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.

With many African jurisdictions being former colonies of Western European countries, it is typical for many African states' insolvency law systems to be based upon those of their former colonisers. Those that were former colonies of Great Britain have an English law tradition, such as Kenya and Nigeria, and those that were colonies of European counties such as Portugal and France accordingly follow a civil law tradition (see Angola and the Ivory Coast). Some have mixed legal systems combining the two, such as South Africa.

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 was a major event that had a significant impact on insolvency law reform in East Asia. An example of reform following this event is Thailand, which made changes to its Bankruptcy Act following the crisis and set up a Bankruptcy Court to service insolvency cases. Indonesia also established its Commercial Court (pursuant to Act Number 1 Year 1998 on Bankruptcy and Suspension of Payment) following the crisis in order to deal exclusively with insolvency cases.

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.

Both states have adopted the Model Law and adopted Protocols to assist with the resolution of international insolvency issues between them.

The American Law Institute has also assisted in setting up the ALI Transnational Insolvency Project. Its advisory groups worked with experts from the USA, Canada and Mexico to prepare an International Statement on each nation's insolvency law as it applies to international insolvency cases, which led to the Principles of Cooperation being approved by the ALI Council and its members in 2000. The Principles have been successfully applied in various cases including PSINet in 2001, which involved proceedings in the USA And Canada. Both courts entered into an agreement authorising the use of the ALI's Court to Court Guidelines.

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.

The laws and approaches to insolvency across different jurisdictions arises from the diverging development of laws between civil and common law jurisdictions. Civil jurisdictions developed from Roman law, whereas common law developed from statute. The treatment of voidable dispositions can vary between civil and common law jurisdictions. Civil law systems' treatment of voidable transactions is derived from the Actio Pauliana, whilst the Act of Elizabeth 1570 is the principal source of this law in English and common law jurisdictions.

This sub-question also required consideration of the nature and importance of voidable transactions.

1

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.

There is no single set of rules that applies globally so it cannot be said to be a single body of rules. It would be difficult to enforce any rule in an international insolvency matter "immediately or exclusively" since by their nature international insolvency matters require cooperation between states, competing interests and more than one jurisdiction, which takes time to consider and apply the relevant rules and a decision be made as to which jurisdiction, if any, is to be the exclusive one. This is increasingly so as a result of the increasing globalisation of insolvency disputes.

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

3.5

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.

Treaties or conventions are a form of public international law whereby states agree to abide by the instrument's terms. Whilst many states may be signatories to a treaty or convention, their effectiveness depends upon ratification by states, and therefore if an insufficient number of states have ratified the convention or treaty they can be of limited assistance. For example, the Istanbul Convention was not ratified by enough states to come into force. The Nordic Convention is an exceptional example of a convention that was made effective by enough states having ratified it.

There is scope to elaborate. While the question says 'briefly' it is for 5 marks. There was scope to discuss, for example, various examples and their significance and to generally discuss success or otherwise.

3
Marks awarded 7.5 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?

Formal insolvency proceedings are those which proceed in accordance with insolvency laws and prescribed legal processes. A formal insolvency proceeding could be a full blown liquidation or a restructuring or voluntary arrangement process that results in an entity or person avoiding being declared bankrupt or wound up, but it would still need to follow the legally enshrined and prescribed processes for the relevant arrangement or proceeding. An informal insolvency process is not prescribed by law and involve parties negotiating a settlement of the debt

and agreeing to be bound by their agreement by contractual means. Advantages of agreeing an informal arrangement with FPPL include saving Lobo legal fees and could result in Lobo being repaid at least some of its debt more quickly than instituting a formal insolvency process. It can also ensure matters remain private rather than in the public eye. An informal process does however depend upon FPPL's cooperation and commitment to the agreement to be effective. A formal insolvency process's legally prescribed procedure has to be complied with to be effective and the Court is available to monitor and enforce the process, whereas in an informal process it is up to the parties to comply with the arrangement and if there is disagreement Lobo will have to seek redress through the Courts in any event. Lobo's position as a creditor would also be prioritised as a matter of law in a formal insolvency process. An informal process also does not place a moratorium on other creditors commencing their own insolvency proceedings and Lobo cannot bind any other creditors to the agreement it reaches with FPPL.

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.

Difficulties that may arise for the insolvency representative pertaining to co-operation and co-ordination between the two jurisdictions may include:

1. *Conflict of laws between the jurisdictions;*
2. *The standing of that Asgardian representative in the insolvency proceeding in Encanto;*
3. *Whether there is a moratorium in Encanto against additional creditor actions there;*
4. *Recognition and enforcement of the Asgardian liquidation order in Encanto.*

International insolvency instruments that have been developed to assist with respect to those difficulties (and whether development of these international insolvency instruments is important and why, or why not):

1. *Model Law on Cross-border Insolvency – states that apply the Model Law enshrine its requirements on cooperation and coordination into their domestic law which the domestic courts must then apply. Its development is important*

as it has had huge success so far in its adoption and application across many different states.

2. *ALI - III Global Principles for Cooperation in International Insolvency Cases and Global Guidelines Applicable to Court-to-Court Communication in Cross-Border Cases (2012) - this provides suggestions for use by courts to improve their communications and cooperation with their counterparts in other jurisdictions. Development is important because its principles have already been applied to cases successfully, such as in Re Nortel and the Lehman Brothers collapse.*
3. *Judicial Insolvency Network, Guidelines for Communication and Cooperation between Courts in Cross-Border Insolvency Matters (2016). This was prepared by members of the Judicial Insolvency Network to improve efficiency of concurrent proceedings and have been adopted by Courts all over the world. Its development is important, as it was created by judges themselves who are well placed to assess the effectiveness of international insolvency laws and initiatives and propose what changes may need to be implemented to improve them.*

There is some scope to elaborate.

4.5

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.

The European Insolvency Regulation Recast ceased to apply to the UK following Brexit as of 31 December 2020. Since the insolvency action in the UK commenced on 30 June 2022, it means that the EIR Recast will not apply to those UK proceedings. If the UK proceeding had been commenced prior to 11pm on 31 December 2020 then EIR Recast would have applied. The question doesn't confirm whether FPPL is incorporated in the UK or in another company in Europe. If it is a UK incorporated company, then it will be subject to the jurisdiction of the UK courts. If it is registered in Europe, then jurisdiction can still be established by the UK courts in respect of its winding up. Section 221(5) Insolvency Act 1986 provides that a court may order the winding-up of "unregistered companies" (including foreign companies) where:

a) *the company is dissolved, or has ceased to carry on business, or is carrying on business only for the purpose of winding up its affairs;*
b) *(b) the company is unable to pay its debts; or*

c) *(c) the court is of opinion that it is just and equitable that the company should be wound up.*

If the court is satisfied of a sufficient connection to England and Wales then it will make an order for the winding up of that company. In this situation we would need more detail about FPPL's operations in the UK, but having an established business there and an office may be a sufficient connection for the court to order its winding up.
It would be beneficial to consider the MLCBI

3.5
Marks awarded 13 out of 15

*** End of Assessment ***

TOTAL MARKS 39/50
A very good paper that generally addresses the questions asked and substantiates its answers.