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 insolvency law systems of many African countries stem from and are influenced by the umbrella legal systems superimposed during the colonial tenure. Hence the systems of former British colonies such as Zambia, Botswana, Kenya, Tanzania and Nigeria have an English common law calibration while the Franchophone states such as those in West Africa have a civil law inclination. There are also some hybrid systems such as in South Africa and Namibia whose insolvency systems have historical stemmings and influence from both civil law and common law.

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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.

There was a financial crisis in 1998 and its effects triggered extensive changes to the insolvency laws of Thailand. Singapore also eventually reformed its insolvency laws into a consolidated singular statute that provided for both corporate and personal insolvency as well as restructuring.

There is 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 an attempt was made at a bilateral insolvency treaty between Canada and USA but no consensus was reached to finalise it. Instead what continued to work between them was bilateral co-operation and co-ordination based on the backbone of their domestic legislation complimented by a wealth of entrenched jurisprudence.

Success was instead scored through an initiative pioneered by the American Law Institute (ALI) which led to promulgation of: the Principles of Cooperation among North American Free Trade Agreement (NAFTA) countries in 2000; and the ALI NAFTA Guidelines Applicable to Court to Court Communications in Cross Border Cases (2000).

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 7.5 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 concept of voidable dispositions in English insolvency law has some foundation in the 1570 Act (Act of Elizabeth) atleast as far as the limb of addressing fraudulent conveyances goes whilst the equivalent concept in civil law is traceable to the actio Pauliana. The other limb of voidable dispositions being preferences (e.g settling the debt of a favoured creditor instead of others or giving security to a previously unsecured creditor).

The fundamental differences between English law and civil law systems invariably colour the approach to voidable dispositions and insolvency in general. Differences include terminologies, inclination between pro-debtor and pro-creditor and also adversarial Court systems on the one hand and inquisitorial on the other.

The rules relating to voidable dispositions are important in insolvency as they can help with:

(i) prevention of fraud;
(ii) ensuring equitable treatment of creditors;
(iii) preventing the target entity or person from occasioning a sudden loss of value in pre-emption of insolvency proceedings; and
(iv) promoting out of Court settlements through a disincentive to creditors from engaging in last minute transactions that run the risk of being set aside instead of the safer dialogue with fellow creditors and stakeholders.

This is answered well. There is some scope to elaborate.

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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 above definition by Wessels is perceived to have some limitations because it is premised on existence of a domestic insolvency law framework as the 'motherboard' with the international aspects coming in as 'add-ons'.

However, there is no insolvency law framework of global application and this lends credence to other definitions such that of Fletcher which recognise that in international

insolvency law, the circumstances extend beyond a single domestic legal system, the provisions of which cannot be applied without due regard to the foreign aspects of a case.

This is answered well. There is some scope to elaborate.

4.5

Question 3.3 [maximum 5 marks]

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

Treaties and conventions can be a source of cross border insolvency (CBI) law if there is buy-in from the relevant states by way of ratification in which event they acquire the status of binding hard law. In the absence of such buy-in they are of no effect as a source of CBI law. An example of this was the 1990 Istambul Convention, Council of Europe Treaty Series No.136 which was a still born because not enough states ratified it to trigger its coming into force.

An example of a success story is that scored by the European Union through its European Insolvency Regulation 2000 (recast in 2015 and amended in 2021), which has rules to govern international insolvency in the regional block.

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

3.5

Marks awarded 13 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 are those instituted pursuant to an insolvency law and regulated by it. Informal insolvency processes on the other hand are voluntary negotiations between the debtor and creditor(s) to reach a consensual arrangement. There is some scope to elaborate.

The two differ in various ways such as mode of commencement. Formal proceedings may require a Court action against FPPL or a formal corporate step such as a resolution of FPPL to begin rescue proceedings together with the attendant filings at the government agency responsible for company registrations. This may invariably attract legal fees and other expenses. Also the formal proceedings can take longer to institute depending on the bureaucracy and efficiency of the Courts or government agency.

Informal insolvency processes by contrast can be instituted by the simple and less costly initiative of a meeting and / or discussion between FPPL and Lobo. Such simplicity also carries the advantage of speedy commencement when compared to formal proceedings.

Another distinguishing feature is that formal insolvency proceedings whether through Court action or corporate process filed with the Registrar of Companies become a matter of public record, which publicity can injure the goodwill and business reputation of the target company (FPPL) thereby potentially worsening its financial standing and ability to pay Lobo.

By contrast, informal insolvency processes for their part are a private arrangement between the debtor and creditor and need not be publicised, thereby minimising the possibility of the aforesaid risks to the business and standing of FPPL.

A further point of difference is that formal insolvency proceedings have limited options of the possible processes which are often exhaustively listed by legislation. Such processes typically include business rescue, re0rganisation, receivership and liquidation.

Informal processes on the otherhand are unlimited in possibility as they are instead left to freedom of contract (party autonomy) and principles for creation of valid binding contracts. Some typical informal processes include restructuring of FPPL, rescue initiatives, debt equity swaps or partial discharge of the debt.

However, formal insolvency proceedings have great ease of enforcement such as through Court supervision and Court orders where needed while informal processes do not enjoy the same enforceability, being dependant instead on good will and the threat of instituting formal proceedings.

Therefore, if in Lobo's assessment, FPPL is genuine about the dialogue and if cost and time are of the essence for Lobo then the informal insolvency processes should be explored in the first instance while the formal proceedings can be reserved as a last resort for the debt recovery.

It would be beneficial to also consider matters such as the absence of moratorium and the inability to bind dissenting creditors in an informal workout. 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.

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.

As observed by Westbrook for such scenarios, the Asgardian insolvency representative may encounter challenges with:

(i) his standing and recognition in the Encanto proceedings;
(ii) a possible moratorium against actions besides the Encanto case;
(iii) creditor participation;
(iv) priorities and preferences;
(v) avoidance provisions;
(vi) coordinated claims procedures; and
(vii) conflict of law issues.

The following international insolvency law instruments can be useful to addressing the challenges:

(i) UNCITRAL Model Law on Cross Border Insolvency;
(ii) ALI-III Global Principles for Cooperation in International Insolvency Cases and Global Guidelines Applicable to Court-to-Court Communication in Cross-Border Cases (2012); and
(iii) Judicial Insolvency Network, Guidelines for Communication and Cooperation between Courts in Cross-Border Insolvency Matters (2016).

Development of the instruments particularly the Model Law is of extreme importance considering that: (i) once adopted its provisions become binding as hard law; (ii) there is an increasing number of countries that have adopted it; (iii) their collective economic size and geographical coverage is very significant.

Also the Model Law has useful provisions that can aid the Asgardian representative such as for recognition (article 2(d) and 15), participation of foreign representatives (article 24) and co-operation (article 27) to mention a few.

The ALI-III Guidelines and JIN Guidelines for their part are simply non-binding instruments that can serve for useful legal literature to fashion a uniform and reasoned approach to co-operation and co-ordination in international insolvency law matters between the Courts of Encanto and Asgard as well as their role players (lawyers and litigants).

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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 (EIR) Recast would not apply since the UK left the European Union, with the EIR Recast ceasing to apply from 11pm on 31 December 2020.

Consequently, the international insolvency issues surrounding the UK commenced proceedings would be governed by: (i) common law principles of cross border insolvency; (ii) possibly the relevant provisions in the Insolvency Act 1986(UK) such as s.426; and the adopted UNCITRAL Model Law on Cross Border Insolvency.

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Marks awarded 13.5 out of 15

* End of Assessment *

TOTAL MARKS 44/50
Excellent paper.