INSOL INTERNATIONAL

FOUNDATION CERTIFICATE

IN INTERNATIONAL INSOLVENCY LAW

SUMMATIVE (FORMAL) ASSESSMENT: MODULE 1

(INTRODUCTION TO INTERNATIONAL INSOLVENCY LAW)

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

INSTRUCTIONS FOR COMPLETION AND SUBMISSION OF ASSESSMENT

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

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

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

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

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

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

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

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

ANSWER ALL THE QUESTIONS

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

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

Question 1.1

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

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

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

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

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

Question 1.2

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

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

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

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

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

Question 1.3

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

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

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

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

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

Question 1.4

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

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

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

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

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

Question 1.5

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

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

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

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

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

Question 1.6

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

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

(a) Public International Law.

(b) UNCITRAL Legislative Guide on Insolvency Law.

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

(d) Private International Law.

Question 1.7

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

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

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

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

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

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

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

Question 1.8

Which of the following best describes international insolvency law?

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

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

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

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

Question 1.9

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

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

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

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

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

Question 1.10

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

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

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

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

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

Marks awarded 9 out of 10

QUESTION 2 (direct questions) [10 marks]

Question 2.1 [maximum 3 marks]

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

The various insolvency jurisdictions stem primarily from the Organisation pour l'Harmoisation en Afrique du Droit des Affaires or commonly known as OHADA. This was established in the Sub-Saharan African Region. The OHADA was in the form of a treaty and was signed in 1993 and had force and effect from 1995. There are 17 member states and the purpose of the treaty is to attempt to harmonise and modernise the domestic laws of the member states. It is pertinent to note that all 17 signatory states have enforced the UNCITRAL model law on cross border insolvency, which has further resulted in the OHADA council of ministers enacting the Uniform Act on Insolvency or more correctly known as Acte uniforme portant organisation des procedures collectives d'apurement du passif.

The above was a significant development as prior to such events African jurisdictions had their insolvency laws predominantly rooted in legislation inherited from

their previous colonial masters. More detail is required for a higher mark. ***Such legislation, in many respects, is and was outdated and does not serve the new global economy and international trade.***

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.

At present there is no ratified treaty or convention in force to address international insolvency within the Asian region, however some recent developments are paving the way for insolvency law reform. Such reform however takes the form of soft law and was spearheaded by the Asian Business Law Institute and their joint project with the International Insolvency Institute. This collaboration takes the form of the publishing in 2020 of its report on corporate restructuring in Asia. This paper attempted to map out business re-organisation mechanisms on both a formal and informal basis in the ASEAN Region and included Australia, China, Hong Kong, India, Japan and South Korea.

The above is the most significant development giving rise to insolvency reform in the region.

I therefore submit that two examples of the development of insolvency law reform in Eastern Asia would be the abovementioned joint project which led to the publication of the report of Corporate Restructuring and Insolvency in Asia, which for the first time gave a clear indication of the in court and out of court regimes in the areas.

For a higher mark you needed to consider the financial crisis of 1998 and reforms taken in response.

1

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.

For many years the United States and Canada have worked together on various principals regarding cross border insolvency. This started ion the 1970s when work began on a proposed bilateral insolvency treaty. Sadly, the two countries failed to reach consensus and no agreement or treaty was signed. However, various protocols have been adopted by both countries and for many years, prior to such protocols, there had been bilateral co-operation between the two as a result of current legislation at existed at the time and case law.

Both countries have adopted the UNCITRAL model law on insolvency.

Further, the American Law Institute has assisted in many ways in resolving insolvency problems between the NAFTA Countries. NAFTA, or the North American Free Trade Agreement was signed by the United States, Mexico and Canada, and gave rise to the American Law Institute embarking on the Transnational Insolvency Project in order to improve relations and joint co-operation with regard to insolvencies crossing the trade agreement states. However, the NAFTA agreements only apply to corporate insolvencies and do not extend to the insolvency or bankruptcy of a natural being.

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

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Marks awarded 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 main historical reasons for different approaches to insolvency laws between different jurisdictions, can be seen in the fact that English law of more commonly Common Law jurisdictions have a more creditor driven approach, while civil law jurisdictions tend to be more focused on giving the debtor a fresh start.

With regards to voidable dispositions, English Law was developed by the Act of Elizabeth in 1570, while the civil law systems derive their voidable disposition laws primarily from the Actio Pauliana. In short, a voidable disposition is a fraudulent disposition of property, such as in the case where property, of either a movable or immovable nature, is sold by means other than that of an arm's length agreement, or in other words, for less than its true value.

The Act of Elizabeth and the Actio Pauliana are important facets of any insolvency law, as it is trite that once insolvency proceedings have begun, a collective debt collection mechanism comes into force and all creditors are treated equally, dependent on the category of creditor.

Creditors are generally paid their claims pari passu or in other words on a proportionate basis. Allowing a voidable transaction would have a detrimental effect on such payment. Thus such rules protecting against voidable dispositions are important as they protect the general body of creditors and go some lengths to ensuring the best possible dividend to creditors.

This question also required a consideration of the nature of voidable transactions and deeper consideration of the importance of the rules.

2.5

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.

The commentator's reasoning has limitations due to the fact that in the global trade environment that currently exists, there are many instances where a corporation or debtor will have its principal place of business or domicile in one jurisdiction and conduct business in various others.

Once an insolvency occurs in one jurisdiction, mechanisms have had to be developed to enforce such insolvency across all jurisdictions where assets are found. This has given rise to various acts and legislation being adopted by various states that deals with international insolvency proceedings. Such works include the UNCITRAL Legislative Guide on Insolvency which has, amongst other things, given rise to countries enacting some form of cross border insolvency mechanisms. Such mechanisms can be seen from items such as the European Insolvency Regulations, the OHADA organisation.

Further work has been done on harmonising cross border insolvency by organisations such as the American Law institute, The Judicial Insolvency Network, The International Lawyers Associations, The International Bar Association, The International Insolvency Institute and INSOL International.

Therefore, the commentator's definition has definite limitations, in the modern era more and more effort is being given by the courts and legislators to try and find a universal approach, however, the commentator is correct in his submission that domestic law needs to be considered with each case. This cannot be seen to stop the full enforcement of insolvency proceedings.

It'd be beneficial to also consider other definitions, such as Fletcher's comments.

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 form a valuable source of cross border insolvency law, as many treaties and conventions form binding law on the countries that have ratified such treaties and conventions. One very important treaty is the treaty giving rise to the NAFTA Convention. Probably the most important source of cross border insolvency law is derived from organisations such as the world bank and UNCITRAL. The UNCITRAL rules on cross border insolvency has given rise to member states who have ratified the rules from the convention adopting their own form of cross border insolvency legislation.

Other conventions such as the EC Convention on Bankruptcy and Related Matters aimed at requiring contract states adopting a uniform set of laws regarding insolvency. However, this was not adopted by held bearing on the current European Insolvency Regulations. The World Bank further, through its conventions, very often insist on law reform with regards to insolvency prior to the granting of any loans. However, the most successful is the United Nations Commission on International Trade Law and its legislative guide on insolvency law. This is the best example of a successful treaty regarding international insolvency law.

It would be beneficial for you to elaborate and consider treaties such as the Nordic Convention (1933).

3.5

Marks awarded 10 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?

The main differences between formal and informal insolvency proceedings are that formal proceedings are normally done in the courts, are public and enforce a monitorium moratorium *on enforcement procedures. A formal process begins a collective debt collection process. On the other hand, an informal insolvency arrangement is a private one, is not in the public domain and does not enforce a monitorium on debt collection processes.*

The advantages that Lobo should consider regarding any informal out of court workout arrangement is that as aforementioned, such arrangement will be private and it will not raise speculation in the marketplace, which could jeopardise future contracts and/or business. Costs are relevant to advantages. *The disadvantage to this is that there will be no monitorium* moratorium *on enforcement proceedings and therefore the numerous other debt collection proceedings could be instituted.* Inability to bind dissenting creditors is also relevant *Thus, this could lead to assets of Lobo's being attached without the protection of the formal procedures afforded to it should it enter into such formal recovery procedures.*

4

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.

The difficulties that could arise for the insolvency representatives is that the two countries may very well not be signatories to any treaty of convention granting recognition to the other country's courts jurisdiction. Thus, the assets int eh one country could be utilised solely for the benefit of that country's creditors and to the detriment of the other countries.

However, to avoid this detriment and duplication of efforts and costs certain instruments have been developed, such as the European Insolvency Regulations, UNCITRAL Legislative Guide on Insolvency Law and principals

relating to the enforcement of foreign judgements stemming from private and public international law.

Several international instruments needs to be considered.

2.5

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.

In the above set of facts, the European Insolvency Regulation Recast would not apply to the UK proceedings, as the EIR Recast no longer applies to UK proceedings instituted after 11pm on 31 December 2020. Therefore, the normal rules of cross order insolvency would apply, and to this end one would need to look at current law which, in terms of the UK law, the Insolvency Act of 1986 and more specifically S426(5) thereof empowers UK courts the ability to apply, upon request, the insolvency law applicable to either jurisdiction when the matter falls within that's courts jurisdictions.

Further, to give a more in-depth answer to the above one would need to know the exact location of assets and debtors in relation to jurisdiction.

Consideration of the MLCBI would be beneficial.

3

Marks awarded 9.5 out of 15

*** End of Assessment ***

TOTAL MARKS 33.5/50

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