and (c) the Judicial Insolvency Network Guidelines which has the objective of improving the efficiency and effectiveness of parallel proceedings in an international insolvency. The development of these instruments has been important in developing and increasing communication and co-operation between States in the context of international insolvency.

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Question 4.3 [Maximum 5 marks]

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

The European Insolvency Regulation Recast would not apply with respect to the UK commenced insolvency proceeding as the proceeding was opened in the UK on 30 June 2022. As the UK ceased to be a member of the EU on 31 January 2022, the European Insolvency Regulation Recast no longer applies to post 31 December 2020 proceedings in the UK.

The consequence of this is that if Lobo opens proceedings in another country in Europe, the Court in that country will not be obliged to apply the terms of the European Insolvency Regulation Recast. This in turn means that: (a) the European country will

not automatically recognise the UK insolvency proceedings; (b) jurisdictional competence will not be allocated to the UK court even if the UK is the "centre of the debtor's main interests"; and (c) Lobo can open proceedings in another country in Europe even if FPPL does not have an "establishment" (as defined in the European Insolvency Regulation Recast) in that country (albeit this would be subject to the country's domestic laws as to whether it has jurisdiction over FPPL).
It would be beneficial to consider the MLCBI.

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Marks awarded 11 out of 15

*** End of Assessment ***

TOTAL MARKS 42.5/50
Excellent Paper.