INSOL INTERNATIONAL

FOUNDATION CERTIFICATE

IN INTERNATIONAL INSOLVENCY LAW

SUMMATIVE (FORMAL) ASSESSMENT: MODULE 1

(INTRODUCTION TO INTERNATIONAL INSOLVENCY LAW)

This is the summative (or formal) assessment for Module 1 ***of this course and is compulsory for all registered candidates on the Foundation Certificate. The mark awarded for this assessment will determine your final mark for Module 1. In order to pass this module you need to obtain a mark of 50% or more for this assessment.***

INSTRUCTIONS FOR COMPLETION AND SUBMISSION OF ASSESSMENT

Please read the following instructions very carefully before submitting / uploading your assessment on the Foundation Certificate web pages.

1. ***You must use this document for the answering of the assessment for this module. The answers to each question must be completed using this document with the answers populated under each question.***

2. ***All assessments must be submitted electronically in MS Word format, using a standard A4 size page and a 11-point Arial font. This document has been set up with these parameters*** – please do not change the document settings in any way. DO NOT ***submit your assessment in PDF format as it will be returned to you unmarked.***

3. ***No limit has been set for the length of your answers to the questions. However, please be guided by the mark allocation for each question. More often than not, one fact / statement will earn one mark (unless it is obvious from the question that this is not the case).***

4. ***You must save this document using the following format:*** [studentID.assessment1summative]***. An example would be something along the following lines: 202223-363.assessment1summative.*** Please also include the filename as a footer to each page of the assessment ***(this has been pre-populated for you, merely replace the words "studentID" with the student ID allocated to you). Do not include your name or any other identifying words in your file name.*** Assessments that do not comply with this instruction will be returned to candidates unmarked***.***

5. ***Before you will be allowed to upload / submit your assessment via the portal on the Foundation Certificate web pages, you will be required to confirm / certify that you are the person who completed the assessment and that the work submitted is your own, original work. Please see the part of the Course Handbook that deals with plagiarism and dishonesty in the submission of assessments.*** Please note that copying and pasting from the Guidance Text into your answer is prohibited and constitutes plagiarism. You must write the answers to the questions in your own words***.***

6. ***The final submission date for this assessment is*** 15 November 2022***. The assessment submission portal will close at*** 23:00 (11 pm) GMT on 15 November 2022***. No submissions can be made after the portal has closed and no further uploading of documents will be allowed, no matter the circumstances.***

7. ***Prior to being populated with your answers, this assessment consists of*** 10 pages***.***

ANSWER ALL THE QUESTIONS

QUESTION 1 (multiple-choice questions) [10 marks in total]

Questions 1.1. – 1.10. are multiple-choice questions designed to assess your ability to think critically about the subject. Please read each question carefully before reading the answer options. Be aware that some questions may seem to have more than one right answer, but you are to look for the one that makes the most sense and is the most correct***. When you have a clear idea of the question, find your answer and mark your selection on the answer sheet by highlighting the relevant paragraph*** in yellow***. Select only*** ONE ***answer. Candidates who select more than one answer will receive no mark for that specific question.***

Question 1.1

Civil Law and English (Common) Law countries have the same historical roots. Select from the following the best response ***to this statement.***

(a) This statement is untrue because English Insolvency Law developed from Roman law principles, and Civil Law Systems were based on the statute of Marlborough of 1267.

(b) This statement is untrue since Civil Law developed from early Roman law principles relating to debt recovery and English Insolvency Law developed via legislation, especially from the 16th century onwards.

(c) This statement is true since, on a principle basis, the developments of insolvency law as a system is the same in all systems.

(d) The statement is true since both systems developed from a pro debtor approach towards the notion of over-indebtedness.

Question 1.2

Both Civil Law and English Law systems in general allowed for a rather liberal discharge of debt for over-indebted debtors right from the inception of these systems. Select from the following the best response ***to this statement.***

(a) This statement is untrue since in both systems the notion of discharge only developed at a later stage.

(b) This statement is true since in both systems insolvency and rehabilitation procedures developed with discharge as a way of departure.

(c) This statement is untrue since discharge of debt never became part of any of these systems.

(d) This statement is true since creditors in both systems had an accommodative approach towards over-indebted debtors.

Question 1.3

England and America each have their own single unified piece of insolvency legislation which apply to both personal and corporate insolvency. Select from the following the best response to this statement.

(a) This statement is true since England has the unified 1986 Insolvency Act and the USA has the 1978 Bankruptcy Code. Both Acts cover personal and corporate insolvency.

(b) This statement is untrue since in England the Insolvency Act 1986 deals only with personal insolvency.

(c) This statement is untrue because the USA has separate Acts dealing with corporate liquidation and rescue.

(d) The statement is true since in England its companies' legislation deals with corporate insolvency and rescue.

Question 1.4

There are no good reasons to distinguish between insolvency rules pertaining to individuals (consumers, natural person debtors, also referred to as personal insolvency) and those insolvency rules applying to corporations or companies since in both instances the applicable insolvency rules are intrinsically collective in nature. Select from the following the best response to this statement.

(a) The statement is true since global insolvency law systems provide exactly the same rules to cover all aspects of insolvency in both instances, ie personal insolvency and corporate insolvency.

(b) The statement is untrue since there are pertinent differences in the treatment of certain aspects in insolvency of an individual and that of a company, like the fact that individuals are not "dissolved' after their estate assets have been liquidated as is the case once the assets of a company have been liquidated and it is finally wound up.

(c) The statement is untrue since insolvency law rules are not collective in nature.

(d) The statement is true since insolvent companies usually survive their liquidation and may continue to conduct business after the debt has been discharged through the liquidation process.

Question 1.5

All countries have one and the same set of rules to apply in the case of recognition of a foreign insolvency order. Select from the following the best response to this statement.

(a) The statement is untrue since the systems differ and some countries have no formal cross-border insolvency rules in place at all.

(b) This statement is true because all member states of the UN have adopted the UNCITRAL Model Law on Cross-Border Insolvency.

(c) This statement is true because the UNCITRAL Model Law on Cross-Border Insolvency applies directly to all UN member States.

(d) This statement is true since the International Court of Justice has a set of global cross-border insolvency principles that apply globally.

Question 1.6

The domestic corporate insolvency laws of a particular country make no mention of the possibility of a foreign element in a liquidation commenced locally. There is also no locally applicable treaty or convention on insolvency proceedings in place.

In a local liquidation commenced in that country, to what other area of domestic law can the local court refer in order to resolve an insolvency related international law issue that has arisen because of concurrent insolvency proceedings over the same debtor in a different country?

(a) Public International Law.

(b) UNCITRAL Legislative Guide on Insolvency Law.

(c) World Bank Principles for Effective Insolvency and Creditor Rights Systems.

(d) Private International Law.

Question 1.7

Private international law raises questions of the conclusive effect of a foreign judgment and the enforcement of a foreign judgment. A German court has issued a judgment in a German insolvency which has a connection with England. The foreign

insolvency office holder seeks recognition and enforcement in an English court of the insolvency order made in the German insolvency proceedings.

Which of the following statements, concerning the request for recognition and enforcement in England, is true?

(a) The English Court hearing the request for recognition and enforcement may apply the EU Recast Insolvency Regulation (2015).

(b) It is relevant factor for the English Court hearing the matter to consider whether Germany has adopted the UNCITRAL Model Law on Cross-border Insolvency 1997, or not.

(c) The English Court will be able to consider the request based on its 2006 Insolvency Regulations (the adopted UNCITRAL Model Law on Cross-Border Insolvency) and / or common law principles.

(d) The German order will be automatically recognised in England due to a cross-border insolvency treaty between England and Germany.

Question 1.8

Which of the following best describes international insolvency law?

(a) It is public international law governing insolvency law between States.

(b) It is private international law governing insolvency law between States.

(c) It may involve aspects of both public international law and private international law.

(d) It involves a simple classification within either public international law or private international law.

Question 1.9

To date, the most successful soft law approach to international insolvency law issues has been the Model Law on Cross-border Insolvency. Select from the following the best response to this statement.

(a) This statement is untrue because not all States have adopted the Model Law on Cross-border Insolvency.

(b) This statement is untrue because of the requirement for reciprocity in relation to the Model Law on Cross-border Insolvency.

(c) This statement is true because the Model Law on Cross-border Insolvency creates regulations which binds each State and has been the most influential response to international insolvency law issues.

(d) This statement is true because the Model Law on Cross-border Insolvency has been adopted by numerous States and is gaining momentum as an influential response to international insolvency law issues.

Question 1.10

Latin American States have some of the most long-lasting multilateral agreements regarding international insolvency issues. Select from the following the best response to this statement.

(a) This statement is untrue because the Bustamante Code was concluded in 1928, which was only a few years before the Nordic Convention of 1933.

(b) This statement is untrue because North America was not a party to these agreements.

(c) This statement is true because agreements such as the Escazú Agreement have been extremely long lasting.

(d) This statement is true because of agreements such as the Montevideo Treaties and Havana Convention on Private International Law.

Marks awarded 10 out of 10

QUESTION 2 (direct questions) [10 marks]

Question 2.1 [maximum 3 marks]

Briefly indicate the historical roots of the various insolvency law systems to be found in African jurisdictions.

African countries received large influence from their former colonizers. In this way, their insolvency law systems have their roots in the English system, for those countries colonized by the United Kingdom, and in the civil law, for the countries colonized by continental Europe, especially Portugal and France. Furthermore, there are countries like South Africa and Namibia that have a mixture of both systems.[1]

To achieve a higher mark further detail, such as country specific examples, were needed.

1.5

[1] BORAINE, André, MASON, Rosalind, Module 1 Guidance Texte: introduction to international insolvency law, INSOL International, London (2022), p. 10.

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 East Asian financial crisis influenced the reform of some insolvency laws. In this regard, Thailand overhauled its bankruptcy law and Singapore passed a new Insolvency, Restructuring and Dissolution Act in 2018.[2]

There is scope to elaborate

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.

In the 1970s, North America and Canada worked on drafting a bilateral insolvency treaty, which was unsuccessful. In 2000, the United States, Canada and Mexico, with the help of the American Law Institute (ALI), developed and approved the Principles of Cooperation among the North American Free Trade Agreement (NAFTA) countries, with "focus on insolvency of corporations and other legal entities engaged in commercial operations".[3]

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.

[2] BORAINE, André, MASON, Rosalind, Module 1 Guidance Texte: introduction to international insolvency law, INSOL International, London (2022), p. 11-12.

[3] BORAINE, André, MASON, Rosalind, Module 1 Guidance Texte: introduction to international insolvency law, INSOL International, London (2022), p. 62-63.

[Type your answer here]
Take care to provide an answer to all sub-questions.

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Question 3.2 [maximum 5 marks]

A Dutch commentator on international insolvency law defines international insolvency law as that part of the law that:

> ***"[i]s commonly described in international literature as a body of rules concerning certain insolvency proceedings or measures, which cannot be fully enforced, because the applicable law cannot be executed immediately and exclusively without consideration being given to the international aspect of a given case."***

However, the author concedes that this definition has limitations. Briefly discuss the reasons why the definition is perceived to have limitations.

The definition is limited, as it assumes the existence of only national legal frameworks[4] that adopt territorialism, that is, closed models that prevent any type of co-ordination and co-operation between insolvency procedures. In territorialism, there is a need to open an insolvency procedure in each place where the debtor has goods or assets, thus making it difficult to carry out a transnational procedure.[5]

Although the universalist model, in which a single procedure would be competent to dispose of all the debtor's debts and assets, is not a reality.[6] Practice demonstrates that a modified universalism based on co-operation and co-ordination of procedures can be a viable alternative to transnational insolvency.[7]
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.

[4] BORAINE, André, MASON, Rosalind, Module 1 Guidance Texte: introduction to international insolvency law, INSOL International, London (2022), p. 34.
[5] BORAINE, André, MASON, Rosalind, Module 1 Guidance Texte: introduction to international insolvency law, INSOL International, London (2022), p. 38-39.
[6] BORAINE, André, MASON, Rosalind, Module 1 Guidance Texte: introduction to international insolvency law, INSOL International, London (2022), p. 37-38.
[7] BORAINE, André, MASON, Rosalind, Module 1 Guidance Texte: introduction to international insolvency law, INSOL International, London (2022), p. 40.

According to BORAIN and MASON the "[c]lassic public international instruments are treaties and conventions to which States become signatories and as such bind themselves and affect their domestic law accordingly".[8] While treaties and conventions are the most efficient way to ensure the effectiveness of a transnational insolvency system, experience shows that they are not the most successful method.

Since the 13th century, bilateral international insolvency conventions appear in Europe. In addition, there are some successful experiences of multilateral treaties such as the Nordic Convention (1933), in the Scandinavian region. However, attempts to draft treaties with a larger number of members have shown failure, in view of low adherence and ratification, as occurred in 1990 with a Convention on Certain International Aspects of Bankruptcy that did not obtain sufficient ratifications to enter into force.[9]

In this sense, it seems to us that the differences between the insolvency systems of each country create a barrier to the adoption of a binding model of insolvency regulation. Thus, a soft law model appears to be the most suitable for bringing the systems together. This is proven by observing the success of the UNCITRAL Model Law on Cross-border Insolvency, which has been adopted by numerous countries, as it allows countries to adapt the Model Law to fit their internal system.[10]

There is scope to elaborate. While the question says 'briefly' it is for 5 marks. I'd love to see further discussion of various examples of treaties/conventions in your consideration of success.

4

Marks awarded 8 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.

[8] BORAINE, André, MASON, Rosalind, Module 1 Guidance Texte: introduction to international insolvency law, INSOL International, London (2022), p. 46.
[9] BORAINE, André, MASON, Rosalind, Module 1 Guidance Texte: introduction to international insolvency law, INSOL International, London (2022), p. 46.
[10] BORAINE, André, MASON, Rosalind, Module 1 Guidance Texte: introduction to international insolvency law, INSOL International, London (2022), p. 46-47.

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

Question 4.1 [Maximum 5 marks]

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

There are two main differences between "formal" insolvency proceedings and "informal" insolvency arrangements. First, informal systems involve voluntary negotiations between the debtor and some or all of his creditors with the parties determining who will participate in the arrangement. Second, these informal arrangements are not always regulated by insolvency law. [11] A comparison with formal arrangements is needed.

Because they may be unregulated, these informal arrangements can have advantages and disadvantages for the debtor. One advantage is that there is greater freedom of negotiation with the debtor, who would not be limited by rules such as the priorities existing in the insolvency laws. On the other hand, these agreements may lack effectiveness if there are no indirect incentive tools or a persuasive force to achieve the reorganization. [12]

Matters such as privacy, cost, moratorium and ability to bind dissenting creditors should be considered.
1.5

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.

According to BORAIN and MASON:

[11] BORAINE, André, MASON, Rosalind, Module 1 Guidance Texte: introduction to international insolvency law, INSOL International, London (2022), p. 17.
[12] BORAINE, André, MASON, Rosalind, Module 1 Guidance Texte: introduction to international insolvency law, INSOL International, London (2022), p. 17-18.

> ***"Without co-ordination and co-operation between Courts of different States in a cross-border situation, there will always be a risk of multiple insolvency proceedings against the same debtor. If these proceedings compete with each other, or are incompatible in nature (for example, winding up or liquidation versus corporate rescue / restructuring), they may lead to unnecessary capital losses for the creditors as attempts to resolve financial distress under a rescue or reconstruction scheme, may be prevented. It may be impossible to predict which law will ultimately govern the many questions that may arise on questions such as security rights and priority payments in an insolvency. Such a situation may also result in a race between creditors for assets, a race in which "only the fittest" would survive. Creditors who are unable to join the race for assets would be the major losers and this would run counter to one of the most basic global principles of insolvency, namely the principle of equality between creditors (par conditio creditorum). The risk of fraud and detrimental forum shopping could also arise in relation to cross-border insolvency proceedings".*** [13]

As can be extracted from the thinking of the authors, co-operation and co-ordination of insolvency proceeding is essential for their success and legal security.

In this sense, several instruments have emerged that aim to make possible the co-operation and co-ordination of insolvency proceeding. In terms of soft law, the UNCITRAL Model Law on Cross-border Insolvency presents as one of its principles the need for co-operation and co-ordination. According to the Model Law, the local court or the insolvency representative must co-operate with the foreign court or the foreign representative. [14]

There are also several guidelines that courts can use to promote co-operation and co-ordination, including: (i) American Law Institute – III Global Principles for Cooperation in International Insolvency Cases and Global Guidelines Applicable to Court-to-Court Communication in Cross-Border Cases (2012); (ii) European Guidelines on Communication and Cooperation (2007); (iii) EU JudgeCo Principles and EU Cross-border Insolvency JudgeCo Guidelines (2015); and (iv) Judicial Insolvency Network, Guidelines for Communication and Cooperation between Courts in Crsso-Border Insolvency Matters (2016). [15]

BORAIN and MASON conclude that

[13] BORAINE, André, MASON, Rosalind, Module 1 Guidance Texte: introduction to international insolvency law, INSOL International, London (2022), p. 35.
[14] BORAINE, André, MASON, Rosalind, Module 1 Guidance Texte: introduction to international insolvency law, INSOL International, London (2022), p. 56-57.
[15] BORAINE, André, MASON, Rosalind, Module 1 Guidance Texte: introduction to international insolvency law, INSOL International, London (2022), p. 56-58.

> *"[t]he development of these international instruments in conjunction with an increased number of States adopting the UNCITRAL Model Law on Cross-border Insolvency, indicate the important role of co-operation and co-ordination as a strategy to address international insolvency matters".* [16]

As exposed, the need for co-operation and co-ordination for the success of insolvency proceeding is evident, in this way, international instruments help that the various systems adopted around the world can adapt to adopt measures that allow greater collaboration between courts.

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.

According to BORAIN and MASON, "[a]lthough the UK is now a former Member State of the EU, for the period it had been a member, the EU Insolvency Regulation also applied to cross-border insolvency matters between the UK and other EU Member States". [17] *Therefore, European Insolvency Regulation Recast (EIR) would apply to the case.*

The authors also point out that:

> *"The EIR allocates jurisdictional competence to the courts of a member State within which is situated the "centre of the debtor's main interests" (COMI).143 While the EIR allocates primary jurisdiction based on the centre of the debtor's main interests (main proceedings), it does allow for the possibility of subsidiary territorial proceedings in other member States. These are permitted where the debtor has an "establishment". An establishment is defined as meaning "any place of operations … where the debtor carries out a non-transitory economic activity with human means and assets"".* [18]

[16] BORAINE, André, MASON, Rosalind, Module 1 Guidance Texte: introduction to international insolvency law, INSOL International, London (2022), p. 58.
[17] BORAINE, André, MASON, Rosalind, Module 1 Guidance Texte: introduction to international insolvency law, INSOL International, London (2022), p. 7.
[18] BORAINE, André, MASON, Rosalind, Module 1 Guidance Texte: introduction to international insolvency law, INSOL International, London (2022), p. 65.

Therefore, the existence of an establishment of the debtor in the place where Lobo intends to open a new procedure must be verified. If there is an establishment, it should be checked where the COMI is located to determine which would be the main proceeding. In this case, whether in the UK or in the country where Lobo opens its proceeding. With that established, we have two possible scenarios. First, if the proceeding in the UK is considered a main procedure, we would have that the new procedure would be considered a "secondary proceeding". Second, if Lobo's procedure is considered a main proceeding, the procedure opened in the UK will be considered an "independent proceeding".[19]

It would be beneficial to consider the MLCBI.

3.5

Marks awarded 10 out of 15

*** End of Assessment ***

TOTAL MARKS 34.5/50

A good paper that correctly identifies many of the issues raised and satisfactorily substantiates several answers.

[19] BORAINE, André, MASON, Rosalind, Module 1 Guidance Texte: introduction to international insolvency law, INSOL International, London (2022), p. 65.