SUMMATIVE (FORMAL) ASSESSMENT: MODULE 1

(INTRODUCTION TO INTERNATIONAL INSOLVENCY LAW)

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

INSTRUCTIONS FOR COMPLETION AND SUBMISSION OF ASSESSMENT

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

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

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

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

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

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

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

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

ANSWER ALL THE QUESTIONS

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

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

Question 1.1

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

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

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

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

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

Question 1.2

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

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

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

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

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

Question 1.3

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

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

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

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

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

Question 1.4

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

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

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

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

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

Question 1.5

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

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

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

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

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

Question 1.6

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

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

(a) Public International Law.

(b) UNCITRAL Legislative Guide on Insolvency Law.

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

(d) Private International Law.

Question 1.7

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

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

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

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

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

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

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

Question 1.8

Which of the following best describes ***international insolvency law?***

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

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

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

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

Question 1.9

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

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

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

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

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

Question 1.10

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

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

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

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

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

Marks awarded 10 out of 10

QUESTION 2 (direct questions) [10 marks]

Question 2.1 [maximum 3 marks]

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

The legal systems in African states are still heavily rooted on the laws of the countries that formerly colonised them. Many states that were colonised by England (such as Nigeria, Tanzania and Botswana) follow an English common law system. Mozambique and Angola are based on Portuguese civil law and some West African states' laws are based on French civil law. Additionally South Africa and Namibia who were influenced by the Dutch and English have a mix of civil (Roman-Dutch) and common (English) law. These insolvency laws in Africa are mostly based on old outdated laws but a number of African states have started to introduce new laws that are more current and relevant.

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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.

Insolvency law reform has taken place in East Asia as a result of the 1998 financial crisis that particularly affected Indonesia and Thailand. Thailand revamped its bankruptcy laws as part of this reform. Singapore unified their corporate and personal insolvency and restructuring laws into one act after they passed a new Insolvency, Restructuring and Dissolution Act in October 2018 which came into force in 30 July 2020. Singapore is now becoming a major role-player in the region.

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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.

In the 1970's there was a failed attempt by USA and Canada to create a bilateral insolvency treaty. It failed because the scope was likely too ambitious and the two states could not meet an agreement. Bilateral co-operation and co-ordination based on existing legislation and long-standing case law around comity was in place, however, considerable progress was made after both states adopted the Model Law.

For international insolvencies involving USA, Canada and Mexico, the American Law Institute ("ALI") Transnational Insolvency Project developed the ALI NAFTA Guidelines Applicable to Court-to-Court Communications in Cross Border-Cases (2000) to improve the co-operation across these three states. By appointing expert advisory groups from each of the three countries, who prepared an International Statement confirming the insolvency law as applicable to international cases for each of the three states, the ALI NAFTA Principles were then successfully approved in 2000. Fletcher considers the ALI NAFTA Principles to be complementary to the Model Law on CBI and was hopeful that there was a compelling case for the development of supplementary provisions and guidelines based on the NAFTA Principles as more states around the world would ratify the Model Law on CBI.

These principles were so successful within the three member states, that later the ALI-III Global Principles of Cooperation in International Insolvency Cases and Global Guidelines Applicable to Court-to-Court Communication in Cross-Border Cases (2012) was developed following a project initiated by the ALI and the International Insolvency Institute, which was led by Fletcher and Wessels, to consider applying the ALI NAFTA Principles to other countries worldwide.

There are of course insolvency exclusions that are not covered by the NAFTA Principles such as individual insolvency.

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 9 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.

Voidable dispositions can be considered either fraudulent conveyances or preferences, both of which result in the moneys which should be available to all creditors equally being diverted from the insolvency assets meaning lower realisations and returns to the creditors as a whole. Fraudulent conveyances involve the dispensation of property for lower than it is worth, typically by way of a donation or under value transaction, that results in the company becoming insolvent or increases the insolvency. Preferences occur when a creditor has some or all of its debt settled after insolvency has commenced at the expense of the other creditors. There are dispensations available in both common law and civil law systems for voidable dispositions but the treatment may differ between the two law systems regarding the requirements for the remedies to be applied.

The actio Pauliana forms the basis in civil law systems regarding fraudulent conveyance law which originates from ancient Roman law. Actio Pauliana was developed from several preceding laws relating to defrauding creditors and was created to specifically focus on the reversing of fraudulent transactions aimed to defraud its creditors. The law allows for creditors to question transactions within one year of the transaction date.

The Act of Elizabeth 1570 in the basis in English common law for this remedy. Similarly this law allows for creditors to undo fraudulent asset transfers.

Elaboration is needed to discuss the importance of voidable transaction rules.

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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 limited because it is linked to a single national legal framework of insolvency law which does not exist. There is no single set of insolvency rules that exists globally. Whilst all states that have a developed legal system do have a form of bankruptcy/insolvency procedures, the approaches, policies and substantive and procedural rule differences can vary significantly from state to state.

With the modern world allowing for much easier trade and movement of assets across countries it means creditors are more likely to have to deal with cross-border legal and transnational insolvency law issues as a result. As countries develop their local insolvency rules to address international insolvency issues, and with the help of guidance produced by intergovernmental bodies like UNCITRAL to base new rules/legislation on, the aim is that harmonisation will occur and these cross-border issues will reduce. However, as it stands, there is still a lot of disparities between states.

There is some 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.

Where there is a lack of rules in a state's domestic law regarding how international insolvency matters should be dealt with, a state can ratify treaties or conventions which are formal legally binding agreements between states. The treaty or convention will import into their domestic law's principles, making them enforceable in court, to resolve insolvency issues between the members. Treaties and conventions are considered "hard law". In the absence of treaties or conventions a country will have to rely on its own private international law principles.

Bilateral international insolvency conventions have been seen in Europe from the 13th and 14th centuries addressing absconding debtors and subsequently collecting assets.

More modern forms of bilateral treaties and conventions have been found in Europe from the 19th Century relating to jurisdiction, recognition and enforcement.

Treaties are not always that successful, however, an example of one of the most successful treaties is the Nordic Convention (1933) which is ratified by Norway, Denmark, Finland, Iceland and Sweden and successfully recognises the law of the place of insolvency without the need for further formalities. Other examples of successful treaties are the Havana Convention (1928) and the Montevideo Treaties (1889) and (1940).

Achieving international insolvency conventions in Europe had been unsuccessful for many years and in 1990 the Istanbul Convention, Council of Europe Treaty Series No. 136 was developed dealing with certain international aspects of bankruptcy. Even though it was signed by 8 member states it wasn't ratified by enough states for it to actually come into force. It did, however, have an important influence on how the European Union responded to international insolvency problems.

Whilst treaty success in Europe was lacking for many years the European Union has been successful in recent years with the European Insolvency Regulation (EIR) in 2000 which has gone on to influence broader developments in international insolvency law.

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Marks awarded 12.5 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?

A formal insolvency proceeding is commenced and governed by insolvency law and a proceeding will be heard by a Court. The Court will then usually appoint an officer to oversee the proceedings. Formal insolvencies can include liquidations or re-organisations. An informal insolvency proceeding usually consists of voluntary negotiations between the debtor and its creditors and is not regulated (although there can be some exceptions) by insolvency law. These discussions with creditors typically involve some form of restructuring of the debtor or its debts and can include payment plans, converting debt for equity or cash injections from third party investors. Whilst insolvency law does not regulate informal insolvency procedures, the insolvency law can be used to incentivise or persuade a company to achieve a reorganisation.

If Lobo were to go down the informal arrangement with FPPL, an advantage would be that the costs involved would be much less than that of a formal proceeding. This then frees up more of FPPL's money to distribute to Lobo and other creditors or invest in its activities to generate more funds to distribute at a later date rendering a higher overall return to Lobo and other creditors. A disadvantage of the informal arrangement is that there would be no moratorium granted meaning that other creditors owed money by FPPL could bring their own formal proceedings against FPPL and Lobo would lose all negotiating power. FPPL seems to be meeting all its debts in Encanto so Lobo may want to consider how many other creditors FPPL has in Asgard and whether it would be beneficial to include those creditors in the informal negotiations with FPPL. Another disadvantage of informal arrangements is once Lobo and FPPL come to an agreement, there is nothing binding the creditors that don't agree to the agreement, meaning the other creditors could still bring their own formal proceedings against FPPL rendering Lobo's agreement worthless.

If Lobo chose to go down the formal proceedings route, the advantages are that a moratorium period provided by the court would be applied preventing any other legal proceedings being brought against FPPL, and the possibility of binding all dissenting creditors to the plan proposed by FPPL or its officeholder. Disadvantages to Lobo would be that a court proceeding is expensive and the officeholder and its legal advisers would sit in a higher priority to receive payment of their fees than to Lobo as an unsecured creditor. This would result in a lower distribution to Lobo. Another disadvantage to FPPL would be the negative publicity received with the public announcement of FPPL facing liquidity issues but this may not have a direct impact on Lobo.

Also, it is made more complex by FPPL carrying on business in more than one State because it is more complicated and costly to monitor the other creditors.

4.5

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.

Concurrent insolvency proceedings can lead to unnecessary capital losses for the creditors if the two proceedings are incompatible in nature, e.g. one proceeding is to wind the company up but the other proceeding is based on a restructure plan, or if the two proceedings are competing with each other and a race to realise assets occurs. This could give rise to a situation that directly contradicts the principle of par conditio creditorum (equality between creditors). It is imperative that there is co-operation and co-ordination between the two courts to ensure that the processes are run in the most efficient way to preserve the assets of the company to establish the highest return for creditors.

There are soft law initiatives that have been created as draft legislation that states can turn to to overcome some of the cross-border difficulties. The International Bar Association ("IBA"), United Nations Commission on International Trade Law ("UNCITRAL") and INSOL International have produced strategies that cover co-operation and co-ordination to promote recognition and enforcement. An example of this include the Model Law on Cross-Border Insolvency developed by UNCITRAL. This has been the most successful soft law approach having been adopted by a significant number of states and is continuing to gather momentum. This is very important in working towards harmonisation across countries.

The Model International Insolvency Co-operation Act 1989 was developed by the IBA which accepted the notion of concurrent proceedings and encouraged a primary proceeding with supportive proceedings. This was not actually adopted by any states but was an extremely helpful step towards modernising approaches to international insolvency.

The Cross-Border Insolvency Concordat was created by the IBA and followed a different approach, being aimed at guiding practitioners to harmonise cross-border insolvencies.

One other remedy to dealing with the co-operation issues is to agree a protocol to follow, formed between the Encanto and Asgard representatives. The use of a protocol was a proven success in the famous Maxwell case between US and UK proceedings.

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

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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 UK is no longer a part of the European Union and therefore, any proceeding brought after 11pm on 31 December 2020 means that EIR Recast is not applicable. This means that recognition of the proceeding brought in the UK will not be automatic in European countries. Instead it will depend on the local law, private international law and treaties regarding recognition and the choice of law.

Getting recognition in other countries can be costly and timely, and during the time it takes to get recognition of the UK proceeding in the European courts it could mean that FPPL assets may be diminishing in that time. Together with the costly court fees this would result in lower asset realisations and therefore a lower chance of distributions to creditors. There is also a possibility the European court rejects the recognition of the UK proceeding.

Further information that might be needed is to understand where the centre of main interest is for FPPL to determine if the UK proceeding will be the primary proceeding. You would want to also understand whether the European country that Lobo wants to bring proceedings in follows a civil law system or an English common law system. The latter would be more in line with the UK proceeding.

Also you would need to confirm if there are any treaties in place, between the UK and the European country that Lobo wishes to bring proceedings in, that would govern the cross-border insolvency process. In the absence of any hard law treaties in place you would want to know if the country in which Lobo wants to bring proceedings has adopted the UNCITRAL Model Law seeing as the UK has adopted this. This would be used as a set of guidelines on how to deal with cross border insolvencies including co-operating and co-ordination.

If the European country's local laws are that of a territorialism approach and would allow for concurrent proceedings, this would mean that Lobo could only rely on a distribution from funds available in the state it brings proceedings in. In this case it would be helpful to understand the location of FPPL's assets, if that information is available, and determine country holds significant FPPL assets to enable the best return to Lobo. Also, Lobo could only bring a proceeding against FPPL in a European state of which FPPL operates in so it would need to be mindful of that.

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Marks awarded 13.5 out of 15

*** End of Assessment ***

TOTAL MARKS 45/50
Excellent Paper