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 8 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.

[There are many countries within the Africa jurisdictions. These countries follow the laws of the respective former colonial powers hence some follow civil law, some follow English law, whilst some have a mixture of both civil and English law. Countries like Nigeria, Kenya, Botswana, Zambia and Tanzania, have an English law tradition. Countries such as Angola and Mozambique have a civil law tradition based on Portuguese law. The French speaking countries within African such as Congo, Chad and Cameroon, follow French law, which is also based on civil law. South African and Namibia, have mixed legal systems as both were influenced by Roman-Dutch law (civil law) and English law.]

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.

[Important event such as 1998 financial crisis in East Asia and the consequences of the financial crisis lead to insolvency law reforms in Eastern Asia.
2 examples of such reform initiatives are firstly, the adoption of Model Law on Cross-Border Insolvency by many countries which? Was this simply in response to the crisis?, ***and secondly, there was a joint project between the Asian Business Law Institution and the International Insolvency Institute, to develop Asian Principles of Business Restructuring, of which a report on Corporate Restructuring and Insolvency in Asia was published in year 20220, mapping business reorganisation regimes in ASEAN, Australia, China, Hong Kong, India, Japan and South Korea.]*** is this a reform per se?

It would be beneficial to consider reforms in countries such as Thailand and Singapore

2

Question 2.3 [maximum 4 marks]

Briefly indicate the various initiatives undertaken to assist with the resolution of international insolvency issues between North America and Canada and the success or otherwise of these initiatives.

[The various initiatives undertaken included a bilateral insolvency treaty, the development of ALI NAFTA Guidelines and adoption of the Model Law.
The bilateral insolvency treaty between Canada and the United States failed to reach an agreement as they were perhaps overambitious with the scope.
The Model Law was more reasonable and there was practical progress made through both Canada and United States.
The ALI NAFTA Guidelines complement the Model Law as it was an initiate to improve co-operation in international insolvencies across the NAFTA States. ALI NAFTA Guidelines was developed in 2000 for Court-to-Court communications in Cross-Border cases for international insolvencies including the United States, Canada and Mexico. Subsequently, in 2012, ALI and the International Insolvency Institute ("III") commenced a project to consider the application of ALI NAFTA Principles worldwide, resulting in the ALI-III Global Principles for Cooperation in international Insolvency Cases and Global Guidelines Applicable to Court-to-Court Communications in Cross-Border Cases.]

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

3

Marks awarded 8 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.

[For Voidable Dispositions, it is important to consider the timing of the commencement of the insolvency proceedings. Not all system regards the commencement in the same way. US, practising English common law, has specialised bankruptcy courts and the insolvency procedure commences by way of a court order. In other jurisdictions, the insolvency proceeding may be opened by way of a more informal process eg. by way of administrative process and not involving the court.

Voidable Dispositions is aimed at preventing fraud, ensuring equitable treatment of all creditors by preventing favouritism and preventing a sudden loss of value for the business entity just before the commencement of the insolvency proceedings.

For countries under the Civil law system, the basis of fraudulent transfer law was derived from the Actio Pauliana. The Actio Pauliana is an action in Roman law intended to protect creditors from fraudulent legal transactions, specifically transactions intended to reduce a debtor's estate by transfers to third parties in bad faith. The aim is to return the transfer of assets that was done in bad faith or fraudulent manner.

For countries under the English Common law, the basis of fraudulent transfer law follows the Act of Elizabeth of 1570. This Act was introduced during the reign of Queen Elizabeth I. This Act was the first law designed specifically as a true bankruptcy statute, rather than as a fraud-prevention law.

These rules are important to determine and review which transactions falls under voidable dispositions and the insolvency representative can pursue after for the return of the assets into the pool fund for him to distribute to the admitted and verified creditors accordingly.]

There is some scope to elaborate upon the nature and importance of the rules but this is answered well.

4.5

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 definition is perceived to have limitations because it is linked to the existence of a national legal framework of insolvency law, i.e. domestic legal systems. There is no one single set of international system. In view that not all countries have the same system nor practice the same insolvency law, whenever there is a case of cross-border insolvency matter says the case was initiated in country A involving country B, the insolvency case of country A relies on the domestic legal system of country A and might not be enforceable/recognised in country B. Most domestic legal system are ill-equipped to deal with insolvencies with cross-border implications. There is no one single common insolvency law nor one single set of standardised regulations for cross-border insolvency matters to be used by all countries nor to be applied globally. Because of this limitation, when an insolvency raises an issue connected with another legal system or State, there will be conflicts of law and raises 3 pertinent questions like which jurisdictions may insolvency proceedings be opened; which country's law should be applied in respect of different aspects of the case and what international effects will be accorded to proceedings conducted at a particular forum.]

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

4.5

Question 3.3 [maximum 5 marks]

Briefly discuss treaties or conventions as a source for cross-border insolvency law. In your answer you should also indicate if these are viewed as a successful way in establishing such rules by providing examples in this regard.

[Treaties or conventions are examples of public international instruments. When treaties and conventions are signed by the governments between different jurisdictions, it becomes binding on the countries and affecting the countries' domestic law accordingly and may form part of the countries' "hard law" on insolvency. Hence, these treaties have been rectified as part of the domestic law.

The Nordic Convention (1993) signed between countries from the Scandinavian region is a successful multilateral treaty. As a result, a bankruptcy declared in one

Nordic country is recognised in the other Nordic countries as automatically applying to the bankrupt's property in those countries.

The Istanbul Convention, Council of Europe Treaty Series No. 136, although it did not gather sufficient numbers of signatures to enter into force, it had an important influence on the development of a European Union response to the problems of international insolvencies among its member States.

The European Union ("EU") have drafted treaties and conventions to address international insolvencies within the EU states, but these treaties and convention are not as successful as the European Insolvency Regulation (EIR) (2000) and EIR Recast in influencing the multilateral developments in EU's international insolvency law.

There is scope to elaborate on your consideration of success. But this is answered well.
4.5
Marks awarded 13.5 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?

[The main differences are informal insolvency arrangements are out-of-court voluntary negotiable or agreement between parties (debtor and some or all of its creditors), it may not be documented in writing and involves no binding contracts, there is no way of binding dissenting creditor to any agreement reached. It may not be regulated by the insolvency law. There is also no moratorium in place preventing other creditors from approaching the courts and commencing an insolvency proceeding. However, it

is less expensive and does not involve publicity to make known to others that the company is experiencing financial difficulties.

Formal insolvency proceedings is considered the safer and more reliable method because it has a high level of protection due to the legal action that's involved. It has a statutory moratorium preventing any creditor to initiate legal action against the company. It may be possible to bind dissenting creditors to the debtor company's workout or restructuring proposal. However, it is more costly and will involve publicity regarding the financial distress of the company which has negative impact.

If Lobo is to consider accepting an informal arrangement with FPPL, it could be easier, faster and cheaper to secure some kind of payment commitment from FPPL and not damage any business relationship. However, Lobo faces the risk of FPPL being placed under formal insolvency proceedings initiated by other creditors resulting in perhaps payment received by Lobo being crawl back because of undue preference or FPPL going back on its promises and stop payment Lobo. Whatever agreement reached between Lobo and FPPL via informal arrangements are not legally binding.
I am of the view that before Lobo agrees to any informal arrangement with FPPL, it is important for Lobo to obtain the financial status with as much information as possible on FPPL in both Asgard and Encanto to gauge the extend of FPPL's financial distress situation, investigate whether there are any potential or existing legal proceedings against FPPL. If FPPL is financially strong with good growth potential and its payment challenge is just cashflow issue especially if it is a temporary problem, then the risk of accepting an informal arrangement is lowered.]

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.

[In view that FPPL has a concurrent insolvency proceeding commenced in Encanto, the appointment of the Asgardian insolvency representative might not be recognised in Encanto hence he/she might face challenges in taking control of FPPL and realise its assets in Encanto, especially if there is any real estate as this will involves retention of titles clause and other means of protecting title available to creditors in Encanto's national law. The insolvency law in Asgard and Encanto might differ, creating a conflict of laws, making it hard for the Asgardian insolvency representative to exercise his duties, he might not have access to Encanto court or other relevant authorities, he might not be able to obtain information or get FPPL's directors' cooperation. The

creditors' claim process will be even more complex when it involves security, set-off and netting arrangements. However, if Encanto has adopted the MLCBI or is subject to certain treaties and conventions, such as the Nordic Convention or EIR (Recast), then Encanto would have amended its domestic insolvency laws to address international insolvency issues and recognised the insolvency order of Asgard. There would be co-operation and co-ordination to promote recognition and enforcement; clear and speedy process for obtaining recognition of foreign insolvency proceedings; relief to be granted upon recognition of foreign insolvency proceedings; foreign insolvency representatives to have access to courts and other relevant authorities; Courts and insolvency representatives to cooperate in international insolvency proceedings and non-discrimination between foreign and domestic creditors. Having established clear and uniform rules relating to cross-border insolvency issues, it will provide clarity and predictability which is extremely important for the purpose of international trade and investment. Hence, the development of these international insolvency instruments are very important.]

It would be beneficial to elaborate and discuss other relevant 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.

[From 11pm on 31 December 2020, the EIR Recast ceased to apply in the UK following its exit from the European Union, UK's Brexit. Therefore, FPPL's insolvency proceeding which occurred on 30 June 2022 is after the Brexit. FPPL being a UK company is no longer part of the EIR Recast and this will post difficulties for the European insolvency representative to take control of FPPL and its assets as it raises the question of recognition and enforcement of the European insolvency order. For UK commenced insolvency proceedings, similarly, it will be difficult to seek cooperation and coordination between the UK and EU courts. Lobo does not need to open another proceeding in another European country since EIR Recast is applicable to all Europe countries. There is already an insolvency proceeding opened by a minor creditor in Europe. Lobo can submit its claim to the other European insolvency representative and be treated pari passu to distribution with the creditors of that European country.]

It would be beneficial to consider the MLCBI

3.5

Marks awarded 12 out of 15

* End of Assessment *

TOTAL 41.5/50

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