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.

Many African countries still follow the laws of their former colonial powers.

Nigeria, Kenya, Botswana and Zambia and countries in Eastern Africa follow the traditions of English law. Countries like Angola and Mozambique tend to follow civil law tradition of Portugal. Countries in West Africa which are former French colonies follow civil law especially French law. Countries like South Africa and Namibia have mixed legal systems since both the Roman-Dutch law and English law had previously influenced their legal systems.
In more recent times many African countries have started to introduce more modern legislation with several adopting UNICTRAL Model Law on Cross Border Insolvency

3

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.

After the 1998 financial crisis in East Asia, some nations decide to change their insolvency laws.
Countries like Thailand made several changes to their bankruptcy laws creating the due to the financial crisis. **Elaboration would be beneficial**
Singapore's role within that region has increased over time with them passing a new Insolvency, Restructuring and Dissolution Act to combine their corporate and personal insolvency and restructuring laws into one Act.

Indonesia also made changes to their insolvency law as well. **How so?**

2

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 Canada and the United States had worked towards creating a bilateral insolvency treaty, but they failed to reach an agreement. Progress has been made as both have adopted the Model Law. There had been prior co-operation and co-ordination between the two countries in terms of legislation and case law around comity.

The American Law Institute (ALI) has taken steps to assist the NAFTA countries with international insolvency issues. Their Transnational Insolvency Project was designed to improve co-operation in international insolvencies between the NAFTA states. Westbrook was appointed and formed an expert advisory group from each country, eventually the Principles of Cooperation were prepared and approved by the ALI Council and Members in 2000.

The ALI and the International Insolvency Institute (III) also started a project with Fletcher and Wessels relating to applying the ALI NAFTA Principles worldwide regarding the ALI-III Global Principles for Cooperation in International Insolvency Cases and Global Guidelines Applicable to Court-to-Court Communication in Cross-Border Cases

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

2

Marks awarded 7 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.

Voidable disposition is when a transaction is automatically void or made voidable depending on the category of the transactions. Avoidable transactions are transactions made hinder the ability of creditors to collect claims, transactions made at undervalue or transactions were certain creditors received preferential transactions. In civil law countries voidable disposition developed form the actio Pauliana and in English Law it developed from the Act of Elizabeth of 1570.

The treatment of voidable dispositions may differ per country the UNCITRAL Legislative Guide on Insolvency Law nots that some laws may consider if certain transactions are void or not. However, an insolvency representative may have to commence proceedings to recover assets where a party has failed to return the asset or pay its value. In states where ethe laws suggest that the transaction is voidable an insolvency representative will need to consider whether avoiding the transaction will be beneficial to the estate. The UNCITRAL Legislative Guide also notes that if a different law is stricter than another there would be a voidance of a larger number of transactions.

You also needed to discuss the importance of relevant rules. Elaboration was warranted.

3.5

Question 3.2 [maximum 5 marks]

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

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

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

This definition has limitations because it is connected to the existence of a national legal framework of insolvency law. Wessel referred to Fletcher's definition which he mentions that international insolvency should be considered as a situation where an insolvency occurs in circumstances which transcend the confines of a legal system. With this a single set of domestic insolvency laws cannot be used in an international insolvency situation, since the states involved would have different legal issues that will have to be ratified.

Many insolvency practitioners accept that there are challenges that are faced in enforcing applicable law in international insolvency situations. With this comes the importance of many multilateral bodies that have been created to help address the legal issues that arise in cross border insolvencies.

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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.

The Nordic Convention on Bankruptcy originating from the Scandinavian region was a successful treaty. It recognises the law of the home state as the state that determines all the effects of the insolvency proceedings in all member States without the need for further formalities. There is an immediate stay if insolvency proceedings are commenced

Latin American States are known to have some of the longest lasting multilateral agreements on addressing insolvency issues. These are the Montevideo Treaties of 1889 and 1940 and the Havana Convention on Private International Law of 1928. The Montevideo Treaty of 1889 covers personal and corporate insolvency matters. It allocates jurisdiction based on the where the debtor's business is domiciled. The Havana Convention is said to be more universal and allows for a single proceeding throughout the region. It does still allow concurrent proceedings and notes that they don't provide guidance on those matters.
The European Insolvency Regulation of 2000 arose after the EU convention in 1996, it has been successful with amendments (resulting in the EIR Recast in 2015). The EIR allows for the courts with COMI to oversee the proceedings, it does allow for other proceedings in other member States.
The Organisation pour l'Harmonsiation en Afrique du Droit des Affaires was a treaty established in Sub-Saharan Africa, its goal is to harmonies the domestic insolvency laws of 17 different African countries. It has successfully seen those African countries adopt the UNCITRAL Model Law on Cross Border Insolvency
There have been several other treaties and conventions to date that have been successful in establishing cross-border insolvency laws to help mediate the issues arising in international insolvency proceedings.

This question also required you to discuss treaties or conventions as a source for cross-border insolvency law. This required a general consideration of the nature of treaties and conventions.

3.5
Marks Awarded 12 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 proceedings are insolvency proceedings that are governed by the law.

Informal proceedings are insolvency proceedings that may not follow insolvency law, they tend to be voluntary negotiations between the debtor and their creditors. These voluntary negotiations are a way to avoid going to the courts which happens in a formal process.
Informal out of court process can be cheaper as legal costs are cut. If negotiations are successful, the relationship between Lobo and FPPL can remain strong without FPPL being pressured in the future or threatened with a formal process. It also avoids the negative publicity that a formal proceeding brings showing that they are having financial difficulties. Opposite to informal proceedings the disadvantages are that there will be publicity regarding the struggles of the company which may negatively impact its goodwill. It can be very expensive to get the court involved during formal proceedings
Some disadvantages of the informal procedure are that there is no moratorium so if they have other creditors that are owed money they can go to the courts and commence insolvency proceedings. There is no way of binding dissenting creditors to any agreement that is reached.
Opposite to informal proceedings the benefits are that a moratorium can be placed on the company, and they can legally bind creditors to whatever is agreed.
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.

4.5

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.

One problem that they may face is the problem of multiple creditors seeking proceedings which is currently the case. If there are formal proceedings in Encanto they may want to seek recognition so that they can obtain an automatic stay/moratorium so they can protect their assets.
When trying to realise assets that are in a foreign country the insolvency representative will have to find out if that nation has adopted any cross-border insolvency laws that may help them with foreign proceedings. This will allow them to gain recognition in those foreign states. However, if states have more territorial legislation, it will be harder to gain recognition.
Another difficulty that the insolvency representative have is directors not being cooperative, this may not be the case in FPPL, but it may be an issue. This makes it harder to get information from the director which could assist the insolvency representative when commencing their proceedings.

This question required you to 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. This required discussion of different laws, and territorial approaches (you touched upon this), together with consideration of international insolvency instruments developed to assist liquidators appointed in concurrent insolvency proceedings.

2

Question 4.3 [Maximum 5 marks]

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

The European Insolvency Regulation Recast (EIR) would not apply to the UK due to its exit from the European Union in December of 2020 and would not apply to this proceeding as it is past this date. However, since the amendments made in the EIR Recast it extends the provisions of the COMI allowing recognition of insolvency proceedings outside of the EU. This is to help with the coordination of proceedings that occur within and outside of the EU. This means that the insolvency proceeds that would have commenced in the UK would be recognised although they have exited the EU. **This warrants further consideration and discussion.**

The UK does also have insolvency legislation that addresses cross-border insolvency law, in section 426 of the Insolvency Act (1986) it allows the UK courts to recognise foreign proceedings in a liquidation allowing the UK court to apply the insolvency law which is relevant to any matters that fall within its jurisdiction. This means that they UK courts are willing to apply rulings that may occur if Lobo was to open proceedings in a country in Europe.

With both the European Union having laws that address cross border insolvency legislation it would address the issue of recognition in the insolvency proceedings and rulings may be applied to whichever country when necessary.

It would be beneficial to consider the MLCBI.

2.5

Marks awarded 9 out of 15

*** End of Assessment ***

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

TOTAL MARKS AWARDED 37/50