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 4 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 following (Sub-Sharian Africa) countries are members of the "AHAD". 'The Organisation pour l'Harmonisation en Afriq du Droit Des Affaires' and/or *'Organisation for the Harmonisation of Business Law in Africa'* "OHBLA". It took effect from 1995 although the treaty were signed in 1993:

- *Congo*
- *Senegal*
- *Burkino Faso*
- *Comoros, etc.*

English Law = Nigeria, Kenya, Botswana Zambia and countries in the Eastern Park of Africa

Civil Law = Mozambique, Angola
Both English and Civil Law with mixed legal systems is South Africa and Namibia]

Please take the time to quite in complete sentences.

4

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.

[Model Law and Cross-Border Insolvency were adopted. This includes some economies – such as,
New Zealand, Philippines, Australia, just to name a few.

Asian Business Law as well as the International Insolvency Institute joined projects for the
development of Asian Principals of Restructuring.]
It would also be beneficial to consider the significant event of the The financial crisis of 1998 and consequent reform

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.

[Due to being too ambitious, USA and Canada failed to reach agreement while working towards a
bilateral insolvency treaty.

However, both states made progress through adopting the Model Law, more important using mechanisms, such as, protocols.

"ALI" American Law Institute assisted with the international insolvency issues between the 'NAFTA' "North American Free Trade Agreement" of USA, Canada and Mexico]
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

1.5
Marks awarded 6 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.

*[*It is indeed correct to state that it is very difficult to develop a single or unified cross border insolvency dispensation to be introduced amongst various jurisdictions of the world. This is due to the fact that different jurisdictions follow different approaches such as the theories of universalism or territorialism which would make it difficult to develop a unified cross border insolvency dispensation.

Furthermore most jurisdictions have their own domestic legislation and protocols and most of its domestic legislation can be vastly different with regards to insolvency law aspects such as being pro creditor or pro debtor depending on the country which therefore makes it difficult to create a single cross border insolvency dispensation*]*

This sub-question required you to discuss the framework / context for voidable transactions, and their historical roots, as well as the importance of rules for voidable transactions.

1.5

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.

[There is too much of a connection to the national legal framework of the insolvency law. Wessels
also quoted the following definition of Fletcher, which proposed the following:
"international insolvency" should be considered as a situation "....in which an insolvency occurs in
Circumstances which in some way transcend the confines of a single legal system, so that a single set

of domestic insolvency law provisions cannot be immediately and exclusively applied without regard
to the issues raised by the foreign elements of the case"]

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

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.

[Referring to the European Convention on Certain international Aspects of Bankruptcy which were
opened for signature by the member states and for the accession by the non-member states.

1. *The Convention provides that creditors may be informed of a sequestration/liquidation/bankruptcy, seeing that creditors that are in another State be able to lodge their claims in the estate.*
2. *There are two (2) possibilities that the Convention offers regarding assets in more than one (1) State, namely:*
   - *2.1. Liquidators appointed in the State to exercise their powers for the administration of the estate and/or realising with the assets. However, the said liquidator must comply the the States' National Law;*
   - *2.2. A second Sequestration/Liquidation/Bankruptcy matter can be opened in the said State.]*

There is scope to elaborate. While the question says 'briefly', it is for 5 marks.
I'd have loved to see you discuss the nature of treaties/ conventions before considering various examples and the success or otherwise of treaties/conventions.

2

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?

[One of the key advantages of an informal out of court workout is that the process may not be regulated by insolvency law. This would enable Lender to enter into voluntary negotiations and agreements without the need to be regulated by law or court order. Another advantage of this informal out of court workout is that they would be massive cost saving to the company as opposed to entering into formal restructuring or insolvency judicial proceedings in order to attempt to recover what it is owed by FPPL. Furthermore, there would be no publicity regarding the fact that FPPL is in financial disarray. One of the key disadvantages of informal out of court workout's is that it does not prevent other creditors or suppliers of whom FPPL is indebted to from initiating restructuring or insolvency proceedings against them for recovery of the debt. Another important disadvantage is that agreements can be breached by FPPL and there would not be any ramifications as the agreements are not formal and binding should FPPL breach the terms of the informal agreement and there would not be any right of recourse. The fact that FPPL is conducting business in more than one state has the potential impact of cross border insolvency proceedings being instituted in different states should FPPL failed to pay back Lobo Lending, which usually makes the process of recovery of the debt more difficult and the possibility of recouping less much greater as local courts have to be approached in each jurisdiction to initiate the proceedings.]

Elaboration is needed, including with respect to the differences between formal and informal.

3.5

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.

*[*The potential relevance that was adopted the MLCBI is that in terms of the provisions of the Model Law an application for recognition of a foreign proceeding may be initiated As per article 15 of the Model Law. Furthermore the relevance is that should a foreign proceeding be recognised then in terms of the MLCBI, it mandates a local court or insolvency practitioner to co-operate with foreign courts or foreign insolvency practitioners and their representatives as per article 25 and 26 of the MLCBI. This will allow the liquidator to trace the significant assets and directors situated in the State.

Furthermore, the liquidator would be entitled to seek relief upon an application for recognition of the foreign proceeding. In terms of article 19(1)(b) urgent relief may be granted by entrusting the administration or realization of all or part of the debtor's assets located to the liquidator, in order to protect and preserve the value of assets that, by their nature or because of other circumstances, are perishable, susceptible to devaluation or otherwise in jeopardy***]***

Article 27 of the MLCBI is relevant as are other international instruments.

3.5

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.

[This will be permitted, at it is the place of business, also known as "establishment", defined as "any
place of operations, where the debtor carries out a non-transitory economic activity with human
means and assets".

In the State where the main interest is, independent proceedings will be opened before the main
proceedings, against the debtor.]

You needed to consider the Recast, which does not apply due to the date, and the MLCBI.

0.5

Marks awarded 7.5 out of 15

*** End of Assessment ***

TOTAL MARKS 25/50
This was a pass standard. You needed to elaborate upon a number of your answers to sub-questions.