INSOL INTERNATIONAL

FOUNDATION CERTIFICATE

IN INTERNATIONAL INSOLVENCY LAW

SUMMATIVE (FORMAL) ASSESSMENT: MODULE 1

(INTRODUCTION TO INTERNATIONAL INSOLVENCY LAW)

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

INSTRUCTIONS FOR COMPLETION AND SUBMISSION OF ASSESSMENT

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

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

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

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

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

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

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

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

ANSWER ALL THE QUESTIONS

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

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

Question 1.1

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

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

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

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

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

Question 1.2

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

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

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

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

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

Question 1.3

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

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

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

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

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

Question 1.4

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

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

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

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

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

Question 1.5

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

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

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

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

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

Question 1.6

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

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

(a) Public International Law.

(b) UNCITRAL Legislative Guide on Insolvency Law.

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

(d) Private International Law.

Question 1.7

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

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

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

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

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

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

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

Question 1.8

Which of the following best describes international insolvency law?

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

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

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

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

Question 1.9

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

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

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

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

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

Question 1.10

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

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

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

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

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

Marks awarded 10 out of 10

QUESTION 2 (direct questions) [10 marks]

Question 2.1 [maximum 3 marks]

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

The insolvency laws found in African countries are, to a large extent, influenced by the former colonial powers of the various African countries. For example, the insolvency law in South Africa and Namibia are based on Roman-Dutch law as well as English law while the insolvency laws in Cape Verde, Angola and Mozambique are based on Portuguese law.

There is scope to elaborate

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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.

The Asian financial crisis in 1998 had caused a substantial part of Eastern Asia's corporate sector insolvent. The lack of proper and orderly methods and procedures to deal with insolvency on a large scale was felt by creditors, corporations as well as governments of the various East Asian countries. This resulted in various insolvency law reform in Eastern Asia. For example, Thailand had reformed its Bankruptcy Act in 1998 by introducing a new rescue mechanism while Japan introduced a new rescue mechanism in 1999 through the Civil Rescue Law which was adapted from the United States of America's Chapter 11 regime.

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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 1970s, there were attempts by the United States of America and Canada to create a bilateral insolvency treaty, i.e., the United States of America – Canada Bankruptcy Treaty. The treaty was negotiated, but was ultimately unsigned as both States failed to arrive at an agreement.

Thereafter, both States adopted the Model Law as well as Protocols. These initiatives were more practical and can be considered to be more successful than the United States of America – Canada Bankruptcy Treaty.

In addition, the American Law Institute ("ALI") also assisted in resolving various insolvency issues among the member states of the United States of America North American Free Trade Agreement (NAFTA) which includes, among others, Canada and Mexico. For instance, the ALI Transnational Insolvency Project was introduced for the purposes of facilitating co-operation among the NAFTA members vis-à-vis international insolvency. Again, this is considered to be a success as it resulted in the Principles of Cooperation among the NAFTA members being prepared and eventually approved in 2000.

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 7 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.

Historically, civil law stems from Roman law as well as Table 3 to the Twelve Tables which essentially dealt with execution of judgments. In this regard, debtors would pledge his own body to repay debts and where he could be imprisoned, sentenced to death as well as sold as a slave for the purposes of securing repayment of his debts.

On the contrary, imprisonment of debtors was never provided for under English law, initially. This was however introduced at the end of the 13th century through the Statute of Marlbridge of 1267, and was subsequently abolished by the Debtors Act in 1869.

As to the historical roots of this aspect of insolvency law: the *actio Pauliana* forms the basis of fraudulent conveyance law in civil law systems, whilst the Act of Elizabeth of 1570 is the basis for this remedy in English law.

Another reason for the difference in treatment of voidable dispositions could be based on the fact that English law adopts the concept of universalism whereas civil law countries are more inclined towards a territorial approach. Under the concept of universalism, it is believed that there should only be a single insolvency proceedings which extends to the entire assets of the debtor, regardless of where they are located around the world. On the other hand, under the concept of territorialism, it is believed that insolvency proceedings can be commenced in every state.

A major setback vis-à-vis the concept of territorialism is that a debtor could be declared as being insolvent in a state where the debts are while remain solvent in another state where its assets are located.

This sub-question also required you to set the framework for, and discuss the importance of, voidable transactions.

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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 above definition is limited as it is linked or confined to the existence of a single set of national insolvency law provisions. This limitation had been exposed by Professor Fletcher's definition of international insolvency or cross-border insolvency law which is as follows:

"International insolvency" or "cross-border insolvency" should be considered as a situation "...in which an insolvency occurs in circumstances which is some way transcend the confines of a single legal system, so that a single set of domestic law provisions cannot be immediately and exclusively applied without regard to the issues raised by the foreign elements of the case."

As a result of globalisation, national borders between different nations are becoming more irrelevant today as cross border transactions and investments increase, and as corporations establish various branches and subsidiaries in foreign countries. To a large extent, goods, services, capital and persons between different countries in the world, are now allowed to move freely in today's economy. As a result of this, many corporate collapses involve multiple nations and jurisdictions as well as competing claims in multiple jurisdictions and different insolvency regimes as seen in the insolvency case of Lehman Brothers.

Generally, legal provisions (including those relating to insolvency) of a state would not have extraterritorial effect. This means that a state's jurisdiction ends at its national borders. As such, domestic legal systems are often incapable when it comes to addressing cross border insolvency matters which transcends national borders. This is especially so when assets can now be transferred from one state to another easily and at great speed.

Cross border transactions which lead to insolvency would almost always give rise to a risk of multiple insolvency proceedings, as in the case of the Lehman Brothers. It is therefore important for there to be a standardise insolvency framework to regulate cross border insolvency matters or at least, for there to be co-ordination and/or co-operation between the judiciary of different states.

Without a standardise insolvency framework or co-ordination and/or co-operation between the judiciary of different states, proceedings in the different jurisdictions would then compete with one another, or worse still, the decisions made in the different jurisdictions would be incompatible with one another. There will also be the issue of which would be the governing law vis-à-vis security rights as well as priority of payments. There is also a possibility of forum shopping by the creditors.

In light of these weaknesses, it is important to establish a clear and uniform framework vis-à-vis cross border insolvency matters so as to provide clarity and certainty to the various stakeholders.

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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 agreements entered into between different nations. States that are signatories to treaties or conventions agree to be bound by the same and must therefore affect their domestic law accordingly to give effect to the treaties or conventions. Domestic laws which give effect to these treaties or conventions will then form "hard law" vis-à-vis insolvency of a particular state.

Between the 13th and 14th centuries, bilateral international insolvency conventions were established in Europe for the purposes of dealing with, among others, the issue of absconding debtors. Beginning the 19th century, bilateral treaties or conventions began to cater for recognition and enforcement vis-à-vis bankruptcy, winding up, arrangements as well as compositions.

Europe has, for many years, failed in its attempt to establish various multilateral international insolvency conventions. While the Instanbul Convention, Council of Europe Treaty Series No 136 was established in 1990, the same was merely ratified by 8 member states and therefore, failed to come into force. Despite its failure, the Instanbul Convention, Council of Europe Treaty Series No 136 was able to bring about some response from European Union in respect of the problems faced by its members states vis-à-vis international insolvency.

European Union was able to achieve more success vide the European Insolvency Regulation (EIR) (2000) which was able to bring about further multilateral developments in the law of international insolvency. The European Insolvency Regulation (EIR) (2000) has gone through some review and amendments and it is now known as the Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on Insolvency Proceedings (Recast) (EIR Recast). The Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on Insolvency Proceedings (Recast) (EIR Recast) codifies the method in determining the centre of main interests. The centre of main interests ascertains whether the Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on Insolvency Proceedings (Recast) (EIR Recast) applies to a specific debtor as well as the applicable jurisdiction vis-à-vis opening of the main insolvency proceedings.

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Marks awarded 10.5 out of 15

QUESTION 4 (fact-based application-type question) [15 marks in total]

Flor Prim Pty Ltd (FPPL) is a company incorporated with its head office and significant operations in Encanto as well as being registered as a foreign company in Asgard, where it also carries on business. FPPL therefore carries on business in more than one State. Lobo Lending Ltd (Lobo) is incorporated and has its head office in Asgard.

FPPL is managing to meet its debts as they fall due in Encanto. However, due to various staffing issues combined with market turndown in Asgard, FPPL is struggling financially in Asgard. FPPL has fallen behind with payments due and owing to Lobo. FPPL's CEO approaches Lobo to discuss possible informal payment arrangements.

If you require additional information to answer these questions, briefly state what it is and why it is relevant.

Question 4.1 [Maximum 5 marks]

What are the main differences between "formal" insolvency proceedings and "informal" insolvency arrangements? What key advantages and disadvantages should Lobo consider regarding any informal out-of-court workout arrangement it could enter with FPPL, compared with its formal debt recovery options?

"Formal" insolvency proceedings are those that are commenced and governed by specific insolvency law. They typically include proceedings such as liquidation and re-organisation. On the other hand, "informal" insolvency arrangements are those that not commenced or governed by any insolvency law. Typically, "informal" insolvency arrangements would include voluntary negotiations between the debtor and its creditors.

There may be some parties who would nonetheless express doubts on the effectiveness of "informal" insolvency arrangements such as negotiation/mediation due to its voluntary nature. While "informal" insolvency proceedings such as negotiation/mediation may be a voluntary process and are not regulated by any specific insolvency law, an agreement reached among parties pursuant to such a process is nonetheless enforceable by the courts. Further, the United Nations Convention on International Settlement Agreements Resulting from Mediation (Singapore Convention) which came into force on 12 September 2020 provides a uniformed and efficient framework for the enforcement and invocation of international settlement agreements resulting from mediation of commercial disputes. The Singapore Convention enables and facilitates the enforcement of mediated settlement agreements among the signatory states, in a manner similar to the Convention of the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) for arbitral awards. This means that a settlement agreement can be enforced in any of the 55 contracting states as if it is a court order.

Lobo must first recognise that any settlement that arises from the "informal" process between itself and FPPL are not regulated by any insolvency law. As such, there are no specific procedures to be followed. As such, it is entirely up to FPPL and Lobo to agree on the terms of the settlement, if any, and the procedures to be followed. This is unlike "formal" insolvency proceedings which are governed and regulated by specific insolvency law and where the procedures involved are all set out in the law.

Lobo should also consider that in the event that FPPL is in breach of any settlement agreement reached between then, Lobo would have to then commence legal proceedings against FPPL vis-à-vis the settlement agreement. That itself may be a futile exercise as FPPL may already be insolvent by then with no longer any assets left. **It would be beneficial to also consider matters such as costs, privacy, the absence of moratorium and the inability to bind dissenting creditors in an informal workout. 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.**

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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.

We will need to first find out whether Encanto has adopted the UNCITRAL Model law on Cross Border Insolvency. This is because of Encanto has adopted the UNCITRAL Model law on Cross Border Insolvency, its Courts will be able to consider a request to recognise and enforce the formal Court Order granted by the Asgardian Court.

Various difficulties may actually arise in this situation. Firstly, the Court Order granted by the Asgardian Court may conflict with the concurrent insolvency proceeding commenced against FPPL in Encanto. Secondly, there may also be difficulties in determining which law (whether the law in Entanto or Asgard) will govern the various questions that may arise such as priority of payments among the creditors. Thirdly, in the event that the proceedings in Encanto and Asgard compete with each other, it may even result in unnecessary capital losses to both the creditors and debtors.

The UNCITRAL Model Law on Cross Border Insolvency as well as the Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on Insolvency Proceedings (Recast) (EIR Recast) were established for the purposes of addressing among others, the difficulties explained above.

This question required you to 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. This required discussion of different laws, and territorial approaches, together with consideration of international insolvency instruments developed to assist liquidators appointed in concurrent insolvency proceedings. It is good that you raise the MLCBI. Reference to article 27 is warranted. Reference to additional international insolvency instruments is also warranted.

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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 European Insolvency Regulation Recast would not apply to the UK commenced insolvency proceedings as it was commenced on 30 June 2022. In this regard, the European Insolvency Regulation Recast has ceased to have effect vis-à-vis UK from 11 pm on 31 December 2020 following UK's exit from the European Union.

Firstly, without the European Insolvency Regulation Recast, it would mean that the UK Court would not be able to apply the concept of centre of main interests (COMI) to determine the jurisdiction for opening of main insolvency proceedings.

Secondly, this would also mean that the UK Court would not have jurisdiction to hear the other actions commenced in the other European countries that are derived directly from insolvency proceedings that are closely linked to that which has begun in UK.

Fourthly, this would also mean that any orders obtained by Lobo in other countries in Europe may be inconsistent with the order, if any, given by the UK Court.

Fifthly, the enforceability of any orders/judgments obtained before the UK Courts, in the other European countries would also depend on whether the other European countries have adopted the UNCITRAL Model Law on Cross Border Insolvency.

Sixthly, the Courts in Europe would have to also consider which law to apply.

It would be beneficial to consider the MLCBI.

3.5

Marks awarded 7.5 out of 15

*** End of Assessment ***

TOTAL MARKS 35/50

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