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 laws followed by the African countries are still linked to their colonial past. English law tradition is followed by countries such as Nigeria, Kenya, Botswana, Zambia and Tanzania. Civil law tradition based on Portuguese law is followed by Angola and Mozambique. Civil law based on French law is followed by Francophone countries of West Africa. A mixed legal system of both Roman-Dutch civil law and English common law are adopted by countries such as South Africa and Namibia.

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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 has affected the financial situation and its laws in East Asia countries in a considerable manner particularly in Indonesia and Thailand. Such an event has prompted countries to reform the domestic insolvency laws.

One of such reform initiative is in the case of Thailand, the bankruptcy laws have seen a considerable changes.

Singapore is another country which is in the limelight of the changing insolvency laws. It passed a new insolvency law in 2018 called Insolvency, Restructuring and Dissolution Act consolidating the corporate and personal insolvency and restructuring laws into a unified statute. The New statute came into effect from 30th July 2020. Singapore in 2017 has also adopted the UNCITRAL Model Law on Cross-Border Insolvency.

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.

Even though United States and Canada has been working towards a bilateral insolvency treaty in 1970s, it never came to success. Later in 2000, the American Law Institute (ALI) approved the Principles of Cooperation among North American Free Trade Agreement (NAFTA) countries, which includes United States and Canada, as a part of the ALI Transnational Insolvency Project. ALI has also developed ALI NAFTA Guidelines Applicable to Court-to-Court Communications in Cross-Border Cases (2000) for NAFTA Countries.

However, the major achievement in the resolution of international insolvency issues between North America and Canada is their successful adoption of UNCITRAL Model Law on Cross Border Insolvency. Both the counties adopted the Model Law in the year 2005.

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

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Marks awarded 8 out of 10

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

Question 3.1 [maximum 5 marks]

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

The historical roots to development of such laws and policies will have a considerable impact in the laws regarding voidable disposition. On the other hand, the historical root for law relating to the voidable disposition is linked to the historical root for the development of law in a

particular country depending on whether a country is civil law country and common law country.

The *action pauliana* form the basis of fraudulent conveyance law in civil law systems, whilst the Act of Elizabeth of 1570 is the basis for the voidable dispositions in English Law.

The law governing voidable disposition is not a standalone law which concerns only the insolvency/bankruptcy laws in a country. It has links to financial regulations, contractual laws, and other financial laws prevalent in the country. Thus, the development of domestic law and financial policies, which are independent to the insolvency regime may also impact the laws regarding the voidable dispositions.

For example, in case of a preferential transaction that has been identified by a court dealing with the insolvency which has an element of multi-jurisdictional transaction, on top of the recognition of the decision of the court with regard to the insolvency commencement, it is also important to look at whether such a preferential transaction is considered as a voidable disposition in the foreign territory. If the law at a foreign country does not recognise such preferential transaction as a voidable transaction, it will end in a roadblock even if the insolvency commencement is recognised in the foreign jurisdiction. Moreover, the enforcement of such a decision to set aside a voidable disposition (preferential transaction in the present case) and the recovery, if any, from a foreign entity becomes difficult if the law of the foreign country in its domestic financial laws does not recognise / allow such practices. Especially in a scenario wherein such transactions is linked to the sovereign entities of that foreign country.

Even if such transactions are considered as voidable dispositions in both the countries, under the insolvency regime of each country, the time period for considering such transactions as voidable dispositions may differ. This generally linked to the look back period (the period from which the voidable dispositions are to be evaluated) and the date from which the look back period is calculated in each insolvency regime may differ and this might bring in a lot of confusion at the time of enforcement or recovery in a foreign country. Furthermore, voidable disposition of MNCs may also be linked to the socio-economic situations of a country. Some developing countries may not be able afford setting aside such transaction as the same might be linked to the investments of that country.

Thus, it is important to bring a harmonised domestic law with respect to the voidable disposition to conduct a smooth cross-border insolvency scenario.

The concept of voidable disposition is important in any insolvency proceeding because otherwise, there is a high possibility that the debtors will dispose of its assets anticipating the initiation of insolvency proceedings against them. For example, in the case of individuals, the assets may be sold at a cheaper rate for even gifted to the immediate family members of the debtor just before the commencement of the insolvency in order to save the assets. Similarly, a corporate person might dispose of its assets or make a preferential transaction benefitting a single creditor which may or may not be related to the debtor.

Thus the concept of voidable disposition fills up the most prevalent loophole in any insolvency regime.

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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.

Professor Bob Wessels in his definition of International Insolvency Law does not envisage a single unified system but a scattered national legal framework which could be applied in the particular scenario. The limitation in such a definition can be seen in the matter wherein, the Wessels only puts forth the international insolvency law as a bridge between various national insolvency frameworks. Rather than just being a bridge, the international insolvency law could also be considered as an international framework which can be adopted by the various countries into its domestic law.

The definition put forth by Wessels does not give the scope for universalism or modified universalism. Such an approach is gaining momentum in light of the fact that many countries have adopted the UNCITRAL Model Law on Cross-Border Insolvency making the process partially harmonised.

Apart from Wessel's definition, there are other definitions which suffer the same limitation. One of such definition is that of Ian Fletcher.

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.

Many countries have tried achieving harmony in cross-border insolvency law through treaties and conventions. Bilateral and multilateral treaties are an important because the countries engaging in such treaties are supporting each other envisaging a smooth trade relation and investment friendly environment. Under international law, no one can force the any country to adopt a particular law or to overhaul its insolvency regime according to the standards adopted by other countries. However, treaties create a safe space for the countries to have a reciprocity in recognition of decisions of insolvency courts and bring a cooperation between the insolvency regimes of two or more countries together. It also helps countries to share the knowledge and resources to amend its own laws.

Moreover, the treaties and conventions even though have its own limitation when it comes to enforceability, influence the countries taking part in it to streamline its own domestic laws according to the standard envisaged by the treaty or convention.

In many situations, even though there is no existing cross-border insolvency regime under its domestic laws, countries in considering the scenario of a cross-border insolvency refers to the treaties and conventions that the country has taken part in to analyse the scenario and come up with a amicable solution to the problems and difficulties faced.

Attributing to its binding characteristics treaties and conventions are considered as hard law when compared to model law and guiding principles. Even though the UNCITRAL Model Law on Cross-Border Insolvency has seen a considerable takers, historically, it is the treaties and conventions which brought about a harmonised system in the cross-border insolvency regime. Some of the success stories are:

1. Nordic Convention on Bankruptcy between Norway, Denmark, Finland, Iceland and Sweden (1933)
2. The Montevideo Treaties (1889) and (1940)
3. Havana Convention on Private International Law (1928) (Bustamante Code)
4. European Insolvency Regulation Recast (2015)
5. Nordic Convention (1933)
6. Organisation pour l'Harmonisation en Afrique du Droit des Affaires (OHADA) Treaty (1993)

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

4

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?

An informal insolvency arrangement would have limited intervention of a court/tribunal compared to a formal insolvency arrangement. Moreover, in an informal arrangement, the parties are at the liberty to negotiate on the terms and conditions which they feel is important and easily enforceable and can also keep their own timeline for recovery. It helps bringing both the debtor and the creditor to single table where they can discuss the future prospects of rescue of the corporate person. Furthermore, in such a situation the creditors may have an advantage when it is compared to formal arrangement as the debtor would in any case prevent a formal insolvency. Furthermore, an informal arrangement when compared to a formal arrangement can be easily achieved without much waste in time and money.

However, it is important for the Lobo to consider that when it comes to enforceability of the terms in an informal arrangement, it would be much difficult as compared to the formal

arrangement where there is a proper set of laws against which neither the creditor nor the debtor can go.

In order to analyse the tactical advantages and disadvantages of formal insolvency arrangement over the informal insolvency arrangement, more information with respect to the domestic insolvency regime of Asgard (as to whether it has adopted a creditor in control or debtor in control system). Moreover, more details with respect to the cross-border insolvency regime in both the countries is required to understand the alternative ways in which lobo can pressurise FPPL for the recovery of its debt.

Matters such as costs, privacy, moratorium and ability to bind dissenting creditors needed to 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.

Assuming there are no cross-border insolvency regime existing in both the counties, the following are the difficulties that may be faced by the insolvency representative in conducting the insolvency process of FPPL.

1. Recognition of concurrent insolvency proceedings
2. Cooperation and communication between the insolvency courts
3. Recognition of insolvency representatives to administer the assets
4. Enforcement of decisions with respect to voidable dispositions
5. Recognition of moratorium and its terms which may be different in both the countries
6. Enforcement of Executory contracts
7. Co-ordination of claim of the creditors
8. Priorities and preferences to a particular class of creditors
9. Discharge of Insolvency in one country and the effect thereto in the other country

In order to clear the difficulties faced in the concurrent insolvency proceedings, the insolvency courts in both countries may resort to various international insolvency instruments and streamline the proceedings initiated in both the countries by adopting the principles enunciated in such instruments. Some of such instruments are:

1. UNCITRAL model law on cross border insolvency (1997)
2. UNCITRAL Model Law on the Recognition and Enforcement of Insolvency-Related Judgments (2018)
3. IBA Model International Insolvency Cooperation Act (1989)
4. IBA Cross-Border Insolvency Concordat (1996)
5. ALI - III Global Principles for Cooperation in International Insolvency Cases and Global Guidelines Applicable to Court-to-Court Communication in Cross-Border Cases (2012)
6. EU Cross-Border Insolvency Court-to-Court Communications Guidelines 2015
7. JIN Guidelines for Communication and Cooperation between Courts in Cross-Border Insolvency Matters (2016)

Such instruments provide the solutions for the conflicting scenarios of cross-border insolvency and helps the insolvency representatives cooperate and co-ordinate in rescuing the FPPL or

administering/ distribution of assets of FPPL and also smoothen the communication between the insolvency courts. Hence, the development of such instruments is a need of the hour to support the development of a cross-border insolvency regime common to all countries and recongisable in all countries.

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.

Prior to 1st January 2021, recognition insolvency proceeding and cooperation between insolvency courts between the UK and EU Member States was subject to common EU Insolvency Regulations Recast, which broadly offered automatic recognition and principles for harmoniously and smooth conduct of concurrent proceedings. After the Bexit, the common EU Insolvency Regulations Recast does not apply to the UK after the Brexit. Since the minor creditor opened insolvency proceeding against FPPL after the threshold date of 31st December 2020, there is no question of European Insolvency Regulation Recast being applied to the proceeding in UK in the present scenario. **What is the consequence of this with respect to automatic recognition?**

The UK insolvency proceeding initiated against FPPL would only be considered as an insolvency proceeding initiated in a non-EU member and the recognition of such a proceeding would be considered by each member state of EU as per the domestic law. Moreover, not all EU member states have adopted the UNICTRAL Model law on cross-border insolvency. Hence, the Lobo's decision to initiate insolvency proceeding would depend on which EU member state does the Lobo considering initiating the insolvency proceeding against FPPL. Thus, a major fact that would be required to asses the scenario would be if that particular country has adopted model law of cross-border insolvency or not.

4

Marks awarded 10.5 out of 15

*** End of Assessment ***

TOTAL MARKS 40.5/50

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