INSOL INTERNATIONAL

FOUNDATION CERTIFICATE

IN INTERNATIONAL INSOLVENCY LAW

SUMMATIVE (FORMAL) ASSESSMENT: MODULE 1

(INTRODUCTION TO INTERNATIONAL INSOLVENCY LAW)

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

INSTRUCTIONS FOR COMPLETION AND SUBMISSION OF ASSESSMENT

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

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

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

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

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

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

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

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

ANSWER ALL THE QUESTIONS

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

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

Question 1.1

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

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

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

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

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

Question 1.2

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

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

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

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

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

Question 1.3

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

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

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

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

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

Question 1.4

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

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

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

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

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

Question 1.5

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

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

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

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

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

Question 1.6

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

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

(a) Public International Law.

(b) UNCITRAL Legislative Guide on Insolvency Law.

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

(d) Private International Law.

Question 1.7

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

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

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

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

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

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

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

Question 1.8

Which of the following best describes international insolvency law?

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

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

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

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

Question 1.9

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

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

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

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

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

Question 1.10

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

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

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

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

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

Marks awarded 10 out of 10

QUESTION 2 (direct questions) [10 marks]

Question 2.1 [maximum 3 marks]

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

The historical roots of insolvency law systems in African jurisdictions can largely be traced back to the law systems of their respective former colonial powers. Countries including Nigeria, Kenya, Botswana and Zambia, as well as East African countries largely follow an English law tradition. Countries such as Angola and Mozambique have a civil law system based on Portuguese law. West African largely have a civil law tradition based on French law, whilst other countries including South Africa and Namibia have mixed legal systems based on their former colonial systems.

Notwithstanding this pattern of importation of old laws, some African countries are introducing modern insolvency legislation into their framework.

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.

The 1998 financial crisis in East Asia and ensuing developments gave rise to substantial insolvency law reform in many countries in the region.

For example, Thailand made major overhauls to antiquated bankruptcy laws, allowing for corporate restructuring similar to Chapter 11 procedures available in the US.

Singapore also recently passed its new Insolvency, Restructuring and Dissolution Act in October 2018, consolidating the country's corporate and personal insolvency and restructuring laws into a single Act, coming into force 30 July 2020.

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.

The United States and Canada sought to enter into a bilateral insolvency treaty in the 1970s, however failed to reach an agreement. Notwithstanding the lack of a formal treaty, both States commonly cooperated and assisted in cross-border matters based on existing legislation and case law in comity.

The States have since both adopted the Model Law, and advance cooperated processes through mechanisms including Protocols.

Furthermore, the American Law Institute assists with resolution of international and cross-border insolvency issues between the States, and other NAFTA countries.

In 2016, judges from Canada and the United States, amongst other countries, participated in an inaugural conference of the Judicial Insolvency Network, providing judicial thought leadership and developing best practices to facilitate cooperation amongst national courts in cross-border insolvency matters.

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

2.5

Marks awarded 8.5 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 primary difficulties in designing a cross-border insolvency dispensation is the sometimes vastly differing insolvency laws across jurisdictions. One potential reason for this is the difference in approaches with regard to the treatment of voidable dispositions, given how the law developed respectively in English law and civil law.

In civil law systems, fraudulent conveyance law can be traced back to the Actio Pauliana, whilst roots of the equivalent in English law can be traced back to the Act of Elizabeth 1570, the purpose of which was to protect creditors from fraudulent transaction. Under said action, the debtor individual could be imprisoned, sentenced to death or enslaved.

On the other hand, early English insolvency law did not provide for imprisonment of the debtor. Bankruptcy provisions were introduced in the Elizabethan Act 1570, where a bankruptcy commissioner would supervise the process, including an investigations of the debtor's transactions including any voidable dispositions.

It is critical that an effective insolvency framework provides for the proper assessment and setting aside for such transactions; such that transactions that are subject to fraud, benefit the debtors (or their owners or officers), or give rise to a preference, may be undone; to treat creditors equitably as well as do discourage dishonest behaviour.
There is scope to elaborate on the context or framework for the treatment of these rules in insolvency systems.

4

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.

Wessels' definition of international insolvency law has a number of limitations, including:

- *It is connected to the existence of a national legal framework of insolvency law. In reality, domestic legal systems are insufficient to facilitating insolvencies that cross national borders.*
- *Generally, a country's enforcement of its jurisdiction is limited to the extent of its own borders, which present many problems in the context of present day globalisation and complexity of business transactions.*
- *Without this set of rules to govern cross-border insolvencies, and in lieu of a system for corporation between national Courts, there is always a risk of multiple proceedings against the same debtor across borders, which can result in unnecessary losses to creditors.*
- *Recognition of proceedings in one country cannot depend solely on the goodwill of another.*
- *It is accordingly critical to establish a clear system to resolve cross-border insolvency issues to provide stability in order to facilitate international trade and investment.*

There is some scope to elaborate

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.

Treaties and conventions are instruments to which States become signatories, binding themselves and adopting to their domestic law. That law becomes enforceable in the courts, which form part of the State's hard law.

Historically, the success of treaties and conventions with respect to establishing international insolvency law has seen mixed success:

- *Bilateral international insolvency conventions first appeared in Europe in the 13th century, addressing absconding debtors and gathering in assets.*
- *Later in the 19th century, more modern forms of bilateral instruments on insolvency proceeding jurisdiction, recognition and enforcement appeared.*
- *Attempts at multilateral international conventions (at least with respect to international insolvency issues) were largely unsuccessful for many years. For example, the Council of Europe, which was established in 1949, attempted in 1990 to ratify the Istanbul Convention Council of Europe Treaty Series No 136; whilst it was signed by 8 member States, this was insufficient for the treaty to enter into force.*
- *The 1933 Nordic Convention, adopted by States of the Scandinavian region, is a rare example of a successful multilateral treaty.*

- ***Whilst not strictly a treaty or convention, the EIR of 2000 had more success influencing multilateral developments in international insolvency law, though no longer applies to the United Kingdom upon their exit from the EU in 2020.***

There is some scope to elaborate

4

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?

An informal arrangement is a contractual agreement between FPPL and Lobo, and accordingly can be extremely flexible. A formal statutory procedure usually involves a commencement procedure, an automatic moratorium, and an independent officeholder replacing existing management (or alternatively a debtor-in-possession process, subject to Encato / Asgard's insolvency procedures).

The key advantages associated with a potential informal out-out court workout that Lobo should consider include:

- *The cost to Lobo, FPPL as well as other creditors would be substantially lower, relative to a formal proceeding.*
- *There would be no publicity with regard to FPPL's potential insolvency. Such knowledge being released to the market may damage FPPL's goodwill and valuations.*

The key disadvantages of an informal out-of-court workout include:

- *There is no moratorium in place to prevent other FPPL creditors from applying to the Court to commence an insolvency proceeding with respect to FPPL.*
- *There is no mechanism in place to bind dissenting creditors to any workout agreement reached between FPPL and Lobo.*

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.

Taking into consideration that insolvency proceedings have commenced against FPPL in Encanto, being FPPL's state of incorporation and location of its head office, the Asgardian insolvency representative may encounter the following challenges:

- *The two insolvency proceedings may compete with each other, which may lead to unnecessary losses for FPPL and creditors. Efforts of creditors pursuing corporate rescue in one jurisdiction may be undone by creditors seeking a winding up in another. The uncertainty associated may dissuade restructuring efforts or capital available for recapitalisation.*
- *It may be difficult to predict which law (that of Encanto or Asgard) will govern the many issues that will arise with respect to the insolvency of FPPL, such as security rights or priority payments.*
- *The Asgardian representative may face challenges gaining access to assets and/or information of FPPL located in Encanto.*

Key information required to determine the degree of co-operation and co-ordination to be enjoyed by the Asguardian representative is the extent of any international insolvency instruments (such as treaties or conventions) available between Asgard and Encanto, or whether they have adopted the UNCITRAL Model Law on Cross-Border Insolvency (or similarly, whether they subscribe to similar initiatives such as EU JudgeCo Guidelines or Judicial Insolvency Network Guidelines). There is scope to elaborate regarding international insolvency instruments.

These international insolvency instruments are critical to facilitate co-ordination and co-operation between States in an international insolvency context, to ensure amongst other things that:

- *The debtor's (FPPL) estate is administered fairly and efficiently, to maximuse the outcome for creditors and the debtor.*

- *Improving communication and co-ordination between States and their respective courts.*
- *Providing guidelines to the States and their courts with respect to concurrent proceedings.*

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.

Taking into consideration that the minor creditor commenced proceedings against FPPL on 30 June 2022, the EIR Recast with not apply to said proceedings, given the UK's withdrawal from the European Union on 31 December 2020.

The EIR Recast provides for the recognition of insolvency proceedings and enforcement of decisions among member States of the European Union, as well as for the co-operation and co-ordination of insolvency proceedings within the EU (subject to a number of requisites, such as the centre of main interest of FPPL residing in one of the member States). Critically, the EIR Recast adopted into English law the UNCITRAL Model Law.

Following the UK's exit from the EU, it is no longer subject to the EIR Recast or UNCITRAL Model Law, and accordingly, the intended Lobo nominated representative would no longer enjoy the same assistance provided under those instruments. That being said, the UK is moving to potential adopt the UNCITRAL Model Laws into their own hard law in the future.

Further information is required to determine the full impact on Lobo and its nominated representative, including:

- *Location of FPPL's assets, businesses, creditors, centre of main interest.*
- *The solvency position of FPPL's respective units in each jurisdiction.*
- *The nature of the UK proceedings, and of the potential proceedings contemplated by Lobo.*
- *Whether the UK may have adopted UNCITRAL Model Laws by the time of the Lobo proceedings, and whether they may apply retrospectively.*

5

Marks awarded 14 out of 15

*** End of Assessment ***

TOTAL MARKS AWARDED 44.5/50

An excellent paper - a thorough response that addresses the questions asked and substantiates the answers well.