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 jurisdictions' insolvency laws appear to have developed in accordance with the laws of the respective former colonial powers. According to J. Calitz, the cornerstone of current South African law is still Roman-Dutch law, which was first applied in the continent's southern region some four centuries ago. Calitz further claims that Table 3 of the Twelve Tables, which dealt with the execution of judgements the borrower was said to have pledged himself as nexus to his creditor, is where South African insolvency law originates. The law allowed for the debtor's incarceration as well as the possibility of a death sentence or the sale of the debtor as a slave in another nation. The creditor placed his hand on the debtor and said the prescribed formula to begin the legal process.

More detail was needed regarding different countries and relevant laws across Africa more generally. While it is good that you discuss South Africa, there are numerous other countries worth discussing.

1

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 East Asia financial crisis of 1998 led to changes in insolvency laws. As a result, Thailand's bankruptcy laws were updated. **How so?** To unify its corporate and personal insolvency and restructuring laws, Singapore also passed a new Insolvency, Restructuring and Dissolution Act, which took effect on July 30, 2020.
There is some scope to elaborate further.

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.

The different initiatives undertaken to assist with the resolution of international insolvency issue between North America and Canada include:

The United States and Canada attempted to achieve a bilateral insolvency treaty in the 1970s, but no agreement was made. The model law and protocols have been embraced by both nations, and they have engaged in bilateral collaboration and coordination based on current laws and well-established case law regarding comity.

The American Law Institute has taken steps to assist with the resolution of international insolvency issues between the North American Free Trade Agreement Countries of the US, Canada and Mexico.

An endeavor to enhance collaboration in international insolvencies among the NAFTA parties was the ALI Transnational Insolvency Project. As the designated reporter, Professor Westbrook and his colleagues created an international statement on the status of each relevant nation's insolvency law as it relates to international cases. As a result, the NAFTA countries created and agreed a set of principles for cooperation.

There is scope to elaborate further, including by discussing *Re Nortel Networks Corporation* [2016] ONCA 332; *In re Nortel Networks, Inc.*, 669 F.3d 128

2.5
Marks awarded 5.5 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.

One of the possible historical reasons why there is a difference in the approach to voidable dispositions is that roman law principles formed the backbone of civil law jurisdictions whereas the English law followed that of the common law. Fletcher states that the roots of bankruptcy law as found in Roman law forced a debtor to liquidate assets to satisfy creditors. The civil law further developed as a result of the customs and usages that developed between merchants and thus influenced the laws of the country. Thus bankruptcy laws started as a debt collecting mechanism that favoured creditors. The English law initially did not provide for imprisonment for debt but the option was introduced by the statute of Marlbridge of 1267. Imprisonment for non-payment of debt was abolished as a principle in 1869 by the Debtors Act under English Law. The English Bankruptcy Act of 1542 introduced the fundamental principle that in the case of a fraudulent debtor there should be compulsory administration and distribution on the basis of equality amongst all the creditors.

With respect to voidable dispositions the time when proceedings commence will affect whether these dispositions were fraudulent or not. After the commencement of insolvency proceedings a number of consequences or effects will follow. The post commencement transactions will affect the administration of the insolvent estate. Thus it is important to work out which assets are in fact assets of the insolvent entity in order to trace and collect them for the purposes of realisation and distribution.

A voidable disposition may be subject to investigation and may be set aside if they are found to be fraudulent such as to hide assets for the benefit of the debtor. These have been classed as fradukent conveyances or preferences .In Civil law The acto pauliana form sthe basis of fraudulent conveyance law whilst the act of Elizabeth of 1570 is the basis for this remedy in English law.

Context or framework

[Type your answer here]

You also needed to provide a context or framework for the treatment of these rules in insolvency systems. This could have been done by briefly explaining the nature of voidable dispositions. Take care to answer the question posed directly.

3

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.

Wessel's definition of international law is considered to have limitations because it assumes that a national insolvency legal system exists. The majority of domestic legal systems are unprepared to handle insolvencies, that traverse international borders. Additionally, because there is not a single, comprehensive standard for insolvency rules, their application will vary throughout nations. It cannot exclusively rely on the goodwill or consideration to recognize insolvency procedures in one state. Thus, this may lead to system which make it impossible to foresee the law that will finally apply to an international part of a case, which could result in a lack of transparency and predictability.

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.

Many states have adopted or joined conventions or treaties that incorporate guidelines for resolving insolvency situations that have linkages to another state into their domestic legislation. These have been seen as facilitating the coordination of laws addressing international insolvency when they have been enacted. These agreements can also be incorporated into the state's insolvency legislation.

Some Examples of Treaties or Conventions in Europe include: 1. The Europe-bilateral international insolvency conventions addressing debtors and later gathering in assets. 2. The Nordic Bankruptcy Convention of 7 November 1933, which has been signed by Denmark, Finland, Iceland, Norway and Sweden, applies between these Nordic countries. This convention provided a legal framework for cross-border recognition and enforcement of bankruptcies between the participating countries.

3. The European Convention on Certain international aspects of Bankruptcy known as the Instanbul Convention provided the mechanism for two possibilities when the bankrupt's assets are in more than one State. It enabled a liquidator in one state to exercise some of their powers directly in the country in which the bankrupt's assets are located and allowed for the opening of secondary bankruptcies.

4. The Council of Europe Treaty Series No 136 although signed by only 8 member states thus was not ratified by enough states to come into force.

5. In Latin America a series of treaties were concluded on private international law which included chapter on bankruptcy or insolvency these include The Montevideo treaties (1889)

and (1940) and The Havana Convention on Private international Law. These have been some of the These have been some of the multilateral agreements for managing global insolvency issues that have lasted the longest.

There is scope to elaborate upon the nature of treaties or conventions as a source for cross-border insolvency law

4

Marks awarded 11.5 out of 15

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

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

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

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

Question 4.1 [Maximum 5 marks]

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

N.B. More information is required on the local insolvency law in Asgard, this would assist to give better advice on the steps to take regarding formal proceedings and whether informal proceedings are recognised under the law.

A country's applicable bankruptcy legislation is typically invoked to begin formal insolvency proceedings, and that law thereafter governs those proceedings. Liquidation, reorganization, or rescue proceedings are some examples of this. Conversely, informal insolvency procedures are not necessarily governed by insolvency law and typically entail voluntary agreements between the debtor and some or all of its creditors. This often entails some sort of debtor restructuring. Even though these conversations are not governed by insolvency law, the existence of such a legislation is necessary for its efficiency since it might act as a direct incentive or persuasive force to achieve restructuring.

Lobo should think about whether formal insolvency proceedings—which may include receiving legal assistance and thus a third independent party to give advise on legal options—are safer and more dependable given that there are clear regulations to follow. This option may be more expensive to Lobo since it may involve legal fees and might take a longer time to come to a resolution.

In an informal agreement, Lobo will consider whether it wants to continue doing business with FPPL, how much is still owed, and the conditions under which the payment is to be made. For instance, this can entail paying in monthly installments. The fact that this informal agreement might not have legal force and effect could be a drawback because it could cause problems in a variety of commercial contexts. Additionally, Lobo have to think about making this formal by contracting FPPL in writing for future payments. This option may be quicker and will be a cheaper alternative to formal proceedings.

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

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.

Cooperation and coordination challenges that the insolvency representative may face include:

i. Whether there is provision for handling a claim in a foreign country (Encanto) which includes foreign creditors. What Evidential hurdles that may need to be overcome in order for a concurrent claim in Lobo to recognised.
ii. Getting information from the Encanto insolvency trustee.
iii. Issues of identifying, locating, and realizing assets that are in Encanto.
iv. Obtaining an Encanto recognition order to enable information sharing.
v. Other creditors may seek concurrent proceedings in various states since FPPL conducts business in more than one state. This raises issues with available recognition and relief.

The following international insolvency instruments have been established:

1. The Model Law on Cross-Border Insolvency developed by UNCITRAL. The Model Law is intended to help States create a modern legal foundation for their bankruptcy laws so that cross-border insolvency proceedings involving debtors who are in serious financial difficulty or insolvency can be handled more successfully. It recognizes the variations across national procedural laws and concentrates on authorizing and fostering collaboration and coordination between jurisdictions rather than aiming to unify substantive insolvency law.

2. The Judicial Insolvency Network, which held its first conference in Singapore in 2016, culminated with the publication of a set of guidelines known as the JIN Guidelines. These guidelines are intended to promote communication and cooperation between courts in cross-border insolvency matters. The JIN Guidelines include important topics and outline procedures for coordination and communication between courts, insolvency administrators, and other parties involved in international insolvency proceedings, including joint hearings. The protection of enterprise value and the minimization of legal expenses are the two main goals of the JIN Guidelines.

3. With the exception of Denmark, the EIR Regime provides that an insolvency action initiated in one of the EU member states is automatically recognized in the other members of the union and establishes the rules that would apply to such proceedings.

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

4

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 UK Is no longer an EU member state for the purpose of the Recast Insolvency Regulation and therefore the co-ordination mechanisms set out in the Recast Insolvency Regulation between EU member states and the UK no longer apply.
A determination by a UK court or insolvency officeholder on a claim by a minor creditor will not bind the Courts of an EU member state, unless that member state has its own domestic law to this effect.

If the country which Lobo is considering to open proceedings has implemented the UNCITRAL Model Law, the question of whether additional insolvency proceedings can or cannot be commenced in a EU member state will now be determined by the domestic law of that country.

NB: Further information on which country FPPL is incorporated is relevant. The applicable insolvency rules of that country would need to be determined and whether it has adopted the Model Law.

5

Marks awarded 12 out of 15

*** End of Assessment ***

TOTAL MARKS 39/50

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